Say what? By Jesse Gibson

A plaintiff's practice is a people practice. As such, I consider it a "contact sport." If you are doing your job properly and diligently, you are in face-to-face contact with your clients and potential witnesses all the time. It is your job to flesh out the facts, understand all of the conversations that occurred surrounding the negligent act, size up and fact check the anticipated testimony, and to make sure you fully and completely understand the story. For many reasons, this is best done through in person, face-to-face conversations. First and foremost, it is part of case evaluation. A little known secret is that sometimes potential clients' memories or recollections of the facts may be incomplete or perhaps consistently skewed in their favor. Second, these conversations help to make connections with lay witnesses and cultivate lay testimony that is often crucial at trial. Without placing yourself within arm's reach of potential witnesses, you often gloss over or miss out on important testimony. Finally, it often helps you develop themes and formulate theories of the case you will not develop if you limit yourself to speaking only with your client.

Never is the importance of lay testimony so important as in medical negligence cases. It is a very southern thing when someone is hurt or in the hospital to rush to the loved one's bedside, often with a casserole in tow. In so doing, many family members and friends come into contact with very a important fact witness in a medical negligence case: the subsequent treating physician. I feel quite certain that every single attorney who has tried a medical negligence case has encountered the situation where an injured person's family members or friends recount a detailed conversation with the subsequent treating physician. These conversations often occur when the treater believes no one was looking or listening (and certainly before he was properly woodshedded by defense counsel). Many times I am told that the treater informed family members that there had been a negligent act that was the fault of the previous treating physician and that they should sue. Often, the family member or friend recalls that the subsequent treating physician even offers to help or testify on the patient's behalf.

Unfortunately, every single attorney who has tried a medical negligence case has deposed the subsequent treating physician about those statements and received only a look of amazement and bewilderment that you would suggest such a thing. "Of course not. I never said that. I would never say that." What then? Is the issue dead? Do you just prepare your clients for the inevitable fact that the subsequent treating physician simply won't help your case and to shift the focus on our expert and cross examining the defense expert? Not always. In certain situations, this "Denial of Peter" by a subsequent treating physician can give you a powerful theme to take to the jury. The reptilian brain hates a cover-up. The reptilian brain hates to be misled or feel like it is playing into a stacked deck. Cover-ups, stacked decks, the "fix," are all dangerous to the reptilian brain and motivates action to protect the reptile. If you can dial-in to this organic reaction, you can make jurors protect your client from a dangerous set of facts conspiring against him or her.

Step One: Vet your story. If during your "contact sport" interviews, there is only one dodgy third cousin who recalls the subsequent treating physician spilling the beans, think twice. You'll be impugning the treater's credibility, so make sure the testimony that this conversation happened is strong. You must feel certain you are on solid ground based on the credibility and veracity of your lay witnesses. If not, the reptile will not be motivated and may take a bite at you.

In a recent case, as I began interviewing lay witnesses at different times, in different places, and for different reasons, this issue kept coming up. All the family members who had gone to see my client during his hospital stay repeated the same story. And not just the same story generally, but the same story ***verbatim.*** The subsequent treating physician had twice rounded on the patient and told the family that the prior treating physician was negligent, that the injury never should have happened, and that he would testify. Even the turn of phrase they claimed the doctor used was the same. It remained consistent as I talked to three, four, five credible witnesses, so I was absolutely convinced that it had happened. At that point, I realized that this had to be a theme in my trial.

Step Two: Identify what's going on, both from your perspective and your client's, and focus on why it's important to shine light on it. Why does this motivate the reptile? Because the reptile hates a liar. Deep down, what the reptile wants is truth. It distrusts a defendant and a subsequent treating physician "getting their story straight" to harm your client. To this end, ask your reptilian brain the following question:

> Why do subsequent treating physicians always show up to depositions with an attorney from a white shoe, silk stocking law firm? And why is it always one of the usual suspect medical malpractice defense attorneys?

Is it just chance? Are they golfing buddies with these guys? Hardly. As soon as they receive a deposition subpoena, they contact their carrier, and their carrier assigns them counsel. Maybe I am a conspiracy theorist, it has happened to me enough that I know in my heart that the first call that is made is between the attorney for the subsequent treating physician and the defendant's counsel is to discuss the case and get the story straight.

