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Deposing the Adverse Medical Expert

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PREPARING FOR AND DEPOSING THE ADVERSE MEDICAL EXPERT

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DEPOSING THE ADVERSE MEDICAL EXPERT

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I. SCOPE.

It is my intent that this paper be a brief, very informal, discussion of some of the strategies plaintiff's lawyers can use to depose defense medical expert witnesses. It is not meant to be a comprehensive discussion of *Robinson*, Texas Rule of Evidence 702, or Texas Rules of Civil Procedure 194 and 195. Rather, this paper is meant to be a general overview of some strategies and techniques that have worked well in the past for this particular lawyer.

If you are in need of a thorough, heavily annotated, treatise on the law as it pertains to expert discovery or the admissibility of expert testimony, this is not your resource. On the other hand, if you are interested in a casual, practical and realistic discussion about how to conduct the deposition of an adverse medical expert in a car wreck case, it is my hope this paper will benefit you.

The majority of the discussion is written from the perspective of the plaintiff's lawyer deposing the defense medical expert witness. Most of the concepts and issues addressed, however, are also applicable to the defense's examination of plaintiff's medical experts.

II. NO-LEGALESE DISCLAIMER.

I have stolen most, if not all, of my ideas and strategies from various authors, lawyers, friends and clients over several years. If I can recall who taught me a specific method or gave me an idea, I will credit them appropriately. If you are one of the people who gave me an idea and I fail to properly credit you, you have my word that I will share all the royalties I earn from this paper with you.

III. INTRODUCTION.

This paper will focus on the question of how to best conduct the deposition of the opponent's retained medical expert. As we all know, there is no one way to cross examine an opponent's expert. There is no single formula that, whenever employed, consistently causes adverse experts to buckle and admit they are frauds. Therefore, my goal in this paper is simply to present a number of ideas that have proven successful with some of the experts some of the time.

IV. THE LAW.

a. Texas Rule of Evidence 702.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

b. Texas Rule of Evidence 703.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

c. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, (Tex. 1995).

Established the well-known six nonexclusive factors to consider in determining the reliability, and admissibility, of expert testimony:

1. The extent to which the theory has been or can be tested;
2. The extent to which the technique relies upon the subjective interpretation of the expert;
3. Whether the theory has been subjected to peer review and/or publication;
4. The technique's potential rate of error;
5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. The nonjudicial uses which have been made of the theory or technique.

d. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

Stated that a properly designed and executed epidemiological study that reveals a doubling of the risk may be part of the evidence supporting causation in a toxic tort case. This "doubling" is not a litmus test. Additionally, a single study or test is legally sufficient evidence of causation. The court must consider the totality of the evidence.. Lastly, when using studies, must show that the plaintiff was similar to the individuals in the study, i.e. "that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study."

e. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998).

Held that the *Robinson* factors applied to expert testimony based on skill and experience, rather than on science. "Nothing…requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

f. *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007).

Finding that Plaintiff's lay testimony was insufficient to establish causation on the facts of this case. The Court stated, however, that "the causal connection between some events and conditions of a basic nature (and treatment for such conditions) are within a layperson's general experience and common sense. This conclusion accords with human experience, our prior cases, and the law in other states where courts have held that causation as to certain types of pain, bone fractures, and similar basic conditions following an automobile collision can be within the common experience of lay jurors. (citation omitted). Other examples where expert testimony may not be necessary are low back pain (*State Office of Risk Mgmt v. Larkin's*, 258 S.W.3d 686 (Tex. App. – Waco 2008, no pet.)) and carpal tunnel syndrome (*Saenz v. Ins. Co. of P.A.*, 66 S.W.3d 444 (Tex. App. – Waco 2001, no pet.)).

g. *Columbia Med. Ctr. Las Colinas v. Hogue,* 271 S.W.3d 238 (Tex. 2008).

Trial court was correct in refusing to submit a contributory negligence question when the evidence of contributory negligence was based on speculation or mere possibility. Testimony that something "could have," "possibly" or "perhaps" resulted in the injury amounts to nothing more than speculation or conjecture.

h. *Merck v. Ernst,* 296 S.W.3d 81 (Tex. App. – Houston [14th Dist.] 2008).

Plaintiff's experts' speculation that a blood clot "could have" existed, but then "could have" dissolved, been dislodged, or fragmented prior to the autopsy was nothing more than mere conjecture and insufficient to support a finding of causation.

i. *Brownsville Pediatric Ass'n v. Reyes,* 68 S.W.3d 184 (Tex. App. – Corpus Christi 2002).

Finding that Texas Rules of Evidence and *Robinson* factors apply to Defense expert witnesses testifying about injury causation just like they do to Plaintiff expert witnesses. The Court upheld the trial court's exclusion of defense expert testimony of alternate theories of injury that were not factually supported.

j. *Niemann v. Refugio Co. Mem. Hosp.,* 855 S.W.2d 94 (Tex. App. – Corpus Christi 1993).

Plaintiff's evidence regarding causation failed when experts report simply stated possibilities. Court upheld trial court's decision to grant defendant's no-evidence Motion for Summary Judgment. "The mere possibility that an act of negligence might have caused the damages from a medical viewpoint is not sufficient to support recovery. It must be shown that the act probably caused the injury." (citation omitted).

k. *Chau v. Riddle, M.D.,* 2008 Tex. App. LEXIS 8440 (Tex. App. – Houston [1st Dist.]).

Plaintiff, who has a pre-existing condition, is not required to prove the degree of additional injury caused by Defendant's negligence as long as the negligence is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.

V. GOALS.

There are a number of goals for conducting the deposition of the opponent's expert. These goals are different, yet similar, to our goals when cross-examining the expert at trial. When cross-examining an expert at trial, we will usually maintain control over the witness with narrowly-tailored, closed-ended questions aimed to tell our client's story and discredit the witness. We are not conducting discovery or having lengthy scientific debates as we might during a deposition. The general mission of advancing our client's story, building rapport with the jury, and damaging the opponent's credibility remain constant, however, whether in deposition or trial.

Depending on the case, the goals of our deposition will usually be some or all of the following:

a. Identify precisely the expert's opinions;
b. Thoroughly explore the expert's methodology;
c. Closely examine the expert's qualifications;
d. Carefully obtain concessions and areas of agreement;
e. Uncover all areas of bias;
f. Confront the expert with any inconsistencies.
g. Test the expert's factual bases;
h. Challenge and/or neutralize the expert's conclusions;
i. Develop rapport with witness; and
j. Discover weaknesses in your case.

Whether every one of the above will be a goal in a particular deposition depends on the facts of the case, the contested issues, and the witness. There are many good reasons, for example, to not take the deposition of an expert at all, let alone attempt to accomplish all of the above goals. What goals are relevant to a specific deposition is a strategic decision that will need to be made by the lawyer on each case.

VI. PREPARATION.

Even though this subject is outside the scope of this paper, thorough preparation is one of the, if not the, most important things we can do to ensure a successful deposition. In an effort to at least provide something on this very important issue, I have attached a checklist done by Betsey Herd, J.D., M.A. and Janabeth Evans, R.N., R.N.C. that gives some very helpful suggestions. See Appendix A.

Because of the increasing frequency of parties presenting experts at trial via video-taped deposition, it is important to conduct as much discovery as possible on the expert witness before the deposition. Because your discovery will likely be asking for information regarding the expert's financial bias, prior employment by the insurer, relationship with opposing counsel, etc., it is probable that you will encounter some resistance and a hearing will be necessary before the deposition. I have included as an attachment a sample deposition notice with subpoena *duces tecum* for an adverse medical expert. See Appendix B.

VII. WHAT QUESTIONS TO ASK.

What questions to ask, of course, depend on many factors including the facts and legal issues present in the case, the expert witness, and whether the witness will be appearing at trial. Attached is a fairly thorough outline of topics typically addressed when deposing a medical expert in a car wreck case. See Appendix C. How the questions are phrased, in what order the questions are given, and what topics are covered is going to vary for each case.

The outline included is not meant to be a comprehensive outline of all possible questions, but rather, a collection of some questions to serve as a starting point for the trial lawyer who is beginning his or her own outline.

VIII. DELIVERY

There are a number of different techniques for cross-examining the adverse medical expert in deposition. Which technique should be employed in a particular case with a specific witness is the judgment call of the trial lawyer. In general, there are three different approaches to consider:

a. “More flies with honey”

With this approach, the trial lawyer is extremely pleasant and respectful toward the expert at the beginning of the examination. This can make it easier to develop a rapport with the expert and, hopefully, lead the expert into adopting a position that is inconsistent with his direct testimony.

b. “*Columbo*[i] approach”

The “Columbo approach” involves the trial lawyer demonstrating an apparent lack of understanding of the subject matter similar to the perpetually confused detective in the crime fiction TV series. The goal is to lull the expert into making careless statements that can be impeached later.

c. Thoroughly prepared

Possibly the most effective approach when dealing with a professional medical expert is for the trial lawyer to demonstrate early in the deposition that he or she has an excellent command of the subject area and the witness. This may increase the likelihood that the witness will testify truthfully. This method often involves use of narrowly tailored leading questions and close control of the witness. While the trial lawyer’s delivery may be more assertive and vigorous than with the “More flies than honey” approach, it is important to always treat the witness with respect and in a professional manner.

IX. CONCLUSION

Cross-examining the adverse medical expert witness is a critical part of the case. If not dealt with properly, the expert can have a devastating effect on your case. Thorough preparation and thoughtful use of the materials provided will, hopefully, enable you to successfully neutralize your next adverse expert witness.

APPENDIX A

PREPARING IN ADVANCE FOR THE MEDICAL EXPERT'S DEPOSITION – PART I

By Betsey Herd, J.D., M.A. and Janabeth Evans, R.N., R.N.C.

Gathering information about the adverse medical expert prior to taking a deposition can optimize the time spent during the deposition. Most of the information is available at no cost, and together an organized legal assistant and lawyer can become a potent force at a deposition.

