

DEPOSING DEFENSE MEDICAL EXPERTS
INCLUDING ORTHOPEDISTS AND NEUROLOGISTS

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I. Do You Need to Depose The Defense Expert?

A. Analyze the defense medical report:

1. Does it hurt you?

- If so, can you live with it?
- Is clarification necessary?
- Do you need to pin down the witness to avoid surprise at trial?
- Do you need ammunition for cross-examination at trial?

2. Does it help you?

- Do you need to memorialize favorable concessions?
- Do you need it to evaluate the case or push for settlement?

B. Will a deposition expose the thrust of your cross-examination at trial?

C. Will a deposition force the defense to prepare or will you have an advantage with a less well-prepared witness?

D. Is there a risk that the witness will be unavailable for trial?

E. Is it worth the cost?

F. Do you need to determine the doctor's ability as a witness?

II. Preparing to Depose The Defense Expert.

A. Issues regarding the deposition notice:

1. The Subpoena Duces Tecum. Use a subpoena duces tecum for items to be produced at the deposition or you might not get everything. A sample is attached as Exhibit 1 to this article. Remember that the doctor is not a party. Although Evidence Code, Section 722(b) entitles you to inquire about expert compensation and expenses for purposes of establishing bias, it does not authorize you to subpoena or examine an expert's financial records unless he refuses to provide good faith estimates of how much of his practice is devoted to medical-legal work, the percentage of the work that is for plaintiff as opposed to the defense and how much he has received in compensation for medical-legal work. The leading case is Allen v. Superior Court, (1984) 151 Cal.1447 which involved a well-known defense orthopedic expert and a plaintiff subpoena duces tecum requesting financial records for defense medical examinations for the last five years. The doctor moved for a protective order, the trial court partially granted it allowing plaintiff to seek defense medical reports prepared for the last five years, and the Court of Appeal issued a writ of mandate compelling the trial court to vacate its order. The court balanced the doctor's right to privacy against the plaintiff's right to show bias and held that deposition testimony was a less intrusive method of discovery. In the court's own words, "Exact information as to the number of cases and amount of compensation paid to medical experts is unnecessary for the purpose of showing bias." Id at 453.

The most recent case on the subject is Stony Brook I. Homeowners Association v. Superior Court, 00 CDOS 8821 (October 31, 2000). Here it was clear that in prior depositions the defense orthopedist had been reluctant to provide accurate estimates about the nature and extent of his prior medical-legal work. The issue was how to deal with the situation where an expert is unable to provide a good faith estimate of this information. The court adopted the Allen

reasoning that a precise accounting was excessively intrusive, but the doctor should be required to provide a description of his practice sufficient to permit a jury to determine whether his opinions had been influenced by bias. The court ordered that the doctor at his deposition provide plaintiff with a 3-year numerical estimate of medical-legal work (exams, reports, deposition, and testimony) and the amount of income generated by this work. The court went further to order that if, after preliminary review of his files, the doctor concluded that this information could best be gathered by his voluntary use of a third party, the third party could compile the information and the charges should be borne by the plaintiff. Stony Brook gives plaintiffs a tool to use if the defense doctor does not make a good faith estimate of the nature and extent of his or her medical-legal work.

2. Payment of the Expert. You have the option of submitting a check for the anticipated expert fee with the notice or providing a check at the commencement of the deposition. Code of Civil Procedure Section 2034(i)(2). In most situations experts rarely insist on being paid before they testify, so you can wait until the deposition is completed and calculate what is owed more accurately.

If you feel that the disclosed expert's fee is unreasonable, do not wait until the deposition to challenge it. Code of Civil Procedure Section 2034(i)(4) outlines the procedure you should take in making a motion to challenge the reasonableness of the fee. This often arises in situations with very high hourly rates or daily fees, but be sure you are correct about this, because the court can impose monetary sanctions against the attorney who unsuccessfully makes or opposes such a motion pursuant to Code of Civil Procedure Section 2023. See March v. Mountain Zephyr Inc., (1996) 43 Cal. App. 4th 289.