Now, this is where it gets sticky. Why does all this matter? The newly initiated might ask, "What's the harm?" It's harmful because it is strictly *verboten* for the defendant's attorney in your case to have direct contact with the subsequent treating physician. That is *ex parte* communication. *See* Ark Rule Civ. P. 503(d)(3)(B). *See also Bulsara v. Watkins,* 2012 Ark. 108, 387 S.W.3d 165. I believe it's improper for the attorneys to discuss the case to circumvent what would otherwise be a clear Rule 503(d)(3)(B) and *Bulsara* violation. It is a time honored legal maxim that one cannot do indirectly what one cannot do directly. We've all heard that, right? And I think at worst, you can do discovery about any communication between attorneys. However, most savvy attorneys will do it in an untraceable way. But if you see this enough, you will

eventually have a case where the similarities between the defense counsel's theories of the case and the subsequent treating physician's testimony simply cannot be chance. You will eventually see a case where you are left with the inexorable conclusion that there has been collusion, planning, and a "come to Jesus meeting" about the subsequent treater's offer to testify on behalf of your client.

We recently had a case where during informal discussions between attorneys, some very unique arguments and examples were used many, many months before the subsequent treating physician was deposed. When the subsequent treater was deposed, these very unique arguments and examples were used again. When the treater began a five-minute dissertation that sounded ***exactly*** like the discussion of several months earlier, my ears pricked like a spooked thoroughbred. I listened intently, and immediately wanted to jump up and down and accuse everyone of either direct or indirect *ex parte* communication and a *Bulsara* violation. But that would be costly, difficult, and perhaps impossible to prove unless everyone was very sloppy. So I simply kept quiet and listened, knowing exactly what was going on and keeping my powder dry.

Step Three: Take the time to set it up properly. You have interviewed your witnesses and found a detailed story being recounted in precise detail over and over and over. You've deposed the subsequent treater, and you feel he has been "gotten to." Now what? You are going to put the subsequent treater on trial during your case in chief and give him every chance in the world to admit what he said. Then, you will rebut that testimony and impeach his testimony with your family's testimony that yes indeed, he did say all those things before any lawyers were involved and when he thought no one was looking.

At trial, you have to call the treating doctor **first** and ask him "Did you say X to John Doe?" Ask it sixteen different ways and make him or her deny it sixteen times. Give the treater every opportunity in the world to admit he knows Jesus. Give the treater as much time or chance to explain as he or she needs. Utilize very specific details that you know will come out in short order. How do you know this? Because you're playing a contact sport and know exactly what the family members are going to say when they are called next to rebut the treater's testimony. For example, ask the treater these types of questions:

1. Did you say "X," to John Doe?
2. When you rounded on John Doe, did you say "X," to John Doe's cousin? What about his wife? What about Uncle Jimmy?
3. When you came by the next day, did you sit at the foot of the bed and tell John Doe's wife "X?" What about his cousin? What about Uncle Jimmy?
4. Did you have a conference with John Doe's family out by the water fountain where you told them "X?"
5. Did you tell John Doe's children "X," when they told you they were worried about their dad?

As you will see below, he or she really only has three ways to answer. (1) Yes; (2) No; or (3) I don't know. No matter what the treater says, you get what you want.

A. The subsequent treater says "Yes."

If the subsequent treater says "yes," well, it's game over. He or she has admitted exactly what you wanted him to admit. Then utilize your judgment based on the facts of your case how to handle it.

B. The subsequent treater says "No."

This is where it gets fun. You know that calling rebuttal witnesses about what a non-party witness said out of court rings the hearsay bell. Like a boy scout, be prepared. Have the following Rules of Evidence on the podium with you. Have it incorporated into a bench brief. Arkansas Rule of Evidence 801 defines what constitutes hearsay under the rules. Rule 801(d)(1) defines "statements which are not hearsay," and reads as follows:

> (d) Statements which are not hearsay. A statement is not hearsay if:
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> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony.

See Ark. Rule Evid. 801(d)(1).

The methodology for putting on such testimony impeaching a declarant is found in Rule of Evidence 613(b), which states as follows:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interest of justice otherwise require. This provision does not apply to admissions of a party opponent as defined in Rule 801(d)(2).

See Ark. Rule Evid. 613(b).

In *Flynn v. McIlroy Bank & Trust Co.,* 287 Ark. 190, 697 S.W.2d 114 (1985), the Arkansas Supreme Court held that Rule 801(d)(1) "provides that a prior statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with his

testimony. In civil cases, this rule effectively allows all prior inconsistent statements to be introduced as substantive evidence in addition to any impeachment value they may have." *See id.* at 116; *citing Hawthorn v. Davis,* 268 Ark. 131, 594 S.W.2d 844 (1980); *and David v. State*, 269 Ark. 498, 601 S.W.2d 864 (1980).

