

Medical Malpractice Case:
Pandemic or not, you reap what you sow
Anthony Pirrotti, Jr.

Suggestion during the Pandemic: “Pedal to the Metal”, and don’t let up.

- Vet the facts and medicine of the claim carefully
 - Don’t reply upon only what the client says
- Review all of the medicals yourself
- Vet your Expert carefully
- Hire the best Expert/Specialist to review it from the start: you get what you pay for, often. Money well spent
- Do not hire a family friend to give an opinion for you, or rely upon a GP to review the case that is outside of the specialty concerned: you hurt yourself by spending 3-5 or 7 years litigating because you did not spend the money up front to have the case fully reviewed by the Expert who specializes in the area concerned. Better to get rid of the file up front with a great review: your time (and money) is very valuable.
- Speak to the Expert; don’t just use email or allow an Associate (alone) to speak to the Expert. If the Expert can’t communicate, I do not care if they are Harvard educated.
- Some say do a boiler plate Complaint and/or Bill of Particulars. I say absolutely not. Be detailed, put it out there, outline your case, throw in photos, quote the chart, and let your adversary admit or deny it, and also let your adversary (and carrier) know what you know, and that they should be concerned. Don’t hold back: med mal lawyers are the best of the best, and they can smell weakness and/or blood. Also, a serious case will warrant a serious reserve: establish it up front.

● **BEFORE TRIAL: Discovery and EBTs**

- Think of Westchester and the upper counties as a blessing; in Westchester you have the Court Attorneys who know Med Mal cases like the back of their hand and they will hold everyone tight on discovery, and you get Conferences quickly/systematically. If you have an IAS Judge up here, just as good, especially when you draw an experienced Med Mal Judge. YOU fully comply, timely, with every Court Order, make your Demands clear and detailed, and never give up getting anything you are entitled to; don't be afraid to ask for a Briefing Schedule. {Important Decision: Springman v Klein, Index # 60824/2019}. Make sure you always confer in "good faith" with your adversary/colleague BEFORE a Court Conference, as per the new Rules (and we should do that no matter what).
- Med mal folks are a small (and very smart) club: work together; but if you can't, get what you deserve, don't get upset and don't get jerked around (make the Motion). Nothing more important than relationships. When you help each other, or give a little, a little goes a long way.
- Don't just serve boilerplate demands; make sure each demand is tailored to your specific med mal case; some demands are all the same, but some are not; give thought to the discovery you want, and tailor it to your case and what you need to prove.
- My opinion: the key to a great Cross at Trial is having a strong Foundation established BEFORE trial: "Preparation".
 - The EBT is the key to a controlled and effective Cross of the defendant at Trial. Put in the same prep on your EBT, that you would in preparing for Cross at trial, *if not more*. Think of the EBT as the foundation of your home.

- Most of the time, the Doctor and defense counsel will prep more for the trial, than the EBT; and they train the Doctor to give “Pat” answers. (“Well, every patient is different”, and “medicine is not an exact science”, and they try to hedge: “sometimes”, “maybe”, “not necessarily”). By you preparing more than them, you have the strategic advantage. Seize the moment. Know your adversary and know your witness, and don’t fall for the Pat answers.
- Consult with your Expert throughout the case, from the beginning to the end (money well spent); do not hire a “yes” person.
- Find the crux of the case and key questions to ask; if you move around, don’t forget to circle back.
- Spend the time asking questions at the EBT: do not get in and out; don’t rush
- Think of the global picture: if you have nothing on the witness, think how can you use the witness to your advantage in some other way
- Know what every witness testified at their EBTs when questioning a new witness.
- Have them educate you and lock them in.
- Don’t have a per diem or someone who is not experienced do your med mal depositions.
- Layer your questions
 - Ask the “Why” question at the EBT; why not?? (Read *Medical Malpractice in New York*, by Devine.