We have divided the type of information that can be gathered ahead of the medical expert deposition into seven categories; 1) formal discovery requests, 2) general historical information, 3) academic training and accomplishments, 4) ethical standards/guidelines, 5) articles and publications, 6) disciplinary action, and 7) personal litigation. Because of its length, the article is divided into two parts, the second part to be printed in next month's Journal. It is our hope that this article will help you, or your legal assistant, develop a checklist that can be completed before your next medical expert deposition.

1. FORMAL DISCOVERY REQUESTS

Expert Interrogatories

We all use form expert interrogatories that require the defendant to set forth the expert's generalized opinions and which request the minimal information going to bias now set forth in rule 1.280(b)(4) of the Florida Rules of Civil Procedure. In addition, the relationships between the defense law firm and expert, and between the insurer and expert are also discoverable from the defendant even if the defendant is the insured.

In Allstate v. Boecher, 733 So. 2d 993 (Fla. 1999) the Florida Supreme Court mandated that when this type of information is sought, the balance of interest should shift toward allowing the pretrial discovery. Despite the fact that Boecher was reviewed and the opinion was issued during the same time period that the Supreme Court of Florida had granted review of the same issue in a case where the trial court had ordered production of documents from an insured, (Mattek v. White, Case Number 95-284-CA10), many judges refused to allow discovery into the relationship between insurer and expert when the defendant was the insured.[1] However, in 2000 the Fifth District Court of Appeals removed any doubt about whether the information could be obtained from the insured when it recognized that the insurer who provides a defense for its insured is the insured's

[1] Mattek v. White, 728 So. 2d 200 (Fla. 1999) (Granting review and then dismissing without opinion after Boecher, 733 So. 2d 993, at 735 So. 2d 1283 (Fla. 1999)).

agent. Springer v. West, 769 So. 2d 1068 (Fla. 5th DCA 2000).[2] Thus the relationship between the firm and the expert is discoverable directly from the defendant insured. Id.[3]

A party's responsibility to disclose information known by himself and his attorneys was made clear in Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970). However, many boiler plate objections are made when a defendant is asked to disclose his law firm's prior retention of a medical expert. Springer made it clear that the law firms are effectively "agents" of the insured.

Experts must provide a three year testimonial history to testify in Florida courts. Orkin Exterminating Co. v. Knollwood Properties, 710 So. 2d 697 (Fla. 5th DCA 1998). Many defendants will file responses indicating that they don't have or don't know the information. Unfortunately, many judges are reluctant to seriously consider striking an expert for the failure to provide the testimonial history until you have exhausted other attempts to obtain it. Deposing the records custodian of the expert by written deposition questions pursuant to rule 1.320 of the Florida Rules of Civil Procedure may provide an additional opportunity to demonstrate your efforts. Keep in mind that the deposition of the custodian has to be noticed with a minimum of 50 days lead time.

If you are successful in obtaining a testimonial history from your adverse expert, check it against these databases which contain expert testimony to discover omissions;

1. http://www.trialsmith.com

This database was formerly Depoconnect, and is endorsed by 52 trial lawyer associations world wide. It houses 137,000 depositions, and is the largest on-line bank of its kind in the nation. One search gives you information on experts and topics from 18 different databases.

Contact by phone or write local Trial Lawyers' groups.

Conduct a Westlaw or Lexis Search to see if the expert has been disqualified in a State or Federal Court.

[2] ***But see***, Carrera v. Casas, 695 So. 2d 763 (Fla. 3rd DCA 1997) (Holding that financial information within the 8 parameters first identified in Elkins v. Syken, 672 So. 2d 517 (Fla. 1996) the information must be obtained from the expert.

[3] ***See*** Levy v. Lilly, *719 So. 2d* 354 (Fla. 4th DCA 1998) (Example of interrogatories deemed to be within the scope of Fla. R. Civ. Pro. 1.280(b)(4)).

Request To Produce

At a minimum, you must have the defense expert resume for your research prior to the deposition. Further, consider generating your usual duces tecum list as a formal document request to avoid the argument that you have not given the defendant/expert reasonable notice for the document production since the rule of procedure allows 30 days. Request copies of all documents provided to the expert, or alternatively request that they be produced for review at the deposition.

Florida courts have consistently stated that an expert cannot be compelled to produce nonexistent documents. Allstate v. Pinder, 746 So. 2d 1255 (Fla. 5th DCA 1999).[4], but this does not include testimonial histories. (See Orkin, supra.)

2. GENERAL HISTORICAL INFORMATION

There are many databases that can provide you with generalized information about the expert you are researching. We have highlighted the ones we utilize.

4. http://www.google.com

Google consistently turns up high-quality, highly relevant results. You can utilize specific queries for a given expert, such as "American Pediatric Neurological Organizations", and broad-topic searches, such as "Medical Professional Organizations". This database will also target a specific home page. You can use plus or minus signs to include or exclude keywords, or you can head to the Advanced Search page for drop-down pick lists to construct complex searches.

2. http://www.juryverdicts.com

The National Association of State Jury Verdict Publishers (NASJVP) is an organization of publishers of Jury Verdict Summaries from throughout the United States. These Publishers collect detailed Civil Litigation information directly from the attorneys who tried the cases, then write concise summaries, which are used by attorneys and insurers for case evaluation. Additionally, you will find attached to this site a Directory of Expert Witnesses, which contains the names, area of expertise and publication in which they were referenced. There is a searchable database to locate experts and "Case Testified" for use in the selection or challenge of an expert.

3. Write to ATLA members where your expert is located if your expert is located out of state.

[4] ***See*** Sardinas v. Lagares, 805 So. 2d 1024 (Fla. 3rd DCA 2001) (Appellate court refused to disturb trial court order compelling expert to produce nonexistent documents where petitioner failed to allege irreparable harm depriving the court of jurisdiction).

For a directory of ATLA members, go to http://www.atlanet.org where there is a searchable directory of members. Be aware that it is available to current ATLA members only.

4. Write to local Medical Society for Applications.

To find the local association, go to the Florida Medical Network http://www.floridamedicalnetwork.com where you can search for organizations, directories and other useful information,

3. ACADEMIC TRAINING AND ACCOMPLISHMENTS

1. Subpoena the expert's transcripts.

You should consider the timing of this request, since you may want the expert to commit to a position during the deposition. One member utilizing this research method reports that he learned that a defense accident reconstruction expert had attended school by mail.

2. Search for Board Certifications.

You can go to the American Board of Medical Specialties and search by physician name, http://www.abms.org/ . General databases of information will not include information regarding the number of attempts at Board Certifications. However, individual websites for medical specialties often do provide more complete information, as well as practice standards and guidelines. For example, the American Board of Psychiatry and Neurology, Inc. website (www.abpn.com) walks a subscriber through the process for requesting Board status information and provides the request form online. The request must be in writing and must be accompanied by the required fee.

a. www.certifieddoctor.org/ database containing of 24 Board of Medical Specialties and names of those who have obtained Board certification.

b. American Board of Medical Specialties, Lee Dockery, Executive Vice-President,1007 Church Street, Suite 404,Evanston, IL 60201-5913

c. www.certifacts.org/ includes an annual subscription rate and is a database containing Board Certifications, disciplinary actions in one place rather than taking you to each individual medical specialty.

3. Request verification of license in writing

a. State Board of Licensing: Florida Board of Medicine/ Florida Board of Osteopathic Medicine: 4052 Bald Cypress Way, BIN C06, Tallahassee, FL 32399

b. General Website is http://www9.myflorida.com/mqa/index.html and information on ordering records and what records are available can be

found for the Florida Department of Health/Medical Quality Assurance at http://www9.myflorida.com/mqa/clientserv/clintserv.htm.

4. Verify that your adverse expert is NOT a Quack.

   www.quackwatch.com/index.html

   This database contains exhaustive lists of "quacks", FDA warning letters, regulatory actions, and "nonrecommended" sources of Health Advice.

4. ETHICAL STANDARDS

Many professional organizations have ethical guidelines that include standards for testimonial opinions. Knowing these standards can prove helpful in establishing the bias of the defense expert, especially if the expert is unaware that they exist.

1. American Academy of Forensic Sciences

This organization has a written code of ethics included in its bylaws. The American Academy of Forensic Sciences Bylaws, Code of Ethics and Conduct, Art. II, Section 1 (1999). The code of ethics prohibits the making of material misrepresentations of education or data upon which their professional opinions are based.

2. American College of Emergency Physicians

The ACEP has established guidelines for expert witnesses. These guidelines can be viewed at www.acep.org , and contain a requirement that the expert witness be willing to submit his deposition testimony to peer review. Further, false, fraudulent, or misleading testimony can expose the physician to disciplinary action.

3. American Medical Association

The AMA Code of Ethics can be viewed on line at www.ama-assn.org and contains a fundamental ethical requirement that a physician should at all times deal honestly and fairly with his patients (E-8.12). Further, patients have a right to know their past and present medical status and to be free from mistaken beliefs concerning their condition. The Code of Ethics is also published at Ann Emerg Med. 1997; 30:365-366 and was approved in June 1997.

American Academy of Neurology

The AAN www.aan.com ethical guidelines have not yet been published, but have been adopted.

Next month we will share tools for researching an expert: Articles of Publication, History of Disciplinary Actions and Personal Litigation.

5. ARTICLES OF PUBLICATION – PART II

This is the second part of a two-part series on preparing for the expert witness deposition. Part I was printed in the last edition of the Journal.

Look for articles which the defense expert has authored or co-authored in your subject area. Often articles of publication are referenced on the expert's resume. Even when they are not so referenced many can be obtained on the internet.

Pubmed Database

This database can be found at http://www.ncbi.nlm.nih.gov/PubMed/.

The PubMed database was designed by publishers of biomedical literature as a tool to access and reference citations and provide a link to full-text journal articles at the websites of participating publishers.

Publishers participating in the database electronically supply their citations prior to or at the time of publication. User registration, a subscription fee, or some other type of fee may be required to access the full-text of articles in some journals.

2. MD Consult Database can be found at www.mdconsult.com.

This database was founded by leading medical publishers that include Mosby and W.B. Saunders. MD Consult integrates peer-reviewed resources from over 50 publishers, medical societies, and government agencies. From this site you can obtain full text from 40 respected medical reference books from a variety of specialties, 50 medical journals, and MEDLINE. In addition you can obtain comprehensive USP drug information, (beyond the scope of a PDR), and more than 600 clinical practice guidelines. This is not a free service, but for a small fee you can have access by the day, month or year. A free seven day trial membership is available.

