

CHAPTER 5

WOLVES IN WHITE COATS: HOW TO PROTECT YOURSELF FROM THE INSURANCE COMPANY DOCTOR

BY GARY M. HAZELTON, ESQ.

Janice was a widowed 66 year old retired schoolteacher when a rear-end crash damaged her neck. Nearly six years later she walked into my office. The statute of limitations (the time within which you must start your lawsuit or it will be forever barred) was about to expire, her attorney had dumped her case, ostensibly because her injuries were not significant enough to warrant a lawsuit, and she was in misery because her neck pain had never gone away. Incredi-

bly, review of her medical records revealed not a single complaint of neck pain in the 66 years leading up to the injury. We took her case and got the lawsuit started.

I referred Janice to a neurologist, suspecting her pain was being caused by injured facet joints in the neck. After a careful examination the neurologist suspected the same and Janice underwent a series of diagnostic injections. These objectively confirmed the facet joints as the source of the pain. Janice underwent what is known as a Radiofrequency Facet Neurotomy (RFN) procedure and her pain was gone, all of it.

Janice's restored faith in the legal system and doctors would be short-lived, however. In personal injury litigation, the other side has a right to have the injured person examined by a doctor of their own choosing. These doctors are referred to as Adverse Medical Examiners (AME's) or Independent Medical Examiners (IME's). They are paid by the insurance company for the at-fault party. Despite a 66 year pain-free history and six solid years of pain following the collision, the insurance company doctor, after a mere 15-minute examination, said that although Janice was injured in the accident – that injury healed 12 weeks after the crash and all ongoing pain was just because she was old. He literally said that after 12 weeks the cause of the ongoing pain transformed from being related to the crash and would have occurred even if she had not been in the crash! Absurd? Yes, but this absurd scenario is the rule in personal injury cases. *The AME's are truly wolves in white coats.*

Why would a medical doctor do this kind of thing to the Janices of the world? The answer is MONEY! AME doctors charge insurance companies 6 to 10 times what they charge their own patients for the same examination. The insurance

companies happily pay because they use the opinions to offer injured people like Janice far less than what is fair. If the AME does not consistently give opinions favorable to the insurance companies, they will take their business to a doctor who will. It is not uncommon for AME's to do 200 to 400 AME's per year at \$1000 to \$1500 per exam while devoting only a day or two a week to doing the exams. It is very, very lucrative and a great retirement income for some. Insurance companies will handle thousands of claims in a year. If they can save a few thousand bucks on each case through the use of 'bought and paid for' AME opinions it adds up to a huge sum each year. Understand that no physician patient relationship exists between you and the AME like it does between you and your treating physician. **THE AME OWES YOU NO LEGAL DUTY TO BE ACCURATE OR TRUTHFUL.** They can say what they want.

BITING BACK

No matter what the truth is, you need to understand it is the extremely rare circumstance in which an AME will write a report that is favorable to you. I believe there is a tacit understanding between the AME's and the insurance companies that occasionally an opinion will be adverse to the insurance company's interest just so it looks like the AME's are not biased. When it is your turn to undergo an AME do not expect you will be able to persuade the examiner with facts (the truth). They often appear friendly, leading you to believe they are truthful and will be fair. Rest assured that 99.9% of the time they will not. For the rest of this chapter we will look at what you must do to have the best chance to undermine the AME doctor's credibility.

KNOW WHAT IS IN YOUR MEDICAL RECORDS

Remember this: Whatever is documented in a written record, whether in an accident report, medical record or elsewhere is given inordinate weight by jurors and claims adjusters whether or not it is accurate.

In a personal injury case your credibility is critical. The attorney on the other side (the defense attorney) and the Adverse Medical Examiner will try to find or create, no matter how small or irrelevant, every single discrepancy between what you are saying now and what you have said or are reported to have said before. Every discrepancy will be used to undermine your credibility.

The single most fruitful source for generating these discrepancies is your medical records. Very few people have ever reviewed their own medical file. During your deposition (your testimony under oath before a court reporter), the defense attorney will ask you and during your AME the examiner will ask you, whether you have ever in your life complained to your doctor about “back pain” or whether you have suffered any other “accidents.” You may well have forgotten that many years ago, you saw your family doctor complaining of low back pain, or that when you saw your doctor for the low back pain it was because you had slipped and fallen on the ice. It may even be that the source of that old low back pain turned out to be a bladder infection or something clearly not related to your back. If you now testify that you have never had back complaints or accidents the attorney or AME will impeach you with your own medical records. A thorough review of your medical file is, therefore, critical to jogging your memory about pri-

or incidents and complaints so there will be no discrepancy and no lost credibility.

Review of the records may also jog your memory about specifics of prior incidents and complaints, thereby allowing you to distinguish them from what you are now experiencing. Also, some of your prior complaints or the details of a traumatic incident may have been taken down inaccurately. Review will prepare you to point out discrepancies and correct the record. Finally, although rare, there are occasions where medical information has been recorded in the wrong patient's chart. Review will catch such errors.

Reviewing records relating to the medical care you have received as a result of the current traumatic incident is equally as critical. The records may contain totally inaccurate descriptions of how the accident happened, making it look like you are at fault, or may totally omit some of your complaints. ER doctors are looking for life threatening or serious problems and to treat you just enough for you to get by until you get to your treating doctor. Emergency rooms are busy places with doctors often seeing many patients before getting a break to sit down and dictate their notes. It is very common for errors to appear in these records, particularly when a person has multiple injuries; the doctor forgets to write down some of the complaints. The problem this poses for you is that the defense attorney and AME examiner will claim because you never complained of a particular problem in the emergency room and are complaining of it now, you are either making it up or the problem was caused by something else. The standard line is that if that injury happened in the accident you surely would have told the ER doctor about it, and the highly trained ER doctor surely would have written it down. Knowing of these errors

or omissions will allow you to prepare to firmly testify that the doctor made mistakes, or forgot to write down some of the things you said.

