What you need to know about the rule of discovery in medical malpractice

By Cyril H. Wecht, MD, JD

If you are testifying as a medical expert in a malpractice case you are likely to encounter the rules of discovery. These rules deal with the discovery of information obtained by or through experts who will be called as witnesses at trial or experts who have been retained or specifically employed by a party in anticipation of litigation, but who are not expected to be called to testify at the trial.

After the trial attorney has prepared the case through various means of investigation, consultation with experts, and additional research, the use of the various tools of discovery (in accordance with state and federal rules of pretrial discovery in civil cases) will follow.

Rule 26(b)(4) attempts to standardize throughout the federal courts the procedure, scope, and timing of pretrial disclosure of facts known and opinions held by an adversary’s expert. As the Rules Advisory Committee of the US Supreme Court has noted, effective cross-examination of an expert witness requires advance preparation. A lawyer cannot anticipate the approach the adversary’s expert will take or the data on which the judgment will be based. Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side.

Although Rule 26(b)(4) permits liberal discovery of the adversary’s experts, it does not allow unlimited discovery. It places certain restrictions on discovery to prevent unfairness to the party who employed the expert. Commentators have noted the possibility that one side could wait until his opponent had employed an expert to testify and, by then using the discovery process, could take advantage of his opponent’s superior preparation to develop his own case.

Other provisions of the discovery rule also apply. Rule 26(b)(4)(A) limits discovery to trial witnesses. Under Rule 26(b)(4)(B), experts retained, but who will not testify, may be subject to discovery only upon showing that the expert’s knowledge could be obtained by no other means.

Identifying the expert as adverse witness

Clearly, Rule 26(b)(4)(A) contemplates that, by interrogatory, the opponent will be required to identify the experts who are expected to testify at trial and to state the subject matter on which each expert is expected to testify. Also, the opponent will be required to state the substance of the facts and opinions to which the expert is expected to testify, together with a summary of the grounds for each opinion.

Cases have dealt with what specifically may be discoverable as part of an expert witness’s identity. Courts have required that answers to interrogatories include the name, address, occupation, and the particular specialty of every expert called to testify. Courts have also held that an expert witness’s identity includes the expert witness’s qualifications.

Further discovery of the expert

Further discovery of the expert may be sought only upon motion and court order. As a practical
Medicolegal advisor

Each expert should be deposed, but it is generally helpful to the attorney seeking further discovery to first obtain the written information available through interrogatories. The advantage of having a written report prior to taking a deposition is obvious. The attorney is able to plan the deposition or subsequent discovery of whatever nature. The attorney also is able to explore with his own expert the areas of demonstrable weakness in the adverse party’s expert opinions and conclusions of the adverse party’s witness prior to taking the deposition.

Many cases have held that further discovery could be granted by the court only after the parties had completed discovery by interrogatories. In practice, however, the parties themselves frequently waive the rigidity of the requirements of the rule and make the expert available for deposition at any time, if requested.

Although Rule 26(b)(4)(A) provides for further discovery upon motion and court order, no standard for granting the motion is set. Theoretically, a court in its discretion may determine the scope, timing, and manner of further discovery. Moreover, under certain circumstances, the court might permit “not only discovery of the expert’s direct testimony, but also discovery to prepare for impeachment at trial and discovery in aid of the discovering party’s own case.”

The expert as adverse party

Historically, courts have interpreted statutes permitting a party to be examined as a hostile witness to extend only to eliciting facts known to the adverse witness, but have traditionally refused to compel the witness to testify as to his opinion. Recent cases, however, indicate a trend toward recognizing the right to elicit expert testimony from an adverse party.

Although there remain several jurisdictions that do not permit the adverse party to be cross-examined as to expert opinion, courts are more liberal in allowing such interrogation at pretrial discovery proceedings. This is particularly true in medical malpractice actions where the defendant is a physician. The purpose of discovery is to obtain evidence and as many courts have stated in their decisions allowing liberal discovery, the plaintiff often has great difficulty in discovering evidence in medical malpractice cases. As a result, the defendant in a malpractice action is required to answer questions posed during discovery proceedings that relate not only to facts within his personal knowledge, but also to his expert opinions based on such facts.

Expert not expected to be called at trial

The provisions of discovery are very specific with regard to experts who are not expected to be called as witnesses at the trial. The opponent may agree to permit discovery of the facts known by or opinions held by such experts, but that voluntariness is not frequently encountered. Consequently, it is necessary to show exceptional circumstances that make it impossible or impractical to obtain facts or opinions on that subject matter by other means.

Letters

What is an NSAID?

We enjoyed reading the informative article, “NSAID hepatotoxicity,” by James H. Lewis, MD, and Hyman J. Zimmerman, MD, (February 1996, pp 45–66). However, we would like to point out that allopurinol and gold compounds are not considered miscellaneous NSAIDs. Allopurinol is a xanthine oxidase inhibitor and does not exert anti-inflammatory effects. Although gold is technically a nonsteroidal (by virtue of not being a steroid drug) and has some anti-inflammatory properties, its mode of action is unknown and dissimilar to the group of medicines generally known as NSAIDs. Therefore, it is not considered a part of this classification.

Mark A. Stern, MD
Department of Medicine
Carlos Agudeo, MD
Division of Rheumatology
Department of Medicine
Veterans Affairs Medical Center
Emory University School of Medicine, Decatur, Ga.

Editor’s note: The authors add that the liver toxicity of these drugs—allopurinol and gold compounds—is relevant in any discussion of other antirheumatic medications.