- B. Gather all the Records. This may seem obvious, but you should never depose the opposing expert without having all of your own client's records for treatment of the injury in issue, for treatment of all prior related

injuries and records of your client's family doctor. You have to know what these records say in order to properly question the other side. For example, if there are no prior related injuries or complaints you need to know that. If there are prior related injuries or complaints you need to know this to be able to distinguish these from the present problems. If the injury resulted in the taking of x-rays, MRIs or other studies, be sure to obtain these records, because you may need them at the expert's deposition. The opposing expert frequently has not reviewed these before writing his or her report and you may be able to get him to change his opinion. For example, fractures near a major joint often can extend into the joint and this makes for a more serious prognosis, i.e., traumatic arthritis leading to the destruction of the joint. This can be determined from x-rays.

- C. Do your homework. Make sure you thoroughly understand the anatomy and the nature and extent of each injury. There are many books that can help you, from the most basic ones like It's Your Body by Larry Elson to Campbell's Operative Orthopedics. Learn all of the usual tests performed during an orthopedic and/or neurological examination. How are they performed? What are the "normal" results? There are several sources of this information, but Goldberg's Four Minute Neurological Examination (Med Master, Inc. P.O. BOX 640028, Department NBK, Miami Florida 33164) is excellent, as well as Hoppenfield's Physical Examination of the Spine and Extremities (good illustrations).

Compare the tests the defense doctor performed with the available tests and determine what he did not do, so you can ask him about it. Also, be prepared to compare his "normals" with the normal findings outlined by the authors. Why is there a variation?

- D. See your own expert. Make an appointment to see your own expert (most often the treating physician) and get ideas for the deposition of the defense expert. This can be done in 30 minutes and it is well worth the expense. You can test your knowledge of the anatomy, injury and examination before you take the deposition.
- E. Review Jury Verdicts Weekly to find out more about the defense expert. Then call other attorneys who have

deposed and/or cross-examined the expert because they have prior depositions and can give you insight into demeanor.

- F. Obtain copies of prior depositions of the defense expert from other attorneys and deposition banks, including SFTLA, which is an excellent source of expert depositions.
- G. Final preparation. Thoroughly review the expert's report and highlight all areas to review with him and make an extra clean copy to attach to the deposition. Prepare a brief key word outline to make sure you do not miss anything. Consult the opposing counsel's expert declaration to see what has been disclosed regarding the scope of the expert's testimony to make sure you cover it all.

III. Four Things You Have To Do When You Take Any Defense Doctor's Deposition.

- A. Accentuate the Positive. Look for favorable facts, findings and opinions and bring them out first.
 - 1. What type of impression did your plaintiff make? Lead the doctor into admitting that your client was honest, straightforward and cooperative.
 - 2. Elicit favorable facts regarding the history. For example, if there are no prior injuries establish that with the doctor. Other favorable facts include the mechanism of injury and causation.
 - 3. Are the complaints legitimate? If the doctor believes that your client is really suffering, be sure to bring that out. Rule out the plaintiff as a malingerer. This also is the time to deal with the subject of mitigation of damages (BAJI Section 14.67). Try to get the doctor to admit that the plaintiff has been reasonable in seeking treatment for his injuries.
 - 4. Establish that the billing for plaintiff's treatment was reasonable. This helps you lay the proper foundation for the admission of the medical bills.

the job entails. You should learn the job requirements yourself and first see if the doctor will agree that the plaintiff should not perform certain activities, which are required. Then get him/her to admit that he/she doesn't know the job requirements. Lead the doctor into admitting that he/she is not an expert in rehabilitation medicine and is not a vocational rehabilitation counselor. Get him/her to defer to other experts that are more familiar with these issues.

3. The "surgery is unnecessary" opinion. The focus here is on "experience." Find out the nature and extend of the expert's experience actually performing the surgery that is recommended. How many has the doctor done? How frequently has the doctor performed this surgery? Was the doctor lead surgeon or an assistant? What type of results has the doctor had? When did the doctor last perform this surgery? Would the doctor consider deferring to the treating doctor? Has the doctor ever taught others how to perform the surgery? Does the doctor have philosophical reasons for not performing this type of surgery? Won't the surgery improve plaintiff's condition? What are the risks it will not improve plaintiff's condition? Try to get the doctor to estimate in percentages the chances of improvement with surgery and/or the risks of its worsening plaintiff's condition.