3. Research Service for Attorneys

If you are not confident in your research skills, you may want to contact a medical information specialist to do this research for you. Attorneys Medical Services, Inc. is an example of such a service which can be located at http://www.attorneys-med-serv.com. At this website you can locate articles and other information to assist you in looking for medical-legal information on the internet.

6. HISTORY OF DISCIPLINARY ACTIONS OR HEARINGS BEFORE THE BOARD OF MEDICINE

There are a number of databases available for obtaining this information. Listed below are the resources we chose to highlight for gathering this information.

1. http://www.fdhc.state.fl.us/Inside_AHCA/index/shtml is a resource for health care providers and consumers alike. This directory is designed to provide quick and easy access to the Agency for Health Care Administration's offices and bureaus.

2. http://www.doi.state.fl.us/Data/Liability/ contains reports that are generated as the result of patient or client allegations and are public record. The site contains a listing of only those claims in which an insurer made a payment to a claimant to satisfy a judgment or reach a settlement.

Florida's professional liability reporting statute, section 627.912 doesn't apply to all licensed professionals or institutions. The law requires only that three entities; insurance companies, self-insurance funds and joint underwriting associations, file reports of alleged error, omissions or negligence by insured doctors, dentists, hospitals, health maintenance organizations (HMOs), abortion clinics, ambulatory surgical centers, crisis stabilization units and lawyers. Some providers and institutions to which the statute would otherwise apply, may have claims which do not appear in this listing for various other reasons. For example, some may not carry professional liability insurance; and, others may be self-insured.

3. Another directory which contains reported insurance claims can be found at www.claims.com.

This website includes claims gathered and published by Claims Providers of America. This site also includes a database of expert witnesses.

4. A database containing disciplinary action, malpractice suits and current licensing of doctors and allied health professionals can be found at www.docboard.org/.

7. PERSONAL LITIGATION

Once in a while, you actually get lucky enough to find that the defense expert was not at the Emergency Room rendering treatment to your client because he was stopped for a DUI violation, or her personal litigation is a mile long.

1. Search the local docket where your expert is located. Many of the county clerk offices around the state have their docket available online. The website www.flclerks.com will tell you which ones are available online.

Make sure that you search both the Criminal and Civil dockets and in the county where your expert lives. Search with name as both Plaintiff and Defendant.

2. http://www.questionabledoctors.org/intro.cfm is a comprehensive, publicly available databank that contains information on doctors who have been disciplined by state medical boards and federal agencies in the past ten years. It contains data on disciplinary actions taken for medical incompetence, wrongful prescribing of drugs, sexual misconduct, criminal convictions, ethical lapses and other offenses.

Questionable Doctors, unlike other online databanks, allows you to search for a doctor's name before you pay, and includes information on multiple states.

Finally, we have compiled a general duces tecum list for the medical expert deposition. We want to thank our fellow AFTL and ATLA members who helped compile the list. Consider adding any of the following to your subpoena duces tecum for deposition, and then SERVE the expert 30 days prior to his deposition.

1. Materials prepared for presentation at professional meetings in your subject area.

2. Certificates, memberships, awards.

3. Patents held by expert or expert's employer (Statement of Claims may recognize the hazard and what hazard the invention is intended to ameliorate - (EXAMPLE – needle guard to prevent perforation of vital organs).

4. A copy of your Ph.D. thesis.

5. Copies of Articles submitted for publication.

6. Copies of Abstracts submitted for publication.

7. Copies of requests and applications for continuing medical education credits for seminars and courses attended.

8. Ask for reliable authorities rather than authoritative in your subject area.

9. A copy of your license to practice medicine.

10. A copy of all documents provided to you for review in the subject case.

We hope that these articles will help you generate a checklist for preparing for your next expert deposition. While in total the recommendations may seem burdensome, it is intended to be a guidepost to help you decide what works best for you. Good luck!

APPENDIX B

CAUSE NO. _____

INJURED PARTY,	**§**	**IN THE DISTRICT COURT**
Plaintiff,	**§**	
	§	
v.	**§**	**OF _____ COUNTY, TEXAS**
	§	
NEGLIGENT TORTFEASOR,	**§**	
Defendants.	**§**	**____ JUDICIAL DISTRICT**

PLAINTIFF'S NOTICE OF INTENTION TO TAKE THE ORAL DEPOSITION OF [DEFENSE MEDICAL EXAMINER] WITH SUBPOENA *DUCES TECUM*

TO: Defendant, NEGLIGENT TORTFEASOR, by and through his/her attorney of record, ATTORNEY, FIRM, ADDRESS.

Please notice that Plaintiff, INJURED PARTY, intends to question the Defendant's expert witness, **[DEFENSE MEDICAL EXAMINER],** in the above-styled and numbered cause, at his/her deposition commencing on **____[at least 40 days out], 20__** at __**.m.**, in the offices of _____. This deposition may be videotaped.

Plaintiff also requests, as allowed by Texas Rule of Civil Procedure 199.2, that within thirty (30) days of receipt of this notice, deponent produce the following documents which are in the possession, custody, or control of the party deponent, his/her agents, attorneys, representatives, or employees, at the offices of _____, _____, _____:

For purposes of the subpoena *duces tecum*, the following definitions apply:

"Defendant" means and includes NEGLIGENT TORTFEASOR, its attorneys, agents, representatives, employees, independent contractors, and all other natural persons or business or legal entities acting, or purporting to act, for or on its behalf whether authorized to do so or not.

"You", "Your", and "Deponent" means and includes DEFENSE MEDICAL EXAMINER.

"Document" means and includes writings of every type and from any source, including originals and non-identical copies thereof, that are in your possession, custody, or control or known by you to exist. This would include documents sent outside your organization to any source as well as documents intended for internal use.

The term also includes communications not only in words, but in symbols, pictures, sound recordings, film, tapes and information stored in, or accessible through, a computer or other

information storage or retrieval systems. It includes any computer printout; computer tape; computer program; computer software; computer disk or diskette; and any and every other computerized, magnetic, or electronic matter of any kind whatsoever (Tex.R.Civ.P. 194). If the information is kept in a computer or informational retrieval system, the term also includes codes and programming instructions and other materials necessary to understand such systems.

The term also includes, but is not limited to: calendars, checkbooks, agenda, agreements, analyses, bills, invoices, records of obligations and expenditures, correspondence, diaries, files, legal documents, financial documents, letters, memorandum recording telephone or in-person conferences, manuals, books, press releases, purchase orders, records, schedules, memos of interviews, evaluations, written reports of tests or experiments, public relations releases, telegrams, teletypes, work papers, drafts of documents, and all other writings whose contents relate to the subject matter of the discovery request.

"Photograph" means and includes any motion picture, still picture, transparency, videotape, drawing, sketch, digital image, electronic image, negatives or any other recording of any non-verbal communication in tangible form.

1. your complete file regarding this case including, but not limited to, all notes, drafts, telephone notations, correspondence, calculations, e-mails, facsimiles, medical records, x-rays, films, scans, lab work, photographs, video animation drafts and documents reviewed by you, prepared by or for you, provided to you, or obtained by you or your office.

2. A copy of your curriculum vitae.

3. All billing invoices, records of billing, time sheets, and all receipts of payments relating to this case.

4. All expert reports, including all drafts, prepared by you or your office relating to the incident made the basis of this lawsuit, together with appendices, photographs or other tangible items made a part of, attached to, or incorporated into any such reports.

5. Any documentation prepared or reviewed by a consulting expert or third party that you have reviewed or that you will use or rely upon, in whole or in part, in this cause.

6. A list of all tests, studies, treatises, articles, photographs, brochures, manuals or other writings which were relied upon by you to support your opinions and conclusions in this matter and any other documents that you consulted or relied upon, reviewed and/or prepared relative to this case and/or in making your factual findings, opinions or conclusions in this case.

7. A list of all tests, studies, treatises, articles, photographs, brochures, manuals or other writings which do not support your opinions and conclusions in this matter.

8. A list of all articles, manuals, technical reports, books, or other such publications

that you have authored or co-authored.

9. A list of all cases in which you have testified in deposition or trial from 20__ to present including style, cause number, court, name of party who retained you, and the identity of the lawyer or firm who retained you.

10. All correspondence, including letters, e-mails and memos between you and any lawyers or law firm employees regarding the above-captioned case.

11. Any and all documents evidencing the employment or retention of you or your firm as an expert in any case involving a claim for injuries made against _____ Insurance Company, or any of its insureds, from January 1, 200__, to the present.

12. Any and all documents evidencing remuneration paid to you or your firm for your services as an expert in any case involving a claim for injuries made against _____ Insurance Company, or any of its insureds, from January 1, 20__, to the present.

13. Copies of all written reports, narratives, opinions and correspondence, prepared by or for you evidencing your expert opinion in any case involving a claim for injuries made against _____ Insurance Company or any of its insureds, from January 1, 20__, to the present.

14. Any and all documents evidencing the employment or retention of you or your firm as an expert in any case wherein you were working with the Defendant's lawyer or other lawyers in the Defendant's lawyer's firm.

15. Any and all documents evidencing remuneration paid to you or your firm for your services as an expert in any case wherein you were working with the Defendant's lawyer or other lawyers in the Defendant's lawyer's firm.

16. Copies of all written reports, narratives, opinions and correspondence, prepared by or for you evidencing your expert opinion in any case wherein you were working with the Defendant's lawyer or other lawyers in the Defendant's lawyer's firm.

17. A list of all studies, tests, articles, books, publications, or literature that you believe is reliable authority with respect to any issue upon which you may be called upon to testify.

18. All documents reflecting agreements between you or your office and any expert witness referral service from January 1, 20__ to present.

19. Deposition or trial transcripts in your or your offices' possession where you have given expert testimony at trial or in deposition from January 1, 20__ to present.

20. A copy of all 1099's showing income you have earned as a testifying expert and/or consulting expert from January 1, 20__ to present.

