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REEVALUATING THE “PHYSICIAN”– REASONABLE COMPENSATION FOR ALLIED HEALTH PROFESSIONALS ADVOCATING ON BEHALF OF THEIR PATIENTS IN ILLINOIS

by RACHELLE SICO

In Illinois, reasonable compensation for health care providers providing testimony as a nonparty witness only applies to “physicians” under Illinois Supreme Court Rule 204(c) (“IL SC R. 204(c)”).¹ Other allied health professionals such as Physical Therapists (PTs), Occupational Therapists (OTs), Speech and Language Therapists (SLTs), Nurses (RNs) and Patient

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Care Technicians (PCTs) who also advocate for their patients through third party testimonies do not receive reasonable compensation for the significant impact their contribution has upon their patient's cases.² In light of the Affordable Care Act, the role of allied health professionals is expanding.³ Many provide more involved levels of patient care, but according to Illinois rules of discovery they are not being justly compensated for their advocacy services.⁴ This article will examine the history of IL SC R. 204(c) and the application of the term "physician" in relation to reasonable compensation for allied health professionals that are subpoenaed to provide testimony in a deposition or trial as a non-party witness.

HISTORY OF ILLINOIS SUPREME COURT RULE 204(c)

Currently, the IL SC R. 204(c) is regarding "Compelling Appearance of Deponent".⁵ Section (c) carves out a specific exception for "physicians" who testify at a deposition or trial. The rule states the following:

Depositions of Physicians. The discovery depositions of nonparty physicians being deposed in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a subpoena issued upon order of court. A party shall pay a reasonable fee to a physician for the time he or she will spend testifying at any such deposition. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the court, the party shall pay the fee at whose instance the deposition is taken.

However, prior to 1985 compensation for testimony provided was defined by *Dixon v. People*, 168 Ill 179, 181 (1897) and it held that standard for 87 years.⁶ The Illinois Supreme Court held that a physician called to give expert testimony could not claim extra compensation because of his skill and knowledge.⁷ In *Dixon v. People*, Dr. Dixon was called in as an expert witness in a suit requesting damages for a trip and fall case.⁸ After appearing pursuant a subpoena, Dr. Dixon was asked questions at trial that asked his professional opinion regarding the proximate cause of the claimed injury to the incident.⁹ Dr. Dixon declined to answer until his professional fee was paid.¹⁰ The Illinois Supreme Court stated that "Reasonable expenses are settled by statute at a fixed sum for each day's actual attendance, and for each mile's travel from the residence of the witness to the place of the trial and back, without regard to the employment of the witness, or his rank in life [. . .] Witnesses are not entitled

to special privileges on account of rank or employment.”¹¹ The Court dismissed the argument that Dr. Dixon was entitled to special compensation based on the skill and accumulated knowledge being his professional property that could not be taken without compensation.¹² The objective of *Dixon v. People* was to instill a public policy warning, where if a physician were allowed extra compensation as an expert witness, then individuals pursuing other occupations that require special experience would have the right to demand extra fees for the presentation of their knowledge.¹³

AMENDMENTS TO ILLINOIS SUPREME COURT RULE 204(c)

In 1985 and 1989 the *Dixon v. People* standard changed when the Illinois Supreme Court adopted amendments that allowed for reasonable compensation to physicians. The reasoning behind the change was to regulate the practice of compelling physicians to appear, to be deposed in their professional capacity, and to set guidelines concerning professional fees, which may be paid to physicians and surgeons for attending.¹⁴ Normally, expert witnesses are treated like other witnesses and are entitled to \$20 per day and 20 cents per mile of necessary travel.¹⁵ Nonparty physicians and surgeons typically request a professional fee and a statutory witness fee to compensate for the time spent testifying at depositions.¹⁶ The intent of this rule is to regulate this practice and a party may agree to pay a reasonable professional fee to a physician for the time they will spend testifying at any deposition.¹⁷ Timing is an important factor to take into consideration.¹⁸ A fee should only be paid after the physician has testified and it should not exceed any amount, which reasonably reimburses the medical doctor for the time he or she actually spent testifying at deposition.¹⁹ The party that is taking the deposition is responsible for paying the professional fee and other fees and expenses.²⁰

Landmark Case - Defining the Scope of “Physician” in Illinois Supreme Court Rule 204 (c)