C. Clarify And Understand the Negatives.

1. Don't overlook the history. How does the doctor explain the history of the incident? The doctor may be focusing on the different versions of how the incident occurred in the records or he/she might have heard a different story directly from the plaintiff. How much time did the doctor spend discussing prior injuries? The attack on the plaintiff may be that he did not reveal priors or that his present complaints are merely a manifestation of a pre-existing problem rather than a residual of the injuries he sustained in the incident.

2. Find out why the doctor does not accept the present complaints of your client. It is usually one of several reasons, e.g, the plaintiff is a malingerer because his complaints should have resolved long ago, the symptoms are real but are related to something else, i.e., a prior condition/injury or a subsequent injury, and/or the symptoms cannot possibly be related to the admitted injury for some seemingly legitimate medical reason.
3. Analyze the physical examination with particular attention to the usual tests. Find out the usual tests the doctor performs and inquire why certain test were omitted. Examine each negative or normal result and ask its significance. Inquire about the reliability of the test results, e.g., can you have a negative/normal and still be injured? Does a negative x-ray or CT scan mean that there is no soft tissue injury? What test did he/she perform to determine the presence of an injury to the musculature, the ligaments and the tendons? Get him/her to admit that none of his tests rule out this type of injury.
4. Clarify the diagnosis. Make sure you understand the diagnosis. Get concessions that whatever it is, it was caused by the incident. If the diagnosis is that it is an aggravation of a preexisting condition or injury, make that clear because that is still an injury pursuant to BAJI 14.65. Discuss the issues of susceptibility, whether the preexisting condition was asymptomatic and the chances of it becoming symptomatic without the incident, and the likelihood of future exacerbations due to the severity of the incident.
5. Elicit the prognosis and treatment recommendations and set the doctor up for a challenge of the basis for these opinions. You can expect that the defense doctor's prognosis will be rosier than that of your treating physician and that future treatment recommendations will be non-existent or extremely limited. The deposition is not the place to openly challenge these opinions, however, you should not accept them without a probing challenge of the bases for these opinions. Your own expert will need this information to challenge

the defendant expert's opinions and you can use it for cross-examination at trial. Common opinions deal with the need for surgery and the time that your client will experience symptoms from the injury. How many times have you heard a defense doctor testify that your client's complaints should have resolved within three to six months?

If you feel you are getting an unfair opinion, pin it down and try to indirectly establish that the doctor's position is unreasonable and he is acting as an advocate. There are two steps in doing this:

- a. Establish how strongly he feels about this opinion and how long he has held it. If you can, invite him to overstate his opinion, e.g., that he is 100% certain. Also, ask if there are any exceptions to the rule and explore those;
- b. Probe the basis of his opinion. Is it based on his experience, the majority of patients he has treated, the literature or something else? Once you have explored this, you can plan your strategy of cross-examination at trial with your own expert.

Timing questions are extremely important in discussing an expert's opinions. Pin down the dates when the expert reached his/her opinions and the date each opinion changed, if it did change. This is important to later compare with testimony you will elicit from the subpoena duces tecum regarding dates of receipt of records and other information. Did the expert make up his/her mind before he/she got all the records?

6. Ask the "all-opinion" question to avoid sandbagging. Always ask the expert at the end of the deposition to represent that the opinions he has given are the only ones he will provide at trial. If the expert or his/her attorney tries to evade this question, show the expert declaration and use it to pin down the expert. Code of Civil Procedure §2034, subd.(f)(2)(d) provides that the expert has to be ready to give a "meaningful deposition." See Jones v. Moore, (2000) 80

Cal.App. 4th 557. You have two options once the expert is pinned down: (1) make an anti-sandbagging motion in limine or (2) wait for the expert to testify and raise the proper objection to prevent the expert from blurting out new opinions.