The issue is very similar to the one addressed in *Balentine v. Sparkman,* 327 Ark. 180, 937 S.W.2d 647 (1997). In *Balentine,* a party sought to impeach a police officer's trial testimony because he did not find any evidence that the opposing party had been consuming alcohol, nor did he know of any request by anyone to have blood-alcohol testing performed. There was an attempt to impeach that testimony with an out of court statement at the hospital by the testifying officer that he was asked to test blood alcohol levels and responded, "This man doesn't need a DWI charge, he's got more problems that he can handle now because his wife is probably going to die." *See id.* at 652. The trial judge excluded the statement, and the Supreme Court reversed, holding "the trial judge's ruling excluding the alleged prior inconsistent statement must be reversed as an abuse of discretion." *See id.* at 652-53.

This view was again followed by the Arkansas Supreme Court in *Truck Center of Tulsa, Inc. v. Autrey,* 310 Ark. 260, 836 S.W.2d 359 (1992). "We have adopted Judge Weinstein's view that a witness' prior statement is admissible 'whenever a reasonable man could infer on comparing the whole effect of the two statements that they have been produced by inconsistent beliefs.'" *See id.* at 363; *quoting* 4 Weinstein's Evidence, ¶ 801(d)(1)(A). The *Autrey* went further, holding that Rule 801(d)(1) applied when deposition testimony was played at trial instead of live testimony.

In a recent case, we subpoenaed a subsequent treater live at the trial and was subject to examination and cross-examination by all parties as required by Rules 801(d)(1) and 613(b), cited *supra*. He was asked no fewer than a dozen different ways whether or not he told the plaintiff that the surgery performed by the defendants was below the standard of care, that they should sue, and that he offered to help. He denied doing so. In so doing, he opened himself up to impeachment via extrinsic evidence of prior inconsistent statements. The multiple statements he was impeached with were inconsistent with this testimony. He was afforded every opportunity to explain or deny these statements, and defense counsel was afforded every opportunity to explain or deny the same and interrogate him thereon. These multiple statements to the plaintiff, his family, and friends were properly admitted, not only as impeachment evidence, but also for their substantive value per the *Flynn* court.

The testimony from the plaintiff's friends and family crushed the defendants and their attorney's credibility before the jury. It did not help that an unknown and unidentified attorney attorney walked the treater into the courtroom when we called him to the stand, sat in the back of the room in a power suit holding a file, and then escorted the doctor out of the courtroom after his testimony. The optics were horrible. In closing, we argued that people are most honest when they think no one is looking. They are most honest when a doctor is having a heart-to-heart with a patient, not three years

later after lawyers are involved. Truth, we argued, should be about what the facts are, not what someone wants them to be. It was effective.

C. The subsequent treater says "I don't remember."

Quite often, when faced with such a harmful admission, a treater will resort to amnesia to explain that gosh, he or she would love to help you, but just can't recall what happened. Not to worry. Rule of Evidence 804 gets you where you want to go by providing a hearsay objection when a witness is "unavailable." Subsections (a) and (a)(3) provides that "unavailability as a witness" includes situations in which the declarant "testifies to a lack of memory of the subject matter of his statement."

Continue with the strategy outlined above, and give the treater fifteen different chances to admit what he or she did, utilizing detailed facts that you know will come out later. Make him or her subject to full and complete cross examination and have every chance to explain what happened or why he cannot remember. Then you are free to put on your impeachment witnesses and impeach that testimony by people who have not tragically suffered amnesia.

Conclusion

In so many medical negligence cases, family members will claim that a subsequent treating physician told them the prior doctors were negligent. Often, they will urge the family to consult a lawyer. Sometimes, they will offer to help by testifying. Unfortunately, there is a "code of silence" that either explicitly or implicitly forbids an Arkansas doctor testifying against an Arkansas doctor. I truly believe if left to their own devices and sense of fairness and justice, they would so testify. Most doctors in Arkansas are conscientious, work hard, and do great work in healing their patients. These doctors understand and appreciate the need for peer review, and distasteful though they may find it, understand that medical negligence cases are forms of peer review. Medical negligence insurance carriers, however, feel quite differently. Once attorneys and carriers are involved, any desire to cooperate or shed light on a situation quickly dissipates. It at least routinely appears as though there is coordinated effort to mold or shape the subsequent treater's testimony to conform to the defense's theories of the case.

However, by following these steps, and refusing to timidly accept it when a subsequent treater does the "Denial of Peter," you can arm yourself with a powerful weapon. As a caveat, this will not work in every case. You must carefully analyze it using the steps outlined herein. And even then, you must have a good case. You cannot have a shaky liability case or low damages and expect to cross one subsequent treater and get a worthy verdict. This strategy must augment and support your case. It cannot be your entire case. And even then, jurors must be receptive to the strategy. But when you feel the fix is in, trust your instincts and run with it. You may have been given a great tool to utilize in tough cases.