21. Any written advertising done by you or your firm regarding your availability as an expert witness published from January 1, 20__ to present, including but not limited to, correspondence, brochures, flyers, advertisements, or other writings sent to attorneys or other potential clients.

22. With regard to any consultations performed by you in the last five years in which no physician/patient relationship was created, please provide the following:

a) Any documents that contain the name of the person and the organization for whom they work, who contacted you or your firm to request the consultation.

b) Copies of all reports, deposition transcripts or trial testimony created during the consultation.

c) All written contracts or agreements between you and the party requesting the consultation concerning your work on the case;

d) All time records concerning your work on the consultations, including all documents containing descriptions of the work performed by you on the consultation.

e) All bills or invoices concerning your work on the consultations; and

f) For every consultation that occurred in a lawsuit, any documents that contain the court, county, cause number and parties of each such lawsuit.

Respectfully submitted,

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BY: _____
Daniel J. Christensen
SBN: 24010695

ATTORNEY FOR PLAINTIFF

APPENDIX C

DEPOSITION CHECKLIST FOR DME/RECORD REVIEWER[ii]

The Rules[iii]

You are testifying here today as an expert witness in the field of _____
You have been hired specifically by the defense to give this testimony
The defense hired you to come give your opinions about this case

Expert medical witnesses are bound by the same ethical duties as other physicians
The primary source for physician ethical duties is the AMA Code of Ethics
The AMA Code of Ethics 1.1 says that a "violation of these principles and opinions represents unethical conduct."
So, if you as a treating physician or, like today, as an expert witness, violate the AMA Code of Ethics, it is considered unethical behavior.

One of the Rules you must follow, like every witness, you must tell the truth
The whole truth and nothing but the truth

That means you cannot be an advocate for either side of the lawsuit
In fact, the AMA Code of Ethics expressly prohibits you from being an advocate supporting one side of a lawsuit
AMA Code of Ethics 9.07 specifically states, "The medical witness must not become an advocate or a partisan in the legal proceeding."

How would you define an advocate
An advocate would be more likely to give long-winded answers to simple questions to try to make the point for his side
An advocate would be more likely to rely on facts that support his side and disregard facts that do not support his side

You would agree that a physician who is giving medical opinions about an injury suffered by a party to a lawsuit should be objective and not attempt to serve as an advocate for either side
When you are hired by the defense to be an expert witness like this, do you start out with a particular opinion in mind
Do you attempt to reach an opinion that will please the party that hired you
You should strive for objectivity, honesty and fairness
You would agree that to the extent a doctor gives opinions that are not objective, those opinions should be discounted

This rule prohibiting an expert witness from being an advocate is an important rule, isn't it
Why? What could happen if we allowed expert witnesses to shade the truth and advocate for one side of a lawsuit

When you are acting as an expert witness, you understand that your testimony can have important consequences for the person involved
People with injuries are emotionally and financially vulnerable
They might get paid back what they lost or not based upon your testimony
Not being paid back what they lost could mean losing a house or some other major set-back

So, you agree that as a rule, expert witnesses must gather all relevant information when forming their opinions
It is no different than when you are treating patients, the more information you have the better chance you have of making correct decisions
You try to obtain all the facts that might be relevant to your conclusion
You should base your opinions on facts, rather than speculation
Opinions are only as good as the knowledge of true facts that made those opinions
You would agree that when there is a conflict of medical opinions between physicians of equal qualifications, the opinion of the physician who has the benefit of the greater information is more trustworthy

You expect if there is relevant information, regardless of which side it helps, the defense attorneys will provide it to you
The accuracy of your opinions can be influenced by the material you are or are not given
And if new information becomes available, you would not hesitate to modify your opinion.

If exam –
Another rule is that you are required to maintain patient confidentiality, just like every other physician
AMA Code of Ethics 5.09 says that "Information obtained by the physician as a result of such examinations is confidential and should not be communicated to a third party without the individual's prior written consent, unless required by law."
You informed defense counsel of your examination of plaintiff in this case
You did not have plaintiff's written consent to do so
Why did you do that
[not my patient]

So, when you examined plaintiff, you were doing so for the defense
Plaintiff did not ask you to
I did not ask you to
The court did not ask you to
You were doing that because you were hired by one side of the lawsuit to do that

Your purpose was not to offer treatment to Plaintiff
And you did not, in fact, offer her any treatment
You have not followed up with Plaintiff to see how she is doing
And that is because she is not your patient and you are not her doctor

Another one of the rules governing your behavior as a physician is to advise people you examine about such conflicts of interest.
AMA Code of Ethics 10.03(3) states that you must "disclose fully potential or perceived conflicts of interest" and that you are to "inform the patient about the terms of the agreement between yourself and the third party as well as the fact that you are acting as an agent of that entity."
Did you do that?
What did you tell her?

Initial document/file review

Medical Records
Medical Bills
Scans/Films
Case documents (police report, photos, depos, pleadings, etc.)
Correspondence (including e-mails)
CV
Fee Schedule
Billing and payments
Treatises/Articles
Report
Drafts
Notes
Depo summaries
Anything wanted to see but wasn't provided?

How long to review
Could he have really examined the whole file in that amount of time
Did he go through ALL of the records/depos or have other summarize
What reviewed
When get materials and from whom
How did it affect opinion? Why important?
Consult anyone else

Review any articles
Relying on any articles
What articles support conclusions
What articles do not support conclusions
Did he look for any articles that did not support conclusions

NOTE what is NOT there
He would agree the more information the better
If information about injury/treatment out there, he would want it
Def counsel did not provide
Def counsel provided X, Y, Z (that helps his case)
So, didn't have the benefit of that information when formulated his opinions

Each document, note entry, highlight, etc:
Who provided/made
When provided/made
What is the significance

Who did he consult with, when, about what, what said/written, significance

Did you ask for anything that was not available
Did the defense attorney give you everything that you thought was important
Do you believe you have all relevant and important facts necessary to reach a responsible conclusion

What work does he anticipate doing between now and trial
What work does he normally do
What demonstrative aides will he make
What demonstrative aides does he normally make
Aware of his obligation to supplement

If exam –
Did upon defense counsel's request
Judge did not request
I did not request
Knew who hired him before exam

Who spoke to before exam
What records review before exam
How long to take history
How long actually examine
What did exam consist of
Recorded
Notes
Witnesses

How many times done exams and agree with treaters

Before designated

Knew def counsel before?
Called?
Go through each contact/conversation
Fee agreement
Payments

When lack any information:
Been doing for a long time
Know when involved could be deposed
In fact, have been deposed ____ times

Know when involved could go to trial
Have testified at trial ____ times
Know that lawyers ask for this information
Know that juries may want or need to see this information
But don't keep any of this information
You could if you wanted
But you consciously decide not to
So if the jury has questions or concerns about how you were fed information, they are forced to rely solely on your word because you consciously failed to document any of it

The designation

Is the designation complete under Rule 194
Designated before def counsel gave materials?
Designated before he reviewed the materials?
Designated before def counsel knew opinions?
Designated for – ??? (go through each specific thing)
Anything else?
So, will not be offering opinions on – x, y, z (anything not in designation)

NOTE: we are just covering areas in which expert is to testify and not examining the specific opinions at this point.

The report (if any)

How long to prep
Could he have really examined the whole file in that amount of time
Did he go through ALL of the records/depos or have other summarize
What reviewed
When get materials and from whom
How did it affect opinion? Why important?
Consult anyone else
Review any articles
Relying on any articles
What articles support conclusions
What articles do not support conclusions
Did he look for any articles that did not support conclusions

Need all drafts
Defense counsel review
Communications with def counsel prior to signing

What facts did he include in report
Just as important, what facts did he not include or mischaracterize

Factual Concessions

Go through all favorable facts
Just ask whether agrees with the fact. Do not ask him to characterize or comment.

Reviewed entire medical treatment history
Def counsel went and got medical records from birth
Def counsel provided those records
Also, had all medical records from after the collision
Spend ___ hours reviewing file
Charged the defense $____ for doing it
Looked at each page yourself
So, would have seen:

E.g. - No evidence that had back pain before collision
No evidence of treatment for [back pain] before collision
EMS at the scene noted was suffering [back pain]
Believe the EMTs are capable of conducting a proper exam
ER doctors immediately after collision noted was suffering [back pain]
ER docs told him to follow up in a week if [back pain] persisted
Believe the ER docs are capable of making a proper diagnosis
Agree with the ER docs recommendation for follow up care
GP who saw a week later noted [back pain]
GP referred to PT
Believe the GP is competent
Agree with the GPs treatment and recommendations
PT who saw a week later again noted [back pain]

* * *

If not, don't get into why at this point, just point out.

Medical Concessions

Treatment is individual

When you treat, you take the patient into consideration
Don't just run every patient thru the same treatment
Determine treatment after you have taken history and examined
There is no one recipe for treating each injury that works for everyone
Best person to determine what treatment to perform is treating doc
Some patients will recover quickly
Some patients will take more time to recover
Not because of anything they did wrong, but just because we are all different
Some treatment modalities or some drugs may work for one person
Some treatment modalities or some drugs may not work for another
We all react differently

Some types of care are meant to be recurrent
Chiropractic and physical therapy are like that
They typically don't "cure" someone in one visit
It is therapy that works little by little over time
Just like we can't suddenly get into good shape by working out once, we can't solve the ligament damage from a back injury in one therapy visit.

