

## **DEPOSING THE DEFENDANT ON THE STANDARD OF CARE**

### **I. INTRODUCTION TO TOPIC**

- a. "CALLS FOR EXPERT OPINION"**
- b. "DEFENDANT IS NOT BEING OFFERED AS AN EXPERT"**

### **II. OVERVIEW OF CASE LAW**

- a. Rogotzki v. Schept, 91 N.J. Super. 135 (App. Div. 1966)**
  - i. "a plaintiff in a medical malpractice can ask questions of a defendant doctor in a deposition which seek to elicit expert opinions relevant to the diagnosis and treatment of the plaintiff."**
  - ii. "The critical information necessary to a proper understanding and presentation of the case is almost exclusively within the knowledge of the defendant-expert."**
- b. Stigliano, 140 N.J. 305 (1995)**
  - i. "Although the treating doctors are doubtless "experts," in this case they are more accurately fact witnesses. Their testimony relates to their diagnosis and treatment of the infant plaintiff. In this context, moreover, the characterization of the treating doctors' testimony as "fact" or "opinion" creates an artificial distinction."**
- c. Hutchinson v. APMC, 314 N.J. Super. 468 (App Div. 1998)**
  - i. Provides a nice summary of the earlier case law.**
- d. Parker v. Poole, 440 N.J. Super. 7 (App. Div. 2015)**
  - i. Summarizes earlier case law and also addresses many Rule-driven arguments such as hearsay, statements against interest and R. 403 prejudice**
- e. There are NO CASES that I can find that go the other way.**

### **III. PRACTICAL APPLICATION**

#### **a. PREPARING FOR THE DEPOSITION**

- i. KNOW WHAT YOU DON'T KNOW**
- ii. DETERMINE THE STANDARD OF CARE BEFORE THE DEPOSITION**

##### **1. CONDUCT MEDICAL RESEARCH**

- a. IT'S CHEAPER TO DO IT YOURSELF**
- b. IT'S A GREAT WAY TO EDUCATE YOURSELF**
- c. THE EXPERT ISN'T TYPICALLY GOING TO DO IT FOR YOU UNLESS HE AUTHORED THE ARTICLES**
- d. WHEN YOU'RE REALLY LUCKY, THE DEFENDANT ACTUALLY AUTHORED SOMETHING THAT GOES CONTRARY TO HIS DEFENSE.**

##### **2. SPEAK TO YOUR EXPERT**

- a. HE OR SHE WILL BE WRITING THE REPORT THAT YOU WILL RELY UPON. THEY KNOW MORE THAN WE DO. NO ONE KNOWS BETTER THAN THE EXPERT WHAT INFORMATION THEY NEED UPON WHICH TO BASE THEIR OPINIONS. YOU DON'T WANT TO GET HIT WITH A NET OPINION MOTION LATER ON IN THE LITIGATION.**

##### **3. DON'T PLAY VERBAL VOLLEYBALL WITH AN EXPERT—THEY'LL WIN**

##### **4. BE NICE—UNTIL IT'S TIME TO NOT BE NICE**

##### **5. DON'T BE AFRAID—WHAT'S THE WORST THING THAT WILL HAPPEN?**

- a. CALL THE ON-CALL JUDGE TO GET A RULING ON-THE-SPOT**
- b. FILE A MOTION**