The *Montes v. Mai* case opened the door for further interpretation of who can be determined to fit the definition of “physician” under IL SC R. 204(c). In *Montes v. Mai*, Dr. Perez, a chiropractor, was subpoenaed to testify on behalf of a patient he had treated after a motor vehicle accident.²¹ Dr. Perez’s clinic submitted financial records to determine whether \$550 was reasonable for his time.²² The Court disagreed and ruled that an hourly fee of \$66.95 was rea-

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sonable, with no minimum payment or prepayment. Dr. Perez appealed this decision.²³ The Court held that Dr. Perez, a chiropractor, was entitled to a reasonable fee pursuant to IL SC R. 204(c) governing the discovery depositions of nonparty physicians.²⁴ The Court also held that the trial court's decision that \$66.95 was a reasonable fee, was not an abuse of their discretion.²⁵ The Court's reasoning hinged on the analysis that there was no Illinois case defining "physician" as the term used in Rule 204(c).²⁶

The Court's interpretation of IL SC R. 204(c) involves the application of the same standards used in statutory interpretation.²⁷ Therefore, the Court determined that words utilized by the Illinois Supreme Court should be given their plain, ordinary and popularly understood meanings.²⁸ The Court turned to three different sources to aid in their interpretation of "physician" within IL SC R. 204(c).²⁹ Firstly, Webster's Dictionary states that a physician is "a person skilled in the art of healing; one duly authorized to treat disease; a doctor of medicine."³⁰ Secondly, Black's Legal Dictionary states that a physician is "a practitioner of medicine; a person duly authorized or licensed to treat diseases; one lawfully engaged in the practice of medicine."³¹ Lastly, the Court applied *People ex rel. Gage v. Siman* where the term "physician" applied to one versed in or practicing the art of medicine, and not limited to the disciples of any particular school.³² The primary example the Court referred to was that a Doctor of Osteopathy does not use medicine or operate on patients, but they are included as "physicians" under IL SC R. 204(c).³³ Therefore, the *Montes v. Mai* standard applied the term "physician" as encompassing the treating chiropractor and therefore, he was entitled to a reasonable fee for time spent in a discovery deposition for the case in which he was nonparty witness.

STATUTORY APPLICATION OF THE TERM "PHYSICIAN"

Examination of the various statutory authorities that regulate the health care profession demonstrate that a "physician" is most commonly defined as a person licensed under the Medical Practice Act of 1987 to practice medicine in all of its branches or a chiropractic physician, which is an individual licensed to treat human ailments without drugs or operative surgery.³⁴ Within the Illinois Medical Practice Act, case law is referenced in the footnotes that shed further insight into the extent needed to label an individual as a "physician."³⁵ Precedent Illinois case law has held that the term physician is bestowed upon an individual who is versed in or practicing the art of medicine, and it is not

limited to the disciples of any one school and anyone whose occupation is the treatment of disease for the purpose of curing a patient.³⁶ Comparably, the Illinois Hospital Licensing Act maintains that a “physician” is an individual licensed to practice medicine in all of its branches, pursuant to the Illinois Medical Practice Act definition.³⁷ However, the Patient Safety and Quality Improvement Act lacks the definition of the term “physician” all together.³⁸ Instead the term “provider” is used to broadly indicate an individual or entity that is licensed or authorized under the state to provide health care services.³⁹

THE IMPACT OF MAINTAINING COMPLIANCE WITH ILLINOIS SUPREME COURT RULE 204 (c)

Maintaining compliance with IL SC R. 204(c) is placed on the resources of hospitals or health systems that employ the health professionals that provide care to the patients undergoing legal action.⁴⁰ Commonly, it is the General Counsel’s office that prepares MDs, DOs, PTs, OTs, SLTs, RNs and PCTs for a deposition or testimony in response to a subpoena from a patient’s attorney.⁴¹ Subpoenas requiring providers to testify is common practice for a hospital or health system and although the court takes into consideration scheduling priorities, nevertheless the provider is still taking time away from providing health care and patient treatments which can place a strain on the hospital or health system.⁴² After further discussion with the General Counsel of a rehabilitation medical center, it was discovered that in actual practice the fee letters describing both allied health professionals and medical doctors’ wages are sent to the court and both have been honored at reasonable rates in Illinois.⁴³

CONCLUSION

The 1985 and 1989 amendments to IL SC R. 204(c) created a new standard that for the first time set physicians apart from witnesses in every other profession and employment because they have the ability to obtain a reasonable fee for their testimonial services. But the question remains, what sets “physicians” apart? The rule fails to adequately define what training, licensure and credentialing a “physician” requires or provides guidelines regarding what constitutes a “reasonable fee.” At the most basic level of analysis, the term “physician” is not defined under IL SC R. 204(c). The Illinois Medical Practice Act does not help clarify this point, as evidence by the vague standard for physicians to