You believe her doctors over-treated her
[Go thru each visit and see if it was necessary.]
Of course, if a doc treats a patient unnecessarily and bills health insurance or a third party carrier for it, it is insurance fraud
Now, you have a duty to report unethical and illegal behavior
You haven't reported anything

<u>Injury causation is individual</u>

It is common for different people to suffer different injuries even though they may experience the same trauma
Everyone is different
In the same collision, one person may be hurt and another not

Did he know that the defendant was injured
Never spoken to defendant
Police report says possible injury
Never relied on that
Wouldn't matter because people are different

Certain factors make it more likely for someone to be injured
If they older
If they are female
If they are turning their head
If they have been injured before
Etc.
Agree that some/all of those factors are present in this case

<u>Property damage is irrelevant</u>

You reviewed/did not review the pics
The pics don't tell you how injured
The pics don't tell you if injured
The pics don't tell you how to treat
The pics don't tell you if to treat
In your medical practice, you have never diagnosed someone simply by looking at the pics of their damaged vehicle.
You don't have the expertise to say how fast the vehicle going
You don't have the expertise to say how much force involved
So, you can't tell from the pics whether a person involved in this collision was or was not injured

There is no relationship between property damage and injury causation

Subjective v. objective

Gold standard for diagnosing starts with subjective history
Must rely on subjective history
Doctors do this every day in clinics and hospitals all over

Some injuries are not very suited for objective
Pain can be real
Should not just assume lying
With your own patients, consider their history
Don't just assume they are lying
They can have pain in spine, but no objective films/scans

So, to diagnose, must
Take history
Then, do exam
Then, do testing

Plaintiff's treating docs examined her
They did not just take her word for it
On exam, Dr. ____ found _____
Dr. _____ also found _____

Plaintiff's treating docs performed testing
They did not just take her word for it
Look through all the orthopedic tests they conducted
Dr. _____ performed a _____ test that confirmed her symptoms
Dr. _____ performed a _____ test that confirmed her symptoms

Again, you believe these doctors are competent
There is nothing in the record that would indicate they don't know what they are doing

These doctors are just practicing docs in the community
They are clinicians who treat patients every day
And that is what they were doing with plaintiff
They were treating plaintiff and trying to make her better
These docs do not work as paid expert witnesses
They are not hand-picked and paid to testify for one side or the other in a lawsuit

Opinions

Seems backwards to do this so late, but often experts will come off of the opinions that are in their report or defense counsel's designation during the preceding questions. Up to now, we have been securing concessions and demonstrating our thorough understanding of the facts. Now, we get down the expert's opinions and the basis for them before we go into impeaching them with contrary literature, attacking his qualifications or exposing his bias.

What are all opinions?

Possibilities: not injured from incident at all
not severely injured from incident
injured before the incident and no aggravation
injured before the incident and incident slightly aggravated
some/all treatment cost not reasonable
some/all treatment not necessary due to incident
scan/film does not reflect objective injury
scan/film reflects chronic injury, not from incident
surgery not necessary at all
surgery necessary, but due to pre-existing condition

Each opinion: what is your opinion? Open-ended
Re-cap – so your opinion is X
What are all the bases for your opinion of X? Open-ended
Re-cap – so your bases for opinion X are A, B, C
There are no other bases supporting opinion X.

Do you have any other opinions?

When expert says he may have other opinions depending on what he asks:
I am entitled to know what all the opinions are
This is my one chance to speak to you before trial
I will not ask you to give an opinion that we have not spoken about
Defense counsel has not designated you to give any other opinions
You know you have a duty to supplement your opinions should you have more or they change
You agree to do that

Test Factual Bases

If he did not include or know a material fact?

E.g. –
You included a detailed chronology of plaintiff's medical care in your report
You were careful to note each time plaintiff went even two weeks without seeing a doctor for her back

You commented in your report that you believe her injuries were not causing her significant pain because her treatment was so infrequent and sporadic
You did not mention at all that she had reported back pain to her doctor a day after the collision
You did not mention it because, as you just admitted, you didn't recall seeing that record
You also did not mention at all that plaintiff did not have health insurance during this time
You did not mention it because, as you just admitted, you didn't know that fact
So, when you concluded that plaintiff must not have been feeling significant pain because she did not go to the doctor frequently, you didn't know she couldn't afford such treatment
You never asked whether she had health insurance
You never inquired about any other reason why plaintiff could not go to the doctor every week

If relied on an erroneous fact:

You wrote in your report that X
That was significant to you
Why
It was so significant that you included it in your report
And you are basing your opinion that ____ , at least in part, on X

Test Medical Conclusions

All opinions must be reliable and relevant. Relevance simply requires that the conclusion be sufficiently tied to the facts of the case. Reliability goes to the methodology employed by the expert –

1. *Has the theory been tested or can it be tested?*
2. *What is the potential rate of error?*
3. *Has the theory been subjected to peer review or publication?*
4. *Does the theory or technique simply rely on the subjective interpretation of the expert?*
5. *Does the theory have any non-judicial uses?*

Learned treatises

Disclose your studies first

Do you agree with the statement, "_____"
Aware that comes from …..
This study found …..
Aware of this study before now?
Did you look for studies that support
Did you also look for studies that do not support

Did not disclose these studies in your report

An impartial, unbiased expert examining this issue should consider both studies that support his opinion as well as studies that do not support his opinion

An expert that only discloses studies or literature that supports his opinions and fails or refuses to consider studies that do not support his opinion is not being impartial or unbiased

Go into his studies:
What studies or literature does he rely on in support of his opinions

General causation
What is the sample size
What is the error rate
How was the study conducted
Get behind the data – what assumptions are being made
Was it peer reviewed
Who funded it
Who are authors

Specific causation
How do study subjects compare to plaintiff
Age, size, gender, medical condition, physical health, etc.
How did the study conditions compare to this incident
Vehicles involved, speed, delta V, aware of impact, body position, fixed barrier, etc.

Observation trumps theory

You have heard of the scientific principle "observation trumps theory"
What does that mean
If a result is observed, it is more scientifically valid than a theory saying the result was unlikely
If an airplane is observed crashing into the ocean, that is considered conclusive of the result regardless of the theory that it is very unlikely that a particular plane will crash into the ocean.
You would agree with that.
The same applies in medicine as well, doesn't it
If a competent physician properly makes a diagnosis that someone was injured in a collision, that is considered conclusive of the result regardless of the theory that it is very unlikely that a person would be injured in a particular collision.

Interpretation of the Scan

The expert will typically opine one of the following:
The scan is negative for any objective injury
The scan shows something but it is artifact
The scan shows an objective injury, but it is chronic and not caused by acute trauma

If scan is negative:

How thin are the slices
What is the minimum slice thickness required by ACR (American College of Radiology)

What sort of image was it (T2, etc.)
Discs are best visualized with a T2 weighted MRI where the fluid is dark
Why didn't you ask to have the scan re-shot with T2 weighting

If a disc showed a protrusion and it was b/n slices, would not appear
So, there could be a __mm herniation and we could not see it
The spinal cord is only 5-8 mm wide

Just because the films show no disc herniation, doesn't mean no pain
Pain in the spine can be generated many different ways
If there is no herniation on the film, that just means the discs appear intact and symmetrical
But the disc can still lose some chemical when injured
And this fluid loss can generate pain[iv]

Another article confirmed radiculopathy without compression of nerve.
"In summary, this paper provides clinical evidence that anatomic abnormalities are not required to cause radiculopathy, thus implying that a biochemical etiology is likely to play a significant role in radiculopathy and radicular pain." [v]

Can also be facet pain
This also may not show up on an MRI

Also, some disc abnormalities may not become evident unless the patient moves a certain way
For example, a disc will often appear different if the scan is taken in a standing, weight-bearing position as opposed to lying down in a non-weight bearing position
A disc will often appear different if the scan is taken in the flexion or extension positions
They even have scans that are taken in motion as well
A disc will often appear different depending on what motion is involved
But that is not what we have available in this case
All we have is a scan taken in a neutral, non-weight bearing position
So, if the disc demonstrates weakness is abnormal when the plaintiff moves a certain way, we would never know that from this scan
Why didn't you request the scan be re-shot in these different positions

It also matters when the scan is taken

A disc may not show herniation immediately upon a trauma
It can take a while before a disc herniation can be viewable on a scan
How much time that is, however, is individual
Here is no say to know for sure how long it will take in a particular person
"[T]here has been no prospective study to determine the length of time necessary for a normally hydrated disc to manifest decreased T_2-weighted signal intensity after it herniates." [vi]

When we are looking at a scan, we are simply interpreting a picture
Interrater variation can be as much as 30%
Meaning that two competent, well-trained radiologists can disagree about the same film as much as 30% of the time
And that is with two radiologists
You are not even a radiologist

But even if you were, a radiologist's job is not to diagnose is it
Doctors don't diagnose just off of films do they
It is up to the clinician to determine ultimate diagnosis by marrying the information on the film/scan with the history provided, the exam and any other testing.

So, regardless of whether there is a herniation on the scan or not, as physicians, we don't treat herniations, we treat symptoms
That is because two different people with the same appearing disc herniation may or may not be experiencing symptoms.
You would not operate on someone who is not suffering pain just because they have a herniated disc
But, we may have to operate on someone who does not show a herniation but is suffering pain.

If scan shows injury, but he doesn't see it:

Was disc asymmetric? If so, it should be considered by that very fact, alone, as a herniated not bulging disc. [vii]

The Board-Certified Neuro-radiologist found that Plaintiff had _____
You disagree
You are not a Board-Certified Neuro-radiologist
A neuro-radiologist is a sub-specialty of radiology
They have special training and experience in reading films of the spine
And, to be Board Certified, they have to possess certain experience
And, they have to pass an exam
You have not done any of that with respect to reading films of the spine

If didn't look at actual films or CD:
Never looked at films themselves

Just relied on reports
Standard of care is not to rely on tech
Standard of care is to look at the films yourself
With own patients, would look at films

If looked at film:
CD is much better quality

If looked at the CD:
Did the radiologist have the original
They are different aren't they
Did you use the same digital capabilities as the radiologist
The copy of the original is not as good quality
What software did you use
If used software that comes with the scan, it has a disclaimer that, "This images cannot be used for clinical purposes"

But, you still know a fair amount about reading films
So, you know that interrater variation can be as much as 30%
Meaning that two competent, well-trained radiologists, which you are not, can disagree about the same film as much as 30% of the time
And, that is because we are really just interpreting pictures, aren't we

Of course, a radiologist's job is not to diagnose is it
Doctors don't diagnose just off of films do they
It is up to the clinician to determine ultimate diagnosis by marrying the information on the film/scan with the history provided, the exam and any other testing.

If he says the herniation is "artifact":

You believe this MRI does not show a herniation, but that it is simply "artifact"
What is artifact
This "artifact" was on ____ slices
That is not what you see if it is "artifact"
And, if there was "artifact" at that location, it could actually cover up a herniation
You didn't suggest the MRI be re-shot to see what was behind it
If you were treating plaintiff, the standard of care would require you re-shoot the MRI too see what is behind this "artifact."
But, in this case you not treating plaintiff
You are hired by the defense to testify in this litigation
And the defense stands to benefit from your opinion that the MRI doesn't show a herniation, but rather, shows "artifact."

