IADC COMMITTEE NEWSLETTER

DRUG, DEVICE AND BIOTECHNOLOGY

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In this article, the author explores the important role of the treating physician and the prescriber in prescription drug and medical device cases. The author explains the potential for harmful or helpful testimony from these critical eyewitnesses and identifies strategies that defense counsel should consider in addressing the issues these witnesses often present.

Treaters and Prescribers: To Sue or Not to Sue

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Drug, Device and Biotechnology Committee serves as an educational and networking resource for in-house counsel employed by pharmaceutical, medical device and biotech manufacturers and the outside counsel who serve those companies. The Committee is active in sponsoring major CLE programs at the Annual and Midyear Meetings as well as internal committee programs. The Committee also publishes a monthly newsletter that addresses recent developments and normally contributes two or more articles to the *Defense Counsel Journal* annually. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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For the most part, healthcare providers (e.g., treating physicians and prescribers) typically are not sued in products liability litigation involving patient injuries from allegedly defective medical devices or prescription drugs. This article discusses the considerations that influence the decision whether to sue the provider, including the potential consequences on the testimony of providers at depositions or trial.

The traditional script for medical device and prescription drug cases casts providers, treaters, and prescribers as non-party witnesses. The rationale is simple – neither plaintiff nor defendant want to risk alienating critical medical witnesses because their testimony could influence case outcome. Thus, even in cases where fair criticism of the provider's conduct could be made, parties generally tend to avoid adding such witnesses to the case as a defendant. Indeed, lawyers for manufacturers and patients often commence their depositions of the treating or prescribing physician by assuring him that their client does not intend to sue him, "You are not a defendant in this case and my client, at least, does not intend to sue you."

Other considerations also motivate the parties not to include the physicians as defendants. Plaintiffs risk losing their ability to speak *ex parte* with physicians to educate them about the increased risks that the drug or device manufacturer allegedly "hid" from the medical community, to show them the "scientific" basis for their claims, or to review with them sales representative "call notes" allegedly revealing inappropriate, lack of fair balance promotion. In other words, plaintiffs' opportunity to "poison the well" and create an advocate for his claims, "I never would have prescribed drug x if the company had told me about these increased risks," likely would be lost by suing the physician or provider.

Similar thinking generally motivates the device or drug manufacturer to avoid joining hospitals and physicians as defendants. Though *ex parte* conversations with a plaintiff's physicians generally are prohibited under any set of circumstances, the physician's counsel may be receptive to the company's response, willing to review key medical records and literature supportive of the company's position, and to recognize that the "bad" company internal documents that plaintiff's counsel has shared with him were taken out of context. The physician's defense counsel and the physician himself may be more likely to identify with defendant's counsel and client than with plaintiff's counsel (who most likely is also a plaintiff medical malpractice lawyer). Further, the manufacturer can use independent decisions made by the physician or provider to establish the learned intermediary defense or break the chain of causation, without making the physician a defendant or criticizing his care (e.g., "the physician exercised his own professional judgment in deciding to prescribe over the contraindication").

There are exceptions, of course, and plaintiffs do in fact sue their treaters and prescribers. A frequent motivation is to keep the case in state court by suing a non-diverse party, and some lawyers simply will drop the physician or hospital from the case as trial approaches. Other plaintiffs lawyers reason that a physician, who believes he was unjustly sued for an injury he did not cause, may defend himself at his deposition by attacking the drug

or device company, and, in effect, make plaintiff's case the centerpiece of his own defense (e.g., "the company's sales representative misrepresented to me the frequency of kidney failure as an adverse event").

Less common, the drug or device manufacturer may bring in the physician or hospital as a third-party defendant for contribution. The strategy rationale is difficult to discern, except to the extent that the manufacturer may desire to have an additional party at the settlement table. Beyond that, a manufacturer should not want to risk making an enemy out of a key witness.

As counsel for the manufacturer, you should recognize that an unrepresented treater or prescriber is a wild-card who can inflict damage to your case. Whether sued or not, treating and prescribing physicians are critical medical witnesses in the case. Because they frequently are the only medical witnesses not hired by the litigants and typically have no stake in the outcome, they are generally immune to charges of bias. The "on-the-scene" medical witness may be prepared and then questioned by plaintiff's counsel – on direct or cross – regarding key issues such as the conduct of the company's sales representatives, his interpretation of the science, and his expectations of a "reasonable" drug or device manufacturer. The medical witness may provide harmful "expert" testimony on the adequacy of the company's label, warnings or instructions, and general or specific causation, without the requisite professional experience, training, or knowledge.

In this circumstance, defendant's counsel must undo or minimize the witness's damaging testimony. For example, defendant's counsel could identify entries in the physician's records that contradict his testimony, obtain admissions that he's not an expert in the relevant science or field of medicine, is not familiar with the competing scientific literature, or get the physician to acknowledge that whether the drug or device at issue caused plaintiff's condition was not important to his treatment. Admissions that the physician typically does not rely on company sales representative statements or company internal documents in making his prescribing decisions can be helpful. Of particular weight, testimony that the physician typically does not consult package inserts, that his knowledge of the case is limited to his own chart, and that he continues to prescribe the drug or use the device, also can support the company's defense.

In contrast to the wild-card witness, a treater or provider represented by a competent lawyer may be more likely to confine his testimony to the record, the facts as he recalls them, the opinions that he had formed at the time that were necessary to his care of the plaintiff, and to avoid responding to plaintiff's hypotheticals. From the physician's perspective, the principal goals of the deposition are to defend, as necessary, the medical care that he provided, to give the litigants no basis to assert a claim, and to refrain from providing opinions neither germane to his care, nor relating to matters outside his expertise. Generally, such a witness will be far less helpful to the plaintiff, and indeed, may be damaging to plaintiff's case. Moreover, speaking in advance to the physician's counsel, as previously noted, may

be particularly useful to defendant's counsel. Previewing the company's story, identifying important parts (but a limited number) of the medical record, discussing your expected examination, and plaintiff's likely examination and routinely asked unfair questions, may enhance the possibility of a favorable deposition.

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