- 22 NYCRR 221.2: know it cold:

Hon. Francesca E. Connolly held, in Cassisi v. Yee et al, Westchester County Index No. 60667/2013, NYSCEF Doc. No. 179, that it was improper to direct a witness not to answer and/or block questions at a deposition:

Pursuant to the Uniform Rules for the Trial Court governing the conduct of depositions, a deponent is required to answer all questions, except to preserve a privilege or right of confidentiality, to enforce a limitation set forth in a court order, or **when the question is plainly improper and would, if answered, cause significant prejudice to any person** (Uniform Rules for Trial Courts [22 NYCRR] § 221.2). An attorney shall not direct a deponent not to answer except as provided in CPLR 3115 or this court rule (*id.*). If the witness refuses to answer a question, or the attorney directs the witness not to answer, the attorney shall state clearly and succinctly on the record the basis for the refusal (*id.*).

* * * *

... Moreover, the defendants have not established that the questions are "plainly improper and would, if answered, cause significant prejudice to any person" (Uniform Rules for Trial Courts [22 NYCRR] § 221.2; see also *Wilson v. McCarthy*, 57 AD2d 617, 617 [2d Dept. 1977] ["questions such as those to be posed by plaintiffs' counsel in an examination before trial may roam far and wide, and may be posed for the purpose of eliciting information calculated to lead to relevant evidence"]). Accordingly, Dr. Varanasi **shall be produced for a continued deposition to answer these lines of questioning, and questions flowing therefrom.**

Hon. Joan B. Lefkowitz held in Grippio v. Demello, Westchester County Index No. 65941/2015, NYSCEF Doc. No. 48 (which quoted 22 NYCRR Part 221.2) states:

Pursuant to the Uniform Rules of the Trial Courts [22 NYCRR] § 221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR 3115 (see *Parker v Ollivierre*, 60 AD3d 1023 [2d Dept 2009]). Additionally, Uniform Rules of the Trial Courts [22 NYCRR] § 221.1(b) provides that "[s]peaking objections [are] restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the

questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. **Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning."**

- You can lead at an EBT, just like at Bar:

N.Y. C.P.L.R. 3113 (McKinney)(c) states:

Examination and cross-examination. **Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court**, except that a nonparty deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party. (Emphasis supplied).

Galvin v Hinkle, 2004 N.Y. Misc. LEXIS 3227; 2004 NY Slip Op 30342(U) (Sup. Ct. of New York, 6/24/14), Index #106595/03

Galvan also seeks to compel the further deposition of Hinkle in light of certain objections made by Hinkle's counsel during Hinkle's deposition. He first argues that Hinkle's counsel erroneously objected to certain questions regarding the allegations in the complaint on the ground that such questions constituted "cross examination" and were not the proper subject of a deposition. As the objected to line of questioning is relevant to the action **and there no prohibition against asking leading questions at a deposition**, Galvan should be permitted to question Hinkle regarding the allegations in the complaint, while Hinkle can answer such questions with a yes or no response if appropriate. See generally Siegel, New York Practice (3d ed. 1999) § 356, at 554(Emphasis supplied).

- Remember: 3117(d) states, in pertinent part: "Effect of Using Deposition. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition". This reverses the Pre-CPLR case law.

- **Defendants as your Expert:** McDermott v Manhattan Eye, Ear & Throat Hosp., 15 NY2d 20, 29-30 (1964):

"a plaintiff in a malpractice action is entitled to call the defendant doctor to the stand and question him both as to his factual knowledge of the case (that is, as to his examination, diagnosis, treatment and the like) and, if he be so qualified, as an expert for the purpose of establishing the generally accepted medical practice in the community" and since the CPLR (section 3101) provides for "full disclosure of all evidence" and for "examination and cross-examination" (section 3113) of a witness before trial as in a trial of action in an open court, I see no basis for the Special Term's ruling in this case. As the court pointedly noted in Rogotzki v. Schept, "that the defendant is an "expert" and that the particular questions asked of him [on the examination before trial] are those which only an expert can answer, seem beside the point". See, also, to the same effect 3A Weinstein-Korn-Miller, NY Civ Prac, par 3101.05 and particularly the statement there that "the word 'evidence' appearing in CPLR 3101 'extends to all relevant information calculated to lead to relevant evidence."