If he agrees that it is a herniation, but says chronic:

You believe the herniation was just chronic and not caused by the collision
You believe it is a product of the plaintiff's degenerative disc disease
Degenerative disc disease is just another way of saying that plaintiff's discs are showing some aging
It is not uncommon for people plaintiff's age to have some degeneration
It is akin to arthritis
It does make us more prone to being injured

But it does not necessarily cause herniated discs
While many middle-aged and older people may have some level of degeneration in their spine, most do not have herniations.[viii]

This degeneration that you mention is at the _____ level
There is no mention of it at any other level
If the disc is hydrated or dessicated and it is not due to trauma, then ALL discs should look that way too.
"If disc degeneration were due to a systemic disorder, all discs would presumably be affected equally…" [ix]

It is really impossible for you to look at this scan and tell us when this herniation occurred.
You would need a scan from before the collision to say for sure
"…it is not possible to date the exact occurrence of a disc herniation unless a previous imaging study is available for comparison?" [x]

In fact, you can't even tell us from looking at this scan whether the patient you are looking at is dead or alive
That is also why doctors cannot diagnose a patient simply from a scan
Diagnosis is a clinical determination that is made only after taking a history and performing an exam and testing.
None of which you did

You did review the medical records, however.
Medical records that went back for years before the collision
And nowhere did you see that plaintiff was suffering from back pain
And nowhere did you see that plaintiff sought treatment for back pain
It was not until after this collision that plaintiff reported back pain

If there a herniated disc and there was surgery:

The surgeon who actually saw the inside of plaintiff's body saw the disc
The surgeon confirmed it was herniated
The surgeon had the benefit of seeing the disc in color and three dimensions
You are relying on a black and white scan

Seeing the disc in real life is much better
The surgeon described the herniation the exact same way as the radiologist did in his report
The radiologist reported the herniation existed on ___ slices of the MRI
The radiologist reported the herniation was on the _____ at _____ level
The surgeon also described the herniation being on the _____ at the ____ level
The surgeon sent the disc to the pathologist
And the patholgist confirmed that it was herniated disc material
The surgeon, radiologist and pathologist are treating docs trying to help the plaintiff get better
They are not hired by one side of the lawsuit to provide expert testimony

Malingering[xi]

You believe plaintiff is a malingerer
What does that mean
Read definition out of DSM IV or the like
Agree with that
Essentially, you are saying that she is lying

For a doctor to testify that someone is a liar is very serious
You want to be very thorough and careful before doing something like that
You are aware of the financial and emotional consequences of calling plaintiff a liar
You want to make sure you have all the available evidence before doing that
And, if you found out there was relevant information that you were not given, you would not be reluctant to change your opinion

You believe plaintiff's lies caused her doctors to recommend and perform unnecessary treatment
Her doctors were not involved in some conspiracy to commit fraud
If they were, you would be obligated under your professional rules to report them
And, you haven't reported anyone for anything in this case

Dr. _____ was wrong when he diagnosed plaintiff with _____
Dr. _____ was also wrong when he prescribed _____
Dr. _____ was wrong when he continued to _____
[and so on]

You believe plaintiff just duped her doctors by lying to them
And, relying on what she was telling them, her doctors treated her
Dr. _____ was not capable of seeing through her lies
Plaintiff was able to fool Dr. _____'s testing and manipulate the exam findings
[and so on]

Did you ever call her doctors and tell them that plaintiff was lying to them
In fact, you didn't call her doctors at all
You didn't call her doctors to see what they thought about your theory that she was lying

These doctors who have actually seen plaintiff, looked her in the eye, examined her, questioned her, listened to her answers, performed tests on her – you never called them to confirm your belief before you accused plaintiff of being a liar

Is plaintiff a liar in general or is she just a liar with reference to her injuries from this collision
Is she a hardworking person
How did she feel about her job before the collision
How did she feel about the importance of being truthful before the collision
Is she a spiritual person
Is she an honest person other than with reference to her injuries
When did her character change

When she was rear-ended by defendant, was that part of her scheme to malinger
When she refused EMS at the scene, was that part of her scheme to malinger
She could have taken EMS to the ER and lied about being injured to those doctors, couldn't she
When she tried to go back to work after only two weeks, was that part of her scheme to malinger
She could have lied to her doctors and gotten doctor's notes to be off of work, couldn't she
When did the malingering start
What is she gaining from her malingering

It would be terrible to call someone a liar and malingerer and then find out you were wrong
Lying for money in a lawsuit is perjury, fraud or both
Should plaintiff go to jail for her fraud
You really want to make sure you look at all available evidence before making such an accusation, don't you
It would be horrible to smear someone's name by accusing them of such a fraud and then find out later you were wrong

Plaintiff is not the first person you have called a liar
You have given the opinion that other people were malingerers too
How many times have you been wrong
No way to know really
There is no way to quantify your error rate
You have never taken the effort to follow up with the patient after their case to see if they got worse or their injuries were substantiated by others
Unlike the treating physicians, if you are wrong and make a mistake and cause plaintiff injury, you cannot be sued
And no one will ever know that your mistake hurt anyone

What peer reviewed scientific studies are you aware of that say doctors hired by parties in a litigation setting are more often right than wrong when they call the other party a malingerer
What peer reviewed scientific studies are you aware of that say doctors in general are more often right than wrong when they call someone a malingerer.
Is there anything that you are aware of that says you are right more than wrong when you call someone a malingerer.

Probability v. Possibility (Prior or Subsequent Injury)

Each alternate theory of injury offered by expert must, more likely than not, have been a substantial factor in bringing about plaintiff's claimed harm and without which the harm would not have occurred. If the alleged condition/theory of injury did no more than furnish a condition that made the alleged injuries possible, it will not suffice to establish the substantial-factor, or cause-in-fact, component of proximate cause.[xii]

E.g. - You agree that plaintiff has a disc bulge at L4-5
And, you agree that the disc bulge is the cause of her current symptoms
But, you have opined that the car wreck plaintiff had four years earlier was the cause of her disc bulge

There is no scan showing any disc bulge before the collision that we are here about today
The only scan available that shows this disc bulge was taken after the collision we are here about today
And there is no way to tell exactly when a disc bulge, protrusion or herniation occurred simply by looking at the scan
You can't even tell if the patient is alive or not simply by looking at the MRI

But, in spite of this limitation, it is a valuable diagnostic tool
As a treating physician, you would order a MRI if you believe there could be a disc-related issue
MRI is the best non-invasive diagnostic tool for evaluating disc-related conditions

You base your opinion that this collision 4 years earlier caused her disc bulge on the fact that plaintiff treated for back pain after the collision
She went to the ER and got therapy for about six months
Then, she would periodically go to the chiropractor over the next year and a half
Plus, she was seeing her GP occasionally and getting pain medication
Her GP never thought it was necessary to order a MRI
Her chiropractor also never thought it was necessary to order a MRI
And, as you stated before, MRI is the diagnostic tool that would be ordered if one suspected a disc-related condition

Plaintiff was not treating for back pain during the two years before the collision we are here about today

So, even if she had a disc bulge as you say, she was not reporting any pain from it during the two years before the collision we are here about today
How did her disc bulge affect her at work during the year before the collision we are here about today
Was she able to [garden, ski, etc.] during the year before the collision we are here about today
[etc.]

She didn't treat for back pain until shortly after the collision we are here about today.
And you agree that the treatment she got shortly after the collision was necessary because of the collision
There is nothing in the file that would indicate she was going to suddenly need treatment for her back.
Even if she had this disc bulge before, there is nothing in the file that would indicate she was going to suddenly need treatment
She would not have started treating at that particular time "but for" the collision

And, even if she had the bulge before the collision we are here about today, she would only have needed treatment for it if she was suffering symptoms
Doctors do not treat disc bulges, they treat symptoms
Some people who have disc bulges don't have symptoms
So, you don't treat those people
Some people who have symptoms don't have disc bulges
And you treat them nonetheless

And, we know that she did not have any symptoms for two years before the collision we are here about today
She only needed treatment after the collision we are here about today
So, the collision, not the disc bulge, was the "substantial factor" that caused her symptoms and created the need for treatment

* * *

No Future Treatment

You believe plaintiff does not need surgery
You understand plaintiff is still treating with Dr. _____
It is unethical for a physician to perform unnecessary treatment
It is also unethical and fraudulent for a physician to bill for unnecessary treatment
You have a duty to report unethical and illegal conduct by your fellow physicians
Have you informed Dr. _____ that you believe he is committing fraud
Have you reported Dr. _____ to the Texas Board of Medical Examiners

Dr. _____ has recommended that plaintiff gets a ACDF as soon as possible
Dr. _____ has said that if surgery is not done, plaintiff runs the risk of developing additional nerve damage

Dr. _____ has said that plaintiff cannot continue to keep getting injections
Dr. _____ has also said that plaintiff cannot continue to keep taking prescription pain killers
Dr. _____ says that plaintiff runs the risk of getting addicted to the pain medication if he stays on it
Dr. _____ also says that plaintiff also runs the risk of liver and kidney problems with prolonged use of narcotics

You are comfortable with plaintiff relying on your advice and not getting surgery
Are you willing to sign a document saying that plaintiff will not suffer any further nerve damage if she doesn't get the surgery
Are you willing to sign a document saying that plaintiff will not develop liver or kidney problems from taking narcotic medication

If no –
You want the jury to rely on your opinion that plaintiff doesn't need surgery, but not plaintiff
You are not willing to say that plaintiff should rely on your advice and not get surgery, but you want the jury to rely on your advice and cut off payment for this treatment.
You will take the defendant's money, state your opinion, but you are not willing to be held responsible for that opinion.