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“practice medicine in all branches;” while also including chiropractors as “physicians” even though their practice is limited in scope, widely considered a form of complementary and alternative medicine, and treatment occurs “without drugs or operative surgery.”⁴⁴

The role of the medical profession has come to include broader responsibilities for allied health care professionals and it is recommended that both state and federal standards reevaluate the scope of the term “physician.” As evidence by closer examination of IL SC R. 204 (c), the law has failed to be consistent in the application of the term “physician.” An allied health professional’s testimony can significantly affect the way the patient’s case is viewed by the Court because many are intimately aware of the patient’s medical treatments and are responsible for the patient’s overall care.⁴⁵ Allied health professionals play a large role in providing primary care, monitoring patient treatments, and charting the progress of the patient’s health on a daily basis.⁴⁶ In actual practice, both allied health professionals and medical doctors are being honored with reasonable rates for their advocacy; however, the Illinois Supreme Court rule has yet to change the law to reflect this important consideration, which may lead to detrimental effects with the ever-expanding changes in health reform under the Affordable Care Act.

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NOTES

1 ILL. SUPP. CT. R. 204(c) (Current with amendments received through 2/1/2014).

2 *Id.*

3 KAISER COMM. ON MEDICAID AND THE UNINSURED, IMPROVING ACCESS TO ADULT PRIMARY CARE IN MEDICAID: EXPLORING THE POTENTIAL ROLE OF NURSE PRACTITIONERS AND PHYSICIAN ASSISTANTS 1 (2011), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8167.pdf>.

4 ILL. SUPP. CT. R. 204(c) (Current with amendments received through 2/1/2014).

5 *Id.*

6 Dixon v. People, 168 Ill 179, 181 (1897).

7 *Id.* at 179.

8 *Id.* at 181.

9 *Id.*

10 *Id.*

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- 11 *Id.* at 188.
- 12 *Id.* at 197.
- 13 *Id.* at 196.
- 14 ILL. SUPP. CT. R. 204(c) (Current with amendments received through 2/1/2014) (referencing the Committee Comments regarding this section).
- 15 Witness Fees, 705 Ill. Comp. Stat. 35/4.3 (a) (eff. 1996).
- 16 *Id.*; *see also* ILL. SUPP. CT. R. 204(c).
- 17 ILL. SUPP. CT. R. 204(c) (Current with amendments received through 2/1/2014) (referencing the Committee Comments regarding this section).
- 18 *Id.*
- 19 *Id.*
- 20 *Id.*
- 21 Montes v. Mai, 398 Ill.App.3d 424 (2010).
- 22 *Id.* at 426.
- 23 *Id.*
- 24 *Id.* at 431.
- 25 *Id.*
- 26 *Id.* at 427.
- 27 *Id.*
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 *Id.*
- 32 People ex rel. Gage v. Siman, 278 Ill. 256, 257 (1917).
- 33 Montes v. Mai, 398 Ill.App.3d at 427.
- 34 Medical Practice Act, 225 Ill. Comp. Stat. 60/2 (current through P.A. 98-628 of the 2014 Reg. Sess.).
- 35 *Id.*
- 36 People ex rel. Gage v. Siman, 278 Ill. At 257.
- 37 Illinois Hospital Licensing Act, 210 ILL. COMP. STAT. 85/10.7 (Current through P.A. 98-628 of the 2014 Reg. Sess.).
- 38 Patient Safety and Quality Improvement Act of 2005, P.L. 109-41, 119 Stat. 424 § 921 (8) (2005).
- 39 *Id.* (including physician, physician assistant, nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, certified nurse midwife, psychologist, certified social worker, registered dietitian or nutrition professional, physical or occupational therapist, pharmacist, or other individual health care practitioners).
- 40 Interview by Rachelle Sico with Attorney*, General Counsel at a Chicago-based Hospital (February 2014) (name withheld for privacy).
- 41 *Id.*
- 42 *Id.*
- 43 *Id.*
- 44 Medical Practice Act, 225 Ill. Comp. Stat. 60/2 (current through P.A. 98-628 of the 2014 Reg. Sess.).
- 45 KAISER COMM. ON MEDICAID AND THE UNINSURED, *supra* note 3 at 3.
- 46 *Id.*