Depositions 101: Deposing the Treating Physician
Wednesday, January 27, 2010
Presented By the IADC Trial Techniques and Tactics Committee

Welcome! The Webinar will begin promptly at 12 pm EST. Please read and follow the below instructions:

1. If you have not already done so, please join the conference call.

2. Mute your phone line. If you do not have a mute button or are on a cell phone, press *1 to mute your phone.

3. If you are on a conference phone, please move all cellular or wireless devices away from the conference phone to avoid audio interference.

4. If you have questions during the presentation, you may utilize the Q&A function at the top of your screen. You may type questions here and it will be sent to the presenters for response.

5. If your question is not answered during the presentation, our presenters will answer questions at the end of the webinar, or via email following the webinar.

6. Visit the “Handouts” section in the upper-right-hand corner of the screen if you would like to download a copy of this PowerPoint presentation and referenced documents.
Moderator

Spencer H. Silverglate
Clarke Silverglate & Campbell, P.A.
Miami, Florida
sssilverglate@csclawfirm.com
The International Association of Defense Counsel Trial Academy is a proven program for developing defense trial advocacy skills. This seven-day, intensive program blends faculty instruction and demonstration with individual student participation. Since 1973, more than 3,200 students have attended the Trial Academy and have come away with greater confidence, more defined litigation skills, and friendships that will serve them professionally and socially.

DEFENSE FOCUSED
Unlike many other trial practice programs, the IADC Trial Academy offers training provided by a faculty of the best corporate defense lawyers. They focus on defense techniques and tactics and teach participants how to THINK like defense lawyers.

AUTHENTIC EXPERIENCES
The IADC Trial Academy realistically simulates the elements and environment surrounding a trial. Real physicians and accountants act as expert witnesses and professional actors as lay witnesses and parties to the hypothetical cases during student exercises. Faculty expert witnesses have frequent and recent experience on jury trials for clients from a variety of backgrounds and industries. A true cross-section of members of the surrounding community serve as the jurors for faculty demonstration of voir dire.

INDIVIDUALIZED INSTRUCTION
The Trial Academy is a week of both observing the best trial attorneys in faculty demonstrations and practicing with that new knowledge. Unlike some other trial practice programs, attendees are videotaped while practicing every major aspect of a trial, not just one or two exercises. The faculty members provide one-on-one guidance and constructive criticism that result in immediate and vast improvement in performance throughout the week.
Depositions 101
Part 2 – Deposing the Treating Physician
Wednesday, January 27, 2010

Stay Tuned for Part 3:
Deposing the Adverse Expert
March 23, 2010 at 12 Noon EDT.

Watch your inbox for more information!
Presenters

Christopher A. Callanan
Campbell Campbell Edwards & Conroy
Boston, Massachusetts
ccallanan@campbell-trial-lawyers.com

Edward J. "Ned" Currie, Jr.
Currie Johnson Griffin Gaines & Myers, P.A.,
Jackson, Mississippi
ncurrie@curriejohnson.com

IADC
PLEASE MAKE SURE YOUR PHONE LINE IS MUTED!

Press *1 to mute or un-mute your phone if it does not have a mute button
Determine Your Reasons for Taking the Deposition

- Discovery
- *Daubert* challenge
- Trial
- Consider the consequences
Determine Your Reasons for Taking the Deposition

• Identify every opinion the witness intends to express at trial

• Set up trial cross-examination
  • Confirm that the witness reached opinions without considering pre-existing conditions
  • Confirm that the witness reached opinions without considering other evidence
  • Elicit helpful opinions & admissions
Determine Your Reasons for Taking the Deposition

• Use the plaintiff’s statements to undermine his or her case
• Exploit questionable qualifications or conclusions in preparation for a *Daubert* challenge
• Translate illegible notes
Prepare for the Deposition

• Get and Organize the Records
  • All health providers, doctors, chiropractors, hospitals
  • All pharmacy records for medications
  • Health insurer claim files

• Create A Chronology
Prepare for the Deposition

• **Understand the Medicine**
  – If the deposition is to be used at trial, your goal is to translate your understanding of the medicine to the jury by simplifying the medicine
  – Learn the basic anatomical terms
    • [Dorland’s Illustrated Medical Dictionary](http://medabbrev.com) (medical pronunciations, etymology, illustrations of nerves, muscles and vessels)
  – Learn medical abbreviations
    • [Davis, Medical Abbreviations](http://medabbrev.com)
Prepare for the Deposition

• Understand the Medicine

ANATOMICAL TERMS: JOINT MOVEMENTS

• Flexion (bending toward the body);
• Extension (bending away from the body or straightening the limb);
• Hyperextension (moving beyond normal straight position. Can be normal range of motion in the elbow and abnormal in a neck injury);
• Dorsiflexion (describes raising the part beyond the straight position. It usually refers to raising the foot up);
• Plantar flexion (moving the foot down);
• Pronation (turning the palm down);
• Supination (turning the palm up);
• Eversion (turning the foot outward);
• Inversion (turning the foot inward);
• Abduction (away from the body);
• Adduction (toward the body).
Prepare for the Deposition