No future impairment

You believe the plaintiff is no longer physically impaired
You believe he can go back to work, full duty, without restrictions
And he would not pose a danger to himself or others on the job site
Would you be willing to sign a certification that plaintiff could show potential employers

Certainly, if plainitff's treating physicians told plaintiff he was just fine and gave him this same advice to go back to work and plaintiff hurt himself or someone else, those physicians could be held responsible for their advice
You, however, can give opinions like you have here that plaintiff is fine to go back to work, and regardless of whether he hurts himself or someone else, you can't be held responsible for your opinion
You want the jury to rely on your opinion and cut off any payment for plaintiff's loss of income from not working
But, you are not willing to be held responsible should your opinion be wrong

Qualifications

Articles on this subject
Presentations on this subject
Surgery still?
Malpractice claims?
Sued? Settled?
Disciplinary history
Ever denied privileges

Ever convicted/arrested
How many times take Board Cert Exam
License ever revoked/suspended
# of times performed this actual surgery
# of times in last 10 years
Office: where?
Patients go there?
Get photo of office
Place to examine?

Ever been a party to a lawsuit
Own any other entities, in whole or in part, outside of practice

How many times testify – depo and trial
How many times consulted and not testified
Ever been stricken
Opinions ever been limited
Ever testified on this particular issue

List of cases
If claims no list, has he testified in fed ct where list req'd
What % for plaintiff v. defense

Organizations (professional, social, political)
Positions held
Extent of involvement

Continuing ed
Seminar in this particular area
Speaking for defense attorney or insurance groups

If Plaintiff's expert more qualified –
Know plaintiff's expert
Reputation
Opinion of competence
Ever referred to him
Contrast qualifications

Relationship with firm/carrier

Other cases with def counsel
Other cases with def reps
Other cases with other counsel in def counsel's firm
How many, when were they
Ever opined that person hurt and treatment was proper
Get case names
Ever worked for case review company

Ever speak to attorney groups
Ever speak to insurance industry groups

“Independent” Medical Exam (if exam)

the top of report: “independent medical evaluation”
Independent – dictionary definition
You weren’t hired by Judge
Weren’t asked by the court to give your report
And you weren’t retained by the agreement of counsel
It isn’t as if the defense and me put our heads together and agreed that you were the one to do the evaluation
You were hired by one party
That was the defense
You’ve communicated with one lawyer
That’s the defense lawyer
You haven’t communicated with the court
You haven’t communicated with me
You were paid by one party
That was the defense
I haven’t purchased anything from you
The court hasn’t purchased anything from you
The defense, however, has paid you in excess of $_____
In fact, even the defense has referred to what you did here as a defense medical examination – are you aware of that?
You maintain that you are independent – “free from the influence or control of others”

Subpoena *duces tecum* – free legal counsel from Def.

You claim you’re independent here
I tried to get some specific records from you
Records that would show how much work you do for insurance companies
You refused to produce those records
You had defense counsel tell me you wouldn’t cooperate
And defense counsel announced himself to be your attorney
Did you pay defense counsel personally
Who paid defense counsel for you?
This is a service that the Defendant provided for you
They didn’t even make you pay for it – the Defendant gave you free legal representation

There have been other times that you’ve received subpoenas for your financial records showing how much money you earned from insurance companies
You’ve resisted those subpoenas in the other cases too
And you’ve never yet hired your own lawyers
The lawyers who have resisted those subpoenas have been the lawyers for the defendants in those cases

It's kind of a custom for you, isn't it – you do more and more work for insurance companies, you claim you're not biased, people look for the facts that would either establish that as true or untrue, and you refuse to show those facts and the party who stands to gain from those facts being concealed gives you a free lawyer to resist the subpoena for those facts
But you maintain that you are independent

Causing expert to reverse roles

Have you have had an outside entity review your records and bills
How did it make you feel
Did they reduce your bills
Did they say you performed unnecessary treatment
Were you trying to jack up your expenses
Were you performing unnecessary treatment so you could make more money
You were just trying to do your best for the patient

But someone else, who had never seen your patient at all, said you charged too much
Someone else, who had never seen your patient, said the procedure you requested was not necessary
Overcharging or charging for unnecessary procedures is illegal
It is unethical as well
So, in essence, this person was saying you had committed an unethical and illegal act
You aren't a criminal, are you
It is offensive, isn't it

But, it is all part of the game nowadays
Insurance companies routinely hire doctors to contest the treatment rendered by claimants' physicians
These doctors typically just review records and give opinions
These doctors don't usually examine the patients
And the more they save the insurance company the more they get hired

You are designated by the Texas worker's compensation commission as a doc
You see workers and make determinations as to whether they can go back to work
Again, you are not paid by the workers are you
You are paid by insurance companies
And the insurance companies want the workers back to work as fast as possible
You are not treating those workers there either are you
You are just evaluating them and telling them to go back to work if appropriate
And, the faster you send them back to work the more work the insurance company sends you

Why go to medical school
Did you want to help people
You do that still occasionally
You also do this record reviewing thing

You do the record reviewing more now than treating patients
When you reviewed Plaintiff's records, you were not trying to help her
You were hired by the defense counsel to review her records
The defense counsel's purpose is to not pay plaintiff's claim or pay as little as possible
And you knew that when you took the project
You were not there to treat the plaintiff
Her medical condition and how she could get better was not your concern

Why him (if not local)?

You are certainly not the only doctor that does this record reviewing thing
While they may not do it as much as you do, other doctors can, and do, do this record reviewing
You are an orthopod
Other duly licensed orthopods can do record reviewing as well
It does not require any special licensure
It does not require any special training

Do you know where plaintiff lived at the time you examined her (if there was an exam)
Do you know where this case is pending (if no exam)
Do you know know the next largest city outside of _____.
Do you know if there are any orthopods in _____.
In fact, there are _____.
Conceivably, the defense could have sent [plaintiff/case] to one of the _____ orthopods in _____ for the kind of assessment that you did

The next biggest town from _____ is _____
Any reason to disagree with that
Do you know if there are any orthopods in _____
In fact, there are _____.
Conceivably, the defense could have sent [plaintiff/case] to one of the _____ orthopods in _____ for the kind of assessment that you did

And, if we go a little further from _____ we get to _____
Any reason to disagree with that
Do you know if there are any orthopods in _____
In fact, there are _____.
Conceivably, the defense could have sent [plaintiff/case] to one of the _____ orthopods in _____ for the kind of assessment that you did

But, your office is _____ miles away from _____

Plaintiff came to your office because the defense sent her there [if there was an exam]
Can you think of a reason why the defense would want to make plainitff travel ____ miles for an orthopedic exam, when there are other orthopedic specialists as close as ___ miles away

The defense reached out to _____ to locate you to do this review [if no exam]

Is it because you are more qualified than the other ___ orthodedic specialists between _____ and _____
Have you ever been invited to join the faculty of any medical schools
Have you ever been invited to be a guest lecturer at any accredited medical schools
Have you ever published any articles in medical journals about your work
Have you ever published any articles in medical journals about your studies

Could there be other reasons that the defense [sent plaintiff/sent the case] over ____ miles, past ____ other orthopedic specialists,to end up in your office?

Financial bias

If still seeing patients, what get for an office visit from health insurance
Managed care has cut fees
How long for an office visit
How long to do records for visit
How much money doing litigation work a year
How much money from this particular carrier
How much money from cases with this firm
As a percentage of his practice, how much does lit work account for

Do you advertise in any expert publications
Any trade magazines
Any insurance publications
Internet or other referral services
Look for presentations to insurance/defense organizations

How many record reviews do a year
How many for def
How many for plaintiffs
How many a day
How much money a year
How much money an hour
How much so far on this case
If testify at court, will be more
Other than testifying, what else to do you intend to do
How much in the end on this case

The longer you stay on the case and the more the defense has you do, the more you make
In fact, you charge more for trial testimony than for deposition testimony
So, if the defense asks you to come to trial and testify, you will make even more

You understand you have to update your testimony should you do additional work
You will agree to do that

When you are serving as an expert witness for the defense, if you reach the opinion that the person is hurt from the incident in question, just as she claims, does that usually end your involvement
You are not usually called for a deposition or to testify in trial
If, however, you reach the opinion that the person is not hurt from the incident in question, contrary to plaintiff's position, then you are more likely to be asked to give a deposition or testify in court
You are going to get paid more on a case where your opinion is that the person is not hurt than a case where your opinion is that the person is hurt from the incident in question
What are the names of the cases where you were hired by the defense and then reached the opinion that the person was hurt from the incident in question just like they said they were

How much did doctor _____ charge for his treatment
How much did the therapist
And, of course, they have expenses for their treatment
They have supplies
They have the facilities, the staff, etc.
They have to pay for insurance in case they get sued if they make a mistake
You can't get sued if you are wrong today can you
So, all of the doctors, nurses and therapists combined who actually treated plaintiff for months and incurred all these expenses will be paid less than you alone who worked on the case for _____ hours.

Contrasting with treaters

How many times did you see plaintiff
How many times did her treating doctor _____
How many times did her therapist _____
Why did her treating doctor see her? To treat her
Why did her therapist – to treat her
You have never seen her
You reviewed her records to give an opinion to def counsel
You did not review her records to treat her
You had no interest in treating her
And you will not follow up after this

In your clinical practice when you are treating, you always see the patient
It would be a violation of the standard of care to treat without seeing
It would be a violation of the standard of care to prescribe drugs to a new pt w/o seeing
Actually seeing, examining, testing the patient are critical steps in the process

There is no literature in the field of medicine that allows a doctor to diagnose and treat a patient simply be reviewing the patients records and not meeting them
It is allowed only allowed when there is litigation

But not in the real world of treating patients

If 10 doctors were to see the same patient, they would all document differently
Some use computerized forms, some don't
Some have forms that are different than others
Some are really detailed and some are less detailed
This difference makes it even more difficult to ascertain the condition of a patient from a stack of paper

Her treating doctor performed his treatment
Her treating doctor made his referrals
Her treating doctor took diagnostic testing
Her treating doctor gave his opinions in his records
And if her treating doctor messes up, he can be sued for malpractice
If your opinions are wrong, you can't be held responsible at all

Do you know Dr. _____
Have you ever referred patients to Dr. _____
Have you ever accepted referrals from Dr. _____
Do you have an opinion as to whether Dr. _____ is a competent doctor
Do you know how experienced he is at performing this surgery
Do you know if he, in fact, has more experience than you

Do you think Dr. _____ is capable of taking a history from a patient
Do you think Dr. _____ is capable of performing an exam of a patient with these injuries
Do you think Dr. _____ is capable of performing orthopedic tests of a patient with these injuries
Do you think Dr. _____ is capable of interpreting the diagnostic studies
Do you think Dr. _____ is capable of making an accurate diagnosis
Never consulted with Dr. _____ before rendering your opinions that are critical of his treatment

Impeaching with prior inconsistent statement[xiii]

Whether you want to confront the witness with inconsistent testimony from other depositions, articles, presentations, etc. will depend on the facts of the case, the prior testimony, the issues present, and whether you expect the expert to testify at trial. Additionally, how strongly this is delivered will depend on whether the witness is lying or simply mistaken.

