Medical Expert Witnesses
Selection and Use in Discovery

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Objectives

• Pick great medical experts
• Prepare your great medical experts for deposition
At a Minimum You Want This

Physician reviewers should have a full and unrestricted state license, current ABMS or AOA board certification, no recent Board actions or investigations and have been engaged in clinical practice in the same area of practice as the physician being investigated for the two years prior to reviewing the case.

Picking Great Medical Experts

• Willing to author a report summarizing opinions, talk and meet with you, be deposed and testify at hearing
• Consider a causation expert if SOC expert cannot opine on causation
• Respectable personal life and professional career - look them up!
Where To Look For These People

- Expert CV Databank
- Internet – Just start looking and doing searches
- PubMed
- Medical schools and large hospital systems
- Ask health care providers and lawyers
The First Conversation

• Pick up the phone and have a conversation with the potential expert even if you worked with them in the past
• Make sure no conflicts (i.e. does expert have close relationship/competitor of physician being investigated)
• Ask about any current issues that would make them vulnerable to cross-exam
The First Conversation

• Give the expert a summary of what has transpired in the case and what led to the need for outside expert review.

• Explain process and time you estimate it will take for this particular case – forecast what they will be signing up for with as much detail (how many pages of records) and timeframes (hearing date) as possible.
The First Conversation

• Confirm they have been in practice and have been doing the treatment at issue for appropriate amount of time
• Tell them what you are going to send
• Ask them to call you after they complete their review and before they write their report
• Get agreement on review/report completion timeframes (manual asks for reports in 30 days)
SOC and Personal SOC

• Do not evaluate case on the basis of your personal standard of care, but rather on “what a reasonably prudent physician in [pick a state] would do under the same or similar circumstances.” Expert Manual p.5
• Tell this to the expert every time up front
• If there is a difference between the two, discuss in detail. These can get tricky and should be scrutinized heavily.
Material To Send

• **What To Send**
  - Expert Reviewer Manual (if not already sent)
  - Medical Records
  - Demographic material if out of state
  - Complaint and Physician response (if appropriate)
  - Anything you think the expert needs, will not bias her and you don’t mind being in evidence

• **What Not To Send**
  - Prior Board History
  - Anything else unless you don’t mind it being in evidence and used on cross-examination of this expert
How Many Experts Do You Want?

Ideally you want 2 or 3 standard of care experts
What Expert Do You Want Here?

- MD with 10 years of ED experience who was Board Certified in 2012 has 5 complaints in the past 6 months for missed appendicitis
- 10 charts pulled for ED cases in last 2 years (8 involve appendicitis and 5 are complaint cases)
- The concern is – you guessed it – missed appendicitis cases
You Want This Expert Here

- Expert should be:
  - Board certified in emergency medicine continuously for at least 10 years
  - In full-time emergency medicine practice at least 15 years
  - Emergency medicine practice has routinely included diagnosing appendicitis
What Expert Do You Want Here?

• Interventional Cardiologist with 10 years of experience and Board Certified in 2012 has a patient complaint alleging that MD overutilized intravascular ultrasound (“IVUS”) during a 2015 cardiac catheterization procedure
• 8 charts are pulled where MD did IVUS during catheterization in last 2 years
• The concern is IVUS overutilization
• Expert should be:
  - Board certified in internal medicine/interventional cardiology continuously for at least 10 years
  - In full-time interventional cardiology/cardiology practice at least 15 years
  - Interventional cardiology practice has routinely included IVUS during catheterizations for at least the last 10 years
What about this one?

• MD with 2 years of PGT in internal medicine has been doing internal medicine and pain management in rural solo practice for the last 20 years
• MD’s practice became “cash only” 10 years ago
• Over the last 10 years, MD’s practice has gone from 10% chronic pain to 75% chronic pain
• Most of MD’s chronic pain patients live over 100 miles away
8 charts are pulled for patients treated in last 5 years that MD is treating (1) as internist and (2) for chronic pain.
The concern is MD’s internal medicine practice generally and controlled substance prescribing/lack of pharmacovigilance related to chronic pain patients.
We Get Two In These Cases - #1

- Expert #1 should be:
  - Board certified in internal medicine continuously for at least 20 years
  - In full-time medical practice at least 25 years
  - Has a general internal medicine practice that has included treating at least 10% of patients for chronic pain for the last 20 years
• Expert #2 should be:
  - Board certified in anesthesia with pain management certification for at least 20 years
  - In full-time medical practice at least 25 years
  - 25% - 50% of MD’s medical practice has included treating chronic pain for the last 20 years
Deposition Prep Meeting

• Ask to listen to basic witness prep talk of things to be aware of
• Tell witness how you will handle correspondence and conversations
• Documents reviewed in preparation for deposition testimony
  o Chart, Expert report, complaint/MD response and Medical literature (if any)
Deposition Prep Meeting

• This is not a conversation
• Listen to question and don’t speak until question is complete
• If done – then stop. Don’t fill silence void
• If you don’t understand a question, say it
• Never off the record
• Do not take a break with question pending
Nothing is “Authoritative”

• No textbook, journal or book is “authoritative” as a general rule
• Authoritative: “clearly accurate or knowledgeable”
• Allow expert to say “excellent resource and aid, but by no means authoritative”
• What is authoritative? Expert’s opinion based on training and experience
Deposition Prep Meeting

• Listen to my objections. They can guide you, focus you and alert you to misleading, factually inaccurate, deceptive and repetitive questions.

• Be patient during the attorney discussions over objections, listen and don’t talk.

• This is not coaching, but ensuring that everything is clear and accurate.
Deposition Prep Meeting

• Discuss any baggage the expert has and how to deal with that at deposition
  o Prior lawsuits and medical board issues
  o % income spent testifying and for whom

• Make sure expert knows they are being evaluated as witness and to be cool, calm and always pleasant. Dress professionally.

• Don’t guess
Q: Have you told me all of the opinions you have regarding this case?

A: If you have a specific question, I'd be glad to answer it. I believe I have told you all my general opinions and concerns at the present time subject to further questioning, review and analysis.
Do a Mock Deposition

• Pretend to be opposing attorney. If you know them, imitate them. If not, use different styles and even experiment with trying to trick your expert.

• Make sure expert has blocked out time (good to schedule in early afternoon and ask expert to block out rest of the day)

• Do a full “mini-mock” deposition if possible
What To Remember

If you have selected a great expert and thoroughly prepared her, then (usually) 90% of your work will be done before you ever start defending the deposition.
Thank You Very Much!
Questions?

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