• Understand the Medicine

ANATOMICAL TERMS: JOINT MOVEMENTS
– Sometimes reports describe joint movements in describing injury ("hyperextension injury," "flexion-extension injury"). These injuries occur when the body part is moved beyond the normal range of joint movement due to trauma. Hyperextension of the elbow occurs if the elbow is bent back too far; flexion-extension injury (commonly called whiplash) occurs when the neck is flexed and extended beyond its normal range of motion.
Prepare for the Deposition

• **Understand the Medicine**
  – The normal anatomical position is a person standing, facing forward, feet flat, palms up (toward the viewer).
  – Given that position, the following terms are used by anatomists to describe directions:
    • Lateral (away from the midline of the body);
    • Medial (toward the midline of the body);
    • Proximal (near or nearer a structure);
    • Distal (farther away from a structure);
    • Anterior or ventral (front);
    • Posterior or dorsal (back);
    • Cranial or superior (toward the head);
    • Caudal or inferior (toward the tail [tailbone] or toward the feet).
Prepare for the Deposition

• Learn The Anatomy
  – Gray’s Anatomy
  – Hollinshead, Textbook of Anatomy
  – Netter, Atlas of Human Anatomy
  – Clemente, Anatomy: A Regional Atlas of the Human Body
  – McMinn’s Functional and Clinical Anatomy
  – Guyton, Textbook of Medical Physiology (used in most medical schools)
  – For orthopedic injuries, most orthopedic surgeons acknowledge the authority of Campbell’s Operative Orthopedics
Prepare for the Deposition

• Learn The Anatomy (cont’d)
  – Most internal medicine doctors acknowledge the authority of Cecil Textbook of Medicine and Harrison’s Principles of Internal Medicine
  – For pediatric doctors, most acknowledge the authority of Nelson Textbook of Pediatrics
  – You can find standard medical texts and journals listed in the Selected List of Books and Journals for the Small Medical Library 85 Bulletin of the Medical Library Association
  – For psychiatrics and psychologists, all will acknowledge the authority of the DSM (Diagnostic and Statistical Manual of Mental Disorders), containing the diagnostic criteria for diagnoses.
    • Example: DSM IV states that malingering should be strongly suspected where there is a medicolegal presentation (i.e., the plaintiff was referred by the attorney)
Prepare for the Deposition

• Learn The Anatomy (cont’d)

AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW ETHICS GUIDELINES FOR THE PRACTICE OF FORENSIC PSYCHIATRY
– Adopted May, 2005

Psychiatrists who take on a forensic role for patients they are treating may adversely affect the therapeutic relationship with them. Forensic evaluations usually require interviewing corroborative sources, exposing information to public scrutiny, or subjecting evaluatees and the treatment itself to potentially damaging cross-examination. The forensic evaluation and the credibility of the practitioner may also be undermined by conflicts inherent in the differing clinical and forensic roles. Treating psychiatrists should therefore generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes.
Prepare for the Deposition

- **Other Sources:**
  - Merck Manual; PDR
  - Medscape.com
  - WebMD.com
  - Medline.cos.com
  - New England Journal of Medicine (NEJM)

- **Consult Your Own Experts**
Prepare for the Deposition

• Research the Deponent: Sources of Information on the Doctor
  • Website/advertising
  • Telephone directory
  • What hospitals are near the doctor’s office and is the doctor on that hospital’s staff? If not, why not?
• State professional discipline
  • State medical board/licensing actions taken against the doctor
Prepare for the Deposition

• **Research the Deponent: Sources of Information on the Doctor** (cont’d)
  
  • National Practitioner Databank (42 U.S.C. 11101-11152). This law requires insurers to report malpractice judgments and settlements and requires hospitals to report certain disciplinary actions against doctors. Access is limited.
  
  • Public Citizens Health Research Group, found on the web and a guide providing information and links to state medical boards and disciplinary actions.
  
  • ABMS Directory of Board Certified Medical Specialists lists all doctors certified in their respective medical specialties, including subspecialties. Separates general specialties from subspecialties.
Prepare for the Deposition

• **Research the Deponent: Sources of Information on the Doctor** (cont’d)

  • Example: If the issue is diabetes, the doctor may be certified for internal medicine which is a relevant general specialty. But, is the doctor certified in the subspecialty of “endocrinology, diabetes and metabolism”, which is the relevant subspecialty?