7. Pin down whether the expert plans to do additional work. Ask what the doctor intends to do and do not agree to take a follow-up deposition. C.C.P. §2034 mandates that he/she be ready to testify by the time of his/her deposition. You can use this testimony on unfinished work later to cross-examine him/her. How was the doctor able to give opinions when he/she had not considered everything?

D. Set The Doctor Up For Impeachment.

1. Does the defense expert know any of the other experts?
 - a. Your expert: Will the doctor testify that your doctor has a good professional reputation? Has the doctor ever referred patients (including family members) to your expert or to his/her partners? Does the doctor have any personal or philosophical disputes with your doctor on subjects like treatment, surgery, etc.
 - b. Other defense experts: What relationship, if any, does the defense expert have with any other defense experts, including the defendant (if he/she is a doctor)?
2. How much time did the defense doctor spend on the case? This information goes to the quality of his opinion. How much time did the physical examination take? How much time did he spend with your client?
3. Gathering information about publications to cross-examine the doctor at trial. Evidence Code §721(b)(i) allows you to cross-examine an expert at trial on publications he referred to, considered or relied upon in arriving or forming his opinion. This has been the law for some time,

but we now have Evidence Code §721(b)(2) which permits you to cross-examine experts with "reliable authorities." How do you determine what is "reliable"?

One approach is to look around the doctor's office to see if the doctor has any texts or periodicals which he/she will admit are reliable authorities on the subject. If you do not see them in the doctor's office or the deposition is not taken in the doctor's office, ask the doctor what he/she subscribes to and routinely reads and get him/her to agree that these publications are reliable authorities. If you already have located favorable articles, get the doctor to agree that they are published by a reliable authority.

4. Qualifications. The subpoena duces tecum will give you the curriculum vitae which you later can use to challenge the expert's qualifications. There usually is no need to go into qualifications with the defense expert if the CV is detailed. The reason is that if the expert is unavailable or dies, the defendant will be unable to read his deposition at trial.
5. Bias questions concerning medical-legal work. Go through Items 2-4 of the subpoena duces tecum (attached) carefully. On Item 2 concerning the file, focus on the dates that the expert was first contacted and when he first received records and other information. Then go back after the deposition and compare these dates to the date when he first reached his opinion. Once again, you may find that his opinion was formed before he had all of the necessary information.

On Item 3, ask details about how he bills. What is his hourly rate for various services? Does he request a retainer? How long has his billing schedule been in place? How much does he intend to charge for trial?

IV. Conclusion

Too often plaintiff's attorneys notice a defense doctor's deposition and simply show up with his report and have him regurgitate his findings and opinions. This is a useless exercise. It also can be expensive. If you are going to take a defense doctor's deposition, you have to have a strategy aimed at challenging him at trial. Do your homework and approach the deposition from the point of view that there is always something positive you can get out of the expert.

11/9/00 .

SUBPOENA DUCES TECUM
FOR DEFENSE DOCTOR

1. The most current curriculum vitae of Dr. _____.
2. Dr. _____'s complete original file for this case, including but not limited to the following:
 - a. Each report;
 - b. All draft reports and computer discs used to draft each version of the report;
 - c. All correspondence;
 - d. All writings provided to the deponent, including all medical records, depositions and witness statements;
 - e. All notes;
 - f. All research, including copies of articles consulted;
 - g. All writings prepared by Dr. _____ on the issues involved in this case, including but not limited to, published articles, unpublished papers, lecture and seminar outlines and handouts;
 - h. All medical record summaries;
 - i. All laboratory results and radiological studies (e.g., x-rays, MRIs) performed;
 - j. Any other writings referred to or relied on in forming opinions in this case.
3. All of Dr. _____'s billing records for services performed in this case and all billing schedules and policies for the last three years.
4. Writings (as defined by Evidence Code §250) that would allow Dr. _____ to provide good faith numerical estimates of the following matters:
 - a. The amount of medical-legal work performed during the

last three years;

- b. The percentage of medical-legal work performed for persons representing plaintiffs as opposed to persons representing defendants during the last three years;
- c. The amount of income generated from medical-legal work performed during the last three years.