Is there a Doctor in the House? Effective Depositions, Examination and Cross-Examination of Physicians as Fact or Expert Witnesses

Doctor in the House – Let’s face it. When a doctor is names as a witness in litigation, it makes the case more complicated – whether they are testifying as a fact witness or an expert, preparation for the examination has to be thorough and well thought out, and we lawyers have to make sure we are not intimidated by the doctor’s knowledge. This program will discuss the practical things you must do to prepare for the examination, and then provide examples, via video or live role play.

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1. Medical doctors as fact witnesses-before you enter the deposition room.
   a. State law limitations on ex parte interviews for defendants;
   b. Experts very often will claim diagnoses by treating physicians and bootstrap off of them; [Sample 1]
   c. Charts, notes and scripts can be indecipherable; [Sample 2]
   d. “You don’t know what you don’t know”. Until you take the deposition you have no idea what the person could add to your case;
e. Draft expert reports and communications with the expert under FRCP 26;

f. Be sure to subpoena all up-to-date records and check them closely for obvious gaps in the records, obtain the name(s) of treaters not disclosed by other side, and also to mine for other potential witnesses;

g. Subpoena full prescription records and cross-check against pharmacy records. There could be doctor shopping, which will go a long way toward discrediting a plaintiff’s claim of permanency. [Sample 3]

h. Check the case law (reported and unreported) for other cases involving the doctor and attorneys involved;

i. Check for disciplinary records –you might be surprised by what you find, and also by the Court’s willingness to let you tell the jury all about it [Sample 4];

j. Check the doctor’s stated affiliations, and gather pertinent information such as Codes of Ethics and the like applicable to members of that group. These could be very useful to undercut any diagnosis, address secondary gain and need for objectivity at all levels [Sample 5]

2. Medical doctors as fact witnesses-the deposition room.

a. If plaintiff’s counsel suggests having the deposition at the doctor’s office, take him/her up on it. You can use it to your advantage by observing the texts on the shelves, diplomas on the wall, etc. [Sample 6]

b. Thorough review of their treatment records, or lack thereof. Sometimes the lack of treatment for an extensive period can be used to your advantage in defense of a claim of permanency;

c. Review the factual basis for any claimed diagnoses, or lack thereof. This could be critical down the road if an expert tries to bootstrap off an early “diagnosis”;

d. In matters where there is a claim of lost wages and/or unemployability, gather potential evidence to either support the claim or a defense that the plaintiff has failed to mitigate damages [Sample 7];

e. Sometimes the deposition of a treating psychiatrist can give evidence of friction between plaintiff and counsel [Sample 8].

3. Medical doctors as expert witnesses-additional considerations.

a. Know your subject matter as best you can by reviewing available literature, such as the Diagnostic & Statistical Manual of Mental Disorders (“DSM”), peer reviewed journals on the applicable subject matter, and the like.

b. Understand your limitations --you cannot possibly know the subject matter as well as the deponent. Know when to stop digging.

c. Have a thorough understanding of applicable guidelines for any particular discipline. Example: forensic psychiatry and applicable guidelines for court work.
4. **After the deposition: Putting Your Hard Work to Use.**

a. If you’ve done your work, you should have some fodder for a pre-trial motion to exclude the testimony in whole or in part.

b. Sometimes the medical testimony garnered in pre-trial depositions can be used to your advantage on damages issues, such as where the treating physician says he sees no reason why the plaintiff cannot be working, and there is a substantial claim for front pay in a discrimination case predicated on the inability to work. [Sample 9]

c. Sometimes the medical testimony garnered goes right to liability, such as the treating psychiatrist who gives a rendition of the facts directly at odds with what plaintiff has said in his case in chief. [Sample 10]

d. Trial issues and experiences.