- Some very well known lawyers used to lecture many years ago that if you did not call the defendant doctor as your first witness, that is malpractice: that is not true at all. Sometimes that can work, and sometimes NOT. You decide.
- DO NOT allow them to direct their client not to answer the question, and don't allow them to abuse Carvalho (know the case and what it says).

Carvalho Objection: Very limited exception carved out in Carvalho v. New Rochelle Hospital, 53 A.D.2d 635 (2d Dep't., 1976):

In an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician ***if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness.***

Where, however, the opinion sought refers to the treatment rendered by the witness, the fact that it may also refer to the services of a codefendant does not excuse the defendant witness from deposing as an expert.

Id. (Emphasis; Citations Omitted).

Harley v. Catholic Medical Center of Brooklyn, 57 A.D.2d 827 (2d Dep’t., 1977) -

“Under the test set forth in *Carvalho*, it cannot validly be said in the instant case, as a matter of law, that the questions in dispute do not refer to the treatment rendered by the appellant, since each of the questions attempted to explore his knowledge of the effects on the infant of the medicines given by the codefendant physician to the mother during labor. The appellant admittedly knew, when he examined the infant, which medicines had been given to the mother. **Whether the appellant was aware of the effects of those medicines on the child may be relevant in the determination of whether he reasonably diagnosed the child's condition and properly treated him. *Certainly, it does not appear that the questions bear solely on the alleged negligence of the codefendant physician. The appellant should therefore be required to answer those questions.***”

Id. (Emphasis Supplied).

● AT TRIAL

- Know every word of that medical record to the best possible extent
- Digest every transcript and have critical pages highlighted and tabbed
- READ the Judges Rules that you are assigned to, and know the Judges background: ask friends, look at case law, do it all
- Have marked pleadings and BP, including requests to Charge (Verdict sheet is too variable to prepare early on)
- Don't forget with your Expert witness to ask BOTH the departure question AND Substantial factor! One without the other: no good!
- Buy the daily copy of your Expert witnesses, and, to the extent that you can afford it, every defendant witness.

- Listen carefully to the opening and your witness's direct examination. Remember, listening is an art/skill.
- Pay attention to what they say
 - The incredible importance of listening is really hard....you are onto the next thing, without hearing what they said....or you are on to preparing your cross, while they are on direct.....stop and listen. Find something that they said that you know you can hit them on. Whether it is a video they narrate or show (Dr. Facelle example), or a Netter they describe (Dr. Wu Example) , or a Blow up, or a drawing....walk around to see what they are testifying about on direct.....look at what they are pointing to....be focused, and do not let your guard down.
- Hold them tight and lead
- Use a deposition or collateral EBT (theirs or a co-defendant's) to circumscribe testimony (CPLR 3117[a] [2]).
 - Use the EBT or trial testimony of a defendant(s) or even the plaintiff during cross of the defendant's Expert! Don't fall for your adversaries opposition to the use of it. Look at the CPLR!
- Don't allow the witness to wander/evade
 - Move to strike and force them to answer you question
- Control
- Look at what the witness is doing before the Cross
- Look at what they are reading before the Cross
- Look at who they are talking to
- Destabilize the witness if you can and don't be wed to a pre-planned script
 - You are going to find "one" thing that you can score on cleanly....sometimes hitting that out of the gate destabilizes a witness and the jury gets the flavor of the witness, and you build from that....
 - Voter Registration Example (Dr. Moynahan)

