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## 'Dep assists' can present problems when *Petrillo* doctrine overlooked

It has become more commonplace for Illinois Supreme Court Rule 213(f)(2) witnesses to present for depositions represented by defense counsel retained by their insurance carrier or practice group.

This practice, often referred to as "dep assists," permits the treating doctor or other health-care provider an opportunity to meet beforehand with retained counsel and then have representation at the deposition.

It eradicates *Petrillo* protections in permitting a defense counsel to interject himself or herself into the "confidential and fiduciary relationship between a patient and his physician." *Petrillo v. Syntex Laboratories Inc.*, 148 Ill.App.3d 581, 102 Ill.Dec. 172, 177, 499 N.E.2d 952, 957 (Ill. App. Ct. 1986).

The 1st District Appellate Court in *Petrillo* reasoned that a defense counsel holding an ex parte communication with a plaintiff's doctor was impermissible, violative and "[threatened] the sanctity of the [physician-patient privilege]," because a "dep assist" allows a defense counsel to participate and communicate directly with a treating physician. The physician-patient privilege that forms the basis of the *Petrillo* doctrine has been codified at 735 ILCS 5/8-802.

On the other hand, proponents of dep assists will turn to language in the 1st District's 1992 decision in *Baylaender v. Method*, 230 Ill.App.3d 610 (1st Dist. 1992). In *Baylaender*, it was found that a physician has

the right to consult with his counsel, if in "good faith," that physician "deems himself exposed to risk of suit which could be lessened by early legal consultation." That argument quickly fails when dep assists are utilized outside a two-year statute of limitations for medical-malpractice cases.

Here, the glaring distinction is if the physician in "good faith" believes he or she could be exposed to the risk of a suit. The *Baylaender* court even expressed that "[while] such practice is not without risk that there would be some erosions of the protections provided under *Petrillo*, it is counter-balanced by the fundamental right of any person, including a physician, to seek legal counsel when threatened by potential legal liability without having to wait until suit is filed." The overriding question is whether the treater in "good faith" deems himself at risk of legal liability.

*Petrillo's* protections are rather extensive. The privilege even applies to regulatory investigations and cannot be overcome by the broad investigatory powers granted to the Department of Professional Regulation. *People v. Manos*, 202 Ill.2d 563, 569-570 (2002) (in finding that investigations conducted by the department were not listed as an exception under the physician-patient privilege to compel physicians and surgeons to produce confidential patient records).

Illinois appellate courts should look to determine if dep assists violate *Petrillo*, or



**JACK J. CASCIATO**

*JACK J. CASCIATO is a partner at Clifford Law Offices that focuses his practice on construction cases, trucking accidents and medical-malpractice actions.*

at the least, determine where safeguards need to be implemented to avoid dep-assist counsel from perhaps even inadvertently interfering with the fact-finding process.

Here, dep-assist defense counsel could inadvertently, or presumed at times intentionally, offer their opinions on seminal issues such as causation, nature and extent, loss of normal life, future care and so forth.

In a medical-malpractice case, where of course an action is predicated on a plaintiff's course of care, dep assists certainly could have greater utility as it's more conceivable for a treater to be converted into a defendant versus in a nonmedical-malpractice action.

Although it certainly has occurred, few plaintiffs' attorneys handle cases where a non-medical-malpractice action, a

trucking accident for example, developed into a successive medical-malpractice action.

In addition, it is not uncommon for the Illinois Supreme Court Rule 213(f)(2) witnesses' treatment to occur outside the statute of limitations where no successive medical-malpractice action could be brought, setting aside the exception of the discovery rule.

The overriding purpose of deposing a treater is to elicit reliable and accurate medical evidence pertaining to that treater's personal knowledge of the accident, treatment rendered and professional opinions on causation, future care and permanency.

It can be presumed, whether intended or not, that a deposition preparation meeting with a dep-assist attorney can alter a treater's testimony than if he or she was presenting a medical case study to a group of residents.

In a nonmedical-malpractice action, particularly where the treater's treatment falls outside the two-year statute of limitations for a medical-malpractice action, the need at this time for dep assists should be questioned.

Future motion practice could present arguments as to whether dep assists are permissible in various contexts where a plaintiffs' attorney, for example, evidencing that a statute of limitations has run, presents an argument that no medical-malpractice action in "good faith" can be deemed to follow.