  • Example: Is a board certified neurologist (general) board certified in the subspecialty of child neurology? Or is a board certified orthopedic or plastic surgeon (general) certified in the subspecialty of hand surgery? Is a board certified radiologist (general) board certified as a neuroradiologist?
Prepare for the Deposition

• Docket Search
• Published Articles
  • Medline – Index Medicus
• Prior Transcripts: DRI, IADC, IDEX
• Newspaper Articles; Advertising For Expert Testimony
Prepare for the Deposition

• “Reading Up” Continues In The Doctor’s Office
• Consider Fees And Expenses
• Consider Use At Trial: Discovery Vs. Trial Exam
• Treater Vs. Retained Trial Expert
• Be Ready for Advocacy and Ego
The Deposition -- Preliminaries

- Subpoena and collect CV and publication list
- Review & mark the (entire) physical file
- Confirm on the record that what has been marked is complete or confirm what is missing and where it resides
The Deposition – The Exam

- Qualifications
- Experience as an expert
- Opinions
- Bases for each opinion
- All work done to arrive at each opinion
The Deposition – The Exam

Examination & Treatment
– Identify all of the information that was considered
– Identify all of the information that was not considered
– Confirm sources of information
The Deposition – The Exam

When the plaintiff is the only source, confirm that:

Q: You hold the opinion that the motor vehicle accident caused the non-unions in her spine to go from asymptomatic to symptomatic?

A. Correct.

Q. Please tell me the bases for that opinion.

A. Well, relying on patient data here, I’m a doctor. I trust people. They tell me what happens and I record it and I believe it. She said she was in an accident and about a month later she started to have some significant pain.
(Cont’d.) That’s what I’m basing it on. Prior to the accident, she was asymptomatic. She was doing well. After the accident, she wasn’t.

Q: When you say that she was asymptomatic, you mean the condition was present, but not causing her pain, correct?

A: Correct.

Q: Then you believe that a month after the accident, the condition began to cause her pain?

A: Yes, that’s right.

Q: You base that entirely on what she has told you?

A: Yes, what the patient told me.
The Deposition – The Exam

Distinguish Between Objective vs. Subjective Findings

• Objective Findings: do not depend on the reporter; they are independently verifiable

• Subjective Findings: depend on the reporter
  • When the plaintiff is the reporter, his or her credibility affects the physician’s conclusions
The Deposition – The Exam

Q: You have no other sources of information other than the plaintiff herself, is that correct?
A: Yes.

Q: You also have no way to independently verify whether or not, in fact, your patient is in fact experiencing pain.
A: Correct.

Q: And you have no way to independently verify, in fact, when a patient first begins to experience pain, is that correct?
A: That is correct.
The Deposition – The Exam

Causation vs. Correlation
Test the doctor’s opinions about what event \textit{caused} the condition diagnosed. There is a difference between legal causation and medical correlation. A physician, if pressed, will admit that they take their patients at their word and typically do not consider other possibilities.
The Deposition – The Exam

Q: Tell me everything you know about the motor vehicle accident.
A: Just what was discussed at this table today.
Q: Can you tell me anything about the accident that was significant to you in writing the letter we have marked as Exhibit 8 in which you attribute her injuries to the motor vehicle accident?
The Deposition – The Exam

A: Sure. She described to me that she was in a motor vehicle accident. How she described it to me and, once again, I’m not a lawyer so I don’t write down it was 40 miles an hour and she was hit broadsided. She was in an accident which seemed substantial when she told me. She sustained a sacral insufficiency fracture. She went from an asymptomatic non-union to a symptomatic non-union. That’s what I base the letter on.
Q: So you cannot tell us anything about the accident in particular that led you to conclude that the accident caused the injuries?
A: I’m sure I was told something about – if she told me that she sneezed and she has a sacral insufficiency fracture, I’m not going to write that letter. So she had to tell me something that’s going to make me sit here for three hours and talk to you. I don’t mean that in a bad way. I’m a practicing spine surgeon
The Deposition – The Exam

who predominantly takes care of people’s lives and their back. She had to tell me something to make me write that letter. I got very little money to write that letter, and I don’t do this for a living. So let’s just back off on that a little bit. I know where you are going, but she had to tell me something to make me sit down and say, Yeah, I think you are right.
The Deposition – The Exam

Q: Sir, you cannot articulate whatever it was about the motor vehicle accident that led you to conclude that it caused the condition, correct?

A: No, I cannot tell you what her words were. If that is what you are asking, you are absolutely right.
Distinguish between Impairment and Disability

Q. All right. For example, it’s not unusual for professional football players to suffer fractures, torn ligaments in the knee as a result of which they get operated on; and then as a result of that operation, that medical book would assign them a percentage of impairment?

A. Correct.

Q. But then we know that they often do return to their teams and continue playing.
A. Well, as this has helped me sell many back surgeries the last few years, Air McNair had back surgery and played in the Super Bowl last year. But if they force me to give him an impairment rating, it would be three percent because he’d had lumbar surgery.

Q. Right. So that’s a percentage that the book gives, but even Air McNair was able to return to playing football?
The Deposition – The Exam

- Confirm good results
- Get basic agreements
- Identify future planned appointments; need for and cost of future care
Questions for Presenters?
Depositions 101
Part 2 – Deposing the Treating Physician
Wednesday, January 27, 2010

Thank you for Participating!

Stay Tuned for Part 3:
Deposing the Adverse Expert
March 23, 2010 at 12 Noon EDT

Watch your inbox for more information!