- and then know when to STOP! Hardest thing.
- Keep your eyes/ears open during the testimony, and dig the dirt on them before trial
 - Promotional Video of Dr Example (Dr. Moynahan)
 - Laryngoscope (Dr. Stolar) Example
 - Get the Doctors' file materials reviewed!! Yellow pad (Dr. Kim) Example
 - Get the Experts file materials reviewed!! Post it Example, Quadruple Board (Dr. Silberman)
 - Who they spoke to in the hall Example; watch everything
- Don't need to have a "hard" cross to be effective; most times the soft reasoned approach is better.
 - Jurors hold a physician on a pedestal,
 - Don't just yell at the person: modulate
 - Help the jury to hate the witness and not hate you
- If the Doctor is a bad gal/guy, then sometimes you have no choice but to do a hard cross, and mix in your intonation of incredulousness, as is right to do
 - With the Professional witness who is going to have a response for everything you say, sometimes you need to be hard to control that witness, and not allow that witness just to say what she/he wants to say. Move to strike and hold them tight.
- Don't say the exact same refrain when you lead (i.e. correct, correct, correct). It gets annoying. Change it up, but always lead.
 - Don't stand in one place and do the same thing
 - Walk away from the podium. Do things to have the jury focus on you, rely on you and trust you
 - Gestures and movement for emphasis and effect

- Do straight up Google search....you never know what you can find
- Post on List serves (NYSTLA), speak with friends etc to get info on the defendant, Doctor, nurse etc
- Get transcripts from people you know and trust, and share your own transcripts
- Have a laptop at your desk at trial, and an open link to Drop Box and your e-mail. Have your own high speed hot spot.
- Visuals: give careful thought, and inquire if the Court room is equipped with what you need
- Don't be wedded to notes....allow yourself Freedom, within a tight and known framework, and have the safety net of the EBT.
 - However, if notes work for you, and you feel better doing that, then do it, and don't worry about what other people think (but practice allowing yourself to move away from the notes).
 - If you pull away from your notes, take a break and go over them so that you cover what you need to cover.
- Grab the pertinent pages of the EBT transcript, write trigger words on top, organize the pages in the manner you want and flow with the Cross and if the physician deviates, nail him/her with the transcript
- Be VERY careful about discovery on the stand: If you have a great EBT, there is no need for doing it
 - Be careful about the "Why" question with a physician at Trial
 - Lead, lead, lead
- Know the medicine in your topic like the back of your hand
 - Be careful not to battle about the medicine if you are not "fluent" in it...break it down and simplify it for the jury....be

one of them.

- Be careful about talking over the jurors heads
 - Don't try to impress them with how much you know about the medicine, as you will lose them. Put your ego/hubris behind
 - Don't show the jury how much medicine you know and battle the Doctor on end, as they will be lost in the weeds.
- Don't "open the door" to something you do not want....focus on your Cross, but not with blinders on. However, pry open the door when they crack it open.
- Don't stare at the jury, but do look at them now and again when you hit your mark. Also, if you are "aware" of the jury, and you hit your mark, you stop and don't over-do: look at their gesture, faces, etc.
- Use the 3's: "Fair, accurate and complete" (Thank you Ben Rubinowitz)
- If your Personal Injury case is about "safety", why isn't your med mal case about "safety" also? Use the word (Thank you to Bob Genis and Nick Timko).
- PJI: Read it before every trial, remember what is important, and use the trigger words: prudent, reasonable, departure, acceptable, etc
- Opening: very important listen to what your adversary says (i.e. "many, many, many" times revision Example). Use it on during your cross, and summation.
- Don't let them (Doctor or adversary) paraphrase or "slur" what is stated in the record. They are very smart and they want to paraphrase.