KNOW HOW TO DESCRIBE YOUR SYMPTOMS

Doctors are busy people and their purpose is to treat you and not document your chart for legal purposes. I very frequently see old records stating that my client had “back pain.” So if the client now has back pain, even if it is 10 times worse than it was at the time the old record was made it still looks and sounds the same. This makes it easy for the defense attorney and AME to say you are complaining of exactly the same thing you complained of years ago and so if you do have problems they are pre-existing. Knowing how to accurately describe the symptoms to your doctor greatly helps distinguish the old from the new. (Remember, inordinate weight is giving to something in writing, so get it in the records). Use the following guide:

Location pain: Be precise! “Left side of my neck 2” out from the spine ½ way between the base of the skull and base of the neck.” Not, “My neck hurts.”

Nature of pain: Stabbing, gnawing, aching, piercing, electrical shock, squeezing, pressure. Not, “It hurts.”

Frequency of pain: How often does it occur? What you say will be taken literally. “Always” means 24/7. So if it is 6 hours a day say 6 hours a day.

Intensity of pain: On a scale of 1 to 10 with 1 being minimal pain and 10 being excruciating pain describe

the intensity. If the intensity varies, explain how it varies and what makes it vary, such as a certain activity or time of day.

Duration of pain: Describe how long the pain lasts when you get it and what makes it better or worse. If you typically take pain medication and the pain drops from an 8 to a 4, explain that is because of the pain medication.

Affect: Describe what you don't do or do differently because of the pain. Real life examples are very helpful. "When I bent over to shovel snow on Thursday my back locked up and I crawled back to the house and rested" has far more impact than "Shoveling snow hurts my back."

Distinguish from any pre-existing problems: Using the above as guides, explain to your doctor how the current symptoms are different than any pre-existing problems you had. Particularly explain how your ability to function is now different than it was before, by telling your doctor what kinds of things you were doing right up to the recent incident of trauma that you now have trouble with, or have stopped doing.

WHAT TO DO DURING AND IMMEDIATELY AFTER THE ADVERSE MEDICAL EXAMINATION

My clients get a lengthy letter explaining what to expect during the AME. They also get a lengthy form to complete immediately after they leave the AME doctor's office. Many AME's spend just minutes on their exam and skip important parts or orally tell the client things that are

completely different than what they put in their report. The letter I send explains what to look for and record after the exam. This information can be gold during the cross-examination of the doctor. Jurors are less than impressed when the AME who is making \$500,000 per year part time testifying for the insurance companies only spent 8 minutes with you, and concluded there was nothing wrong with you. In short, write down everything you remember about the exam immediately after the exam. If you will visit my website: www.HazeltonInjuryAttorneys.com and send us a note we will be pleased to send the letter and form to you for your own use.

Here are some of the tricks the examiners use that you should watch for and how to counter them:

- If you have a pre-existing condition, you are not asked how the symptoms from the current trauma are different from the ones you had before or how they affect you now. Tell the doctor even if you are not asked.
- If your medical records contain some unhelpful or damaging information, you are not asked if that information is accurate but rather the AME puts it in the report as though it were the Gospel. If you know of this information, tell the AME of the error. Then if he/she does not put it in the report they look even more biased.
- The doctor does not ask about prior incidents of trauma or complaints, or asks in a very confusing way you don't understand. Know your records and pre-empt the doctor by explaining and delineating how this is different in terms of symptoms and effect on your functioning, using the factors

described above.

- The doctor cuts you off and does not let you fully answer questions. Don't be intimidated!!! Make the doctor hear you out.
- Ask the doctor questions like: Will I ever get better? Can this get worse? Why aren't I getting better? Is there some other kind of care that could help? The doctor will probably refuse to answer the questions saying he/she is not your doctor. Great, you can testify to that statement. But the doctor also just might answer the questions and by the answers indicate his or her true feelings about your injury. Stuff you will never see in the report.

Do your homework, be prepared and you can do much to undermine the damage the AME can do to your case.

Gary M. Hazelton



ABOUT GARY

Gary M. Hazelton, Esq. is the founder and owner of Hazelton Injury Attorneys, located in Bemidji, Minnesota. He has been practicing since 1985, and practicing exclusively in the personal injury field since 1990. The mission of Hazelton Injury Attorneys is to be a resource, where personal injury victims and their families can turn to educate themselves about their rights and about how to find the right lawyer — without the pressure of having to meet with a lawyer. Educational materials are available through the firm website at: www.HazeltonInjuryAttorneys.com or by calling toll free: 1-888-711-4529 at any time (24/7).

Both Gary, and his associate Michael R. Hughes, are graduates of the intense Gerry Spence's Trial Lawyers College in Dubois, Wyoming, and commit to return yearly for additional training and practice. Gary is a Certified Civil Trial Specialist by the Minnesota State Bar Association and a four-time Minnesota SuperLawyer. It is the philosophy of the firm that every case must be fully developed from the beginning as if it will go to trial. The firm accepts a limited number of cases to ensure a full development of each case, and thereby, an increased likelihood of full compensation for the injured clients.

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