- Be careful to protect your Cross and watch/listen to what your adversary tries to do when they are questioning
 - Watch the hypothetical (they always try to use unproven facts and to testify)
 - Watch the leading
- Sometimes a short and concise cross is better than the long cross
- If you have a Cross that is scoring well, *maybe stop while you are ahead....*only you will know when it is right, but it is damn hard to stop, especially when you are on a roll. You don't always have to complete 100% of your planned cross.
- Have that last question prepared in your mind, *just in case* you can't end on a high note that you create.
- Keep the jury awake: watch your tone of voice. Know your acoustics....don't be always in the front of the room, when some of the jurors are in the back. Be aware of your audience. Don't always have your back to them. Incorporate them into your case.
- During your cross, remember the jury is looking at your client, so tell your client that. Make sure that your client does not nod off, or smirk, smile or ham it up....let them be focused, subtle facial gestures, serious, caring and paying attention like you want the jury to pay attention.
- Watch the speed of your questions and your voice; watch the rapid fire; a great Court reporter once told me, if it is hard for him to take it down, then the jury can't hear it (TY Bernie Fabel).
- Don't forget about the Departure question when you have hammered the witness....they are going to say no, *but if it is so absurd, the*

answer “no” can backfire on them, as they can look untruthful and/or incredulous.

- Think about your record, and an appeal. Don't create reversible error, *but also don't forget to create a record*. Be careful of your words and phrases. You know the envelope....*don't go beyond it*. Sometimes when in a passionate Cross, you can lose sight of the envelope. Med Mal cases go up on appeal, as the defense has the money. Be careful with sidebars; have a Court reporter if important, and if you forget, later, put what was said on the record
- Make your record concerning the difficult Judge, who oversteps their duties/job, instead of just calling the balls and strikes {See Porcelli v Northern Westchester, 110 AD3d 703 (2d Dep't 2013) and making your record on a Jury Charge issue can make the day Herman v Moore, 143 AD2d 543 (1st. Dep't 2015)}. *Be respectful*, but put it on the record. If the Judge doesn't like it, respectfully, there is nothing you can do about what they created, other than making a record: you have a duty to your client, and maybe the Judge is not aware of her/his actions...*protect your record*, and ask for a mistrial. If you do not say it, you cannot appeal regarding it.
- Know the Hospital's By-Laws, procedures and policies
- Know your Exhibits.
 - Be organized
 - Do not be fumbling around
 - Take a few minutes and ask the Judge to set up everything before the jury is called in
 - If you are using computers and projection, know how to use it, do a test run and/or have someone there who knows this stuff cold. Technical

“glitches” ticks off everyone.

- At the same token, when your adversary fumbles, help them, be the nice guy/gal, and let the jury know who to trust and reply upon. You want a fair fight.
- Know your “theme”. Every great song, from screamo/heavy metal to an aria in an opera, has a theme....something that repeats and resonates and moves you....*what is your theme.....*and it may change, so change with it, but let it resonate.
- Hold them to their 3101(d), and object every time they go beyond it. Don’t be afraid to make your record: ambush/surprise is not allowed.
 - Remember, what is good for the goose is good for the gander, and make your 3010(d) response detailed and broad and cover all bases. Have the case law to back yourself up.
- On your summation, stand on your own argument, and *rarely* if ever start with commenting on your adversary’s argument....don’t give them that power, *unless you can nail them hard and fast*.
 - Illegal Immigrant Example
 - Ignoring your Adversary’s attacks on you out of the gate. Don’t let them bate you.
- Summation: Control your emotion; don’t yell: modulate your voice, but show your controlled, methodical and well thought out presentation. Humble yourself: self-deprecation doesn’t hurt
- Lastly: we are very hard on ourselves, and we care about what others think. *Block it out and don’t psych yourself out!* (Your adversary may try to psych you out: Arm on my shoulder example, and calling me “son”). Have trust and faith in yourself, your preparedness and your competence. If you are new at this, whatever you lack in skill, make

up in extra preparedness. You be your own best friend and give yourself positive messages, and tune out all the negativity.

Bottom line: You got this and never stop learning!

Dated: Scarsdale, New York
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Yours, etc.,



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