1. Step One – Establish current version of testimony to be impeached.
2. Step Two – Solidly tie witness to this version
3. Step Three – Equate or translate the current versions of testimony to the prior inconsistent statement, if necessary
4. Step Four – Expose the prior inconsistent statement
5. Step Five – Maximize damage

E.g. –

You stated earlier that you earned $100,000 in 2008 from your expert witness testimony and consultations
$100,000 is a fair amount of money, you would agree
Even for a successful orthopedic surgeon like yourself, being paid $100,000 is not something you would forget
And, of course, you, like the rest of us who pay taxes, have to keep track of all of that information for the IRS
You kept track of how much money you made in 2008, just like you do today
As an expert witness, you are frequently asked how much you make from your testimony and consultations
It is a common area of inquiry in depositions like this
And when you are asked under oath how much money you make from being a witness, you always tell the truth
Taking an oath and swearing to tell the truth is something you take very seriously
On July 25, 2009, you gave a deposition in the case of Smith v. Jones

Refresh: If I showed you a copy of the transcript, would that refresh your recollection
Now that you have reviewed a copy of the transcript of that deposition, you recall giving testimony in that case

Before you testified in that deposition, you raised your right hand and swore to the jury, to the judge and to God that you would answer the questions truthfully.
It is the same oath you took at the beginning of this deposition
And you knew the importance of your oath then, just as you do know
Mr. Taylor asked you if you understood all of his questions
You told him that if you did not understand one of his questions, you would let him and the jury know
And at the end of that deposition, you told Mr. Taylor that you understood all of his questions
After the deposition, you had the opportunity to review the deposition transcript and make any changes you wanted
And you made no changes at all
You signed the deposition, again swearing that your answers were true.
And, in that case, you were asked how much money you made in 2008 from your testimony and consultations
And you answered $250,000, didn't you

* * *

Attacking objectivity

People can disagree
Different docs will at times disagree on diagnosis
Different docs will at times disagree on treatment
Different docs will at times disagree on prognosis
This has happened with you during your career

Garbage in, garbage out

Opinions are only as good as the knowledge of true facts that made those opinions
Opinions are only as good as the info available to those who made those opinions

You would agree that when there is a conflict of medical opinions between physicians of equal qualifications, the opinion of the physician who has the benefit of the greater information is more trustworthy

You would agree that a medical opinion based on a review of the medical records with no actual physical exam whatsoever is more likely to be erroneous than one based on a number of medical examinations and detailed medical history from a doctor who has treated the patient for months/years.

You would agree with me that a treating physician who has seen a patient a number of times is in a better position to make a diagnosis and assessment of the patient than one who is merely a record reader.

Bias

Do you think that the reason a person was asked to give an opinion could possibly influence their opinion

Do you think that whomever it is that asks the person to express their opinion could possibly influence their opinion

Do you think who pays for the opinion could possibly influence their opinion

Close out Questions[xiv]

Now, I am going to ask this last set of questions which may sound silly given that we know how well we have gotten along in this deposition, but:

6. Have I been courteous to you?
7. Have I treated you in what you regard as a professional manner?
8. Has there been anything about my conduct or demeanor that caused you to answer these questions in any way other than what you believed to be the truth?
9. Have you had an opportunity to answer my questions as fully and completely as you felt necessary without being cut off?
10. Have you understood all of my questions, or when you didn't, did you ask me to rephrase or re-ask so that you were satisfied that you understood the question and were responding truthfully to it?
11. Sometimes when I am taking a deposition, a witness will tell me that they remembered another thing but we were in a different topic so they didn't tell me. With that in mind, are there any answers you have given me here today that you want to add to, subtract from, change, modify or amend in any way?
12. Are the answers you gave me here today the same ones you will give me at trial to the same questions?

SUMMARY OF THE LAW

a. Texas Rule of Evidence 702.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

b. Texas Rule of Evidence 703.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

c. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, (Tex. 1995).

Established the well-known six nonexclusive factors to consider in determining the reliability, and admissibility, of expert testimony:

1. The extent to which the theory has been or can be tested;
2. The extent to which the technique relies upon the subjective interpretation of the expert;
3. Whether the theory has been subjected to peer review and/or publication;
4. The technique's potential rate of error;
5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
6. The nonjudicial uses which have been made of the theory or technique.

d. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

Stated that a properly designed and executed epidemiological study that reveals a doubling of the risk may be part of the evidence supporting causation in a toxic tort case. This "doubling" is not a litmus test. Additionally, a single study or test is legally sufficient evidence of causation. The court must consider the totality of the evidence.. Lastly, when using studies, must show that the plaintiff was similar to the individuals in the study, i.e. "that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study."

e. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998).

Held that the *Robinson* factors applied to expert testimony based on skill and experience, rather than on science. "Nothing…requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

[i] *Columbo* was a crime fiction television originally aired on NBC from 1971 to 1978 as one of the rotating programs of the *NBC Mystery Movie*. *Columbo* then aired more infrequently on ABC beginning in 1989. The most recent episode was broadcast in 2003.

[ii] Some of this outline is based upon a book written by Dorothy Clay Sims, called "Exposing Deceptive Defense Doctors." Besides being a thoroughly enjoyable person, Dorothy is extremely skilled at deposing medical experts. Her book is the bible on this subject and I would highly recommend those interested in this subject to purchase it.

Another major contributor to my understanding of this subject is Maren Chaloupka in Scottsbluff, Nebraska. Maren is a member of the staff of Gerry Spence's Trial Lawyer's College and an amazing trial lawyer. Some of her advice is reflected in the outline as well.

[iii] The theory behind these questions, and many others within this outline, come from David Ball and Don Keenan's book, *Reptile*, as well as Rick Friedman's book, *Polarizing the Case.*

[iv] "Ultrastructural Changes in Spinal Nerve Roots Induced by Autologous Nucleus Pulposus," *Spine* 21.4 (15 Feb 1996): 411-414.

[v] Slipman, CW, et al., "Clinical Evidence of Chemical Radiculopathy," *Pain Physician* 5.3 (Jul 2002): 260.

[vi] Herzog, RJ, "The Radiologic Assessment for a Lumbar Disc Herniation," *Spine* 21.24Suppl (15 Dec 1996): 23S.

[vii] Herzog, RJ, "The Radiologic Assessment for a Lumbar Disc Herniation," *Spine* 21.24Suppl (15 Dec 1996): 19S-38S.

[viii] "Magnetic Resonance Imaging of the Lumbar Spine in people without Back Pain", by Jensen, Brant-Zawadzki, Obuchoski, Modic, Malkasian, Rosa, New England Journal of Medicine, Vol. 331, No. 2, July 14, 1994, pp 69-73.

[ix] Bogduk, N, "Pathology of Lumbar Disc Pain," *Journal of Manual Medicine* 5 (1990): 73.

[x] Herzog, RJ, "The Radiologic Assessment for a Lumbar Disc Herniation," *Spine* 21.24Suppl (15 Dec 1996): 19S-38S.

[xi] For a more complete discussion of this line of questioning, refer to Rick Friedman's excellent book, *Polarizing the Case*.

[xii] ***Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007).**

Finding that Plaintiff's lay testimony was insufficient to establish causation on the facts of this case. The Court stated, however, that "the causal connection between some events and conditions of a basic nature (and treatment for such conditions) are within a layperson's general experience and common sense. This conclusion accords with human experience, our prior cases, and the law in other states where courts have held that causation as to certain types of pain, bone fractures, and similar basic conditions following an automobile collision can be within the common experience of lay jurors. (citation omitted). Other examples where expert testimony may not be necessary are low back pain (*State Office of Risk Mgmt v. Larkin's*, 258 S.W.3d 686 (Tex. App. – Waco 2008, no pet.)) and carpal tunnel syndrome (*Saenz v. Ins. Co. of P.A.*, 66 S.W.3d 444 (Tex. App. – Waco 2001, no pet.)).

***Columbia Med. Ctr. Las Colinas v. Hogue*, 271 S.W.3d 238 (Tex. 2008).**

Trial court was correct in refusing to submit a contributory negligence question when the evidence of contributory negligence was based on speculation or mere possibility. Testimony that something "could have," "possibly" or "perhaps" resulted in the injury amounts to nothing more than speculation or conjecture.

***Merck v. Ernst*, 296 S.W.3d 81 (Tex. App. – Houston [14th Dist.] 2008).**

Plaintiff's experts' speculation that a blood clot "could have" existed, but then "could have" dissolved, been dislodged, or fragmented prior to the autopsy was nothing more than mere conjecture and insufficient to support a finding of causation.

***Brownsville Pediatric Ass'n v. Reyes*, 68 S.W.3d 184 (Tex. App. – Corpus Christi 2002).**

Finding that Texas Rules of Evidence and *Robinson* factors apply to Defense expert witnesses testifying about injury causation just like they do to Plaintiff expert witnesses. The Court upheld the trial court's exclusion of defense expert testimony of alternate theories of injury that were not factually supported.

***Niemann v. Refugio Co. Mem. Hosp.*, 855 S.W.2d 94 (Tex. App. – Corpus Christi 1993).**

Plaintiff's evidence regarding causation failed when experts report simply stated possibilities. Court upheld trial court's decision to grant defendant's no-evidence Motion for Summary Judgment. "The mere possibility that an act of negligence might have caused the damages from a medical viewpoint is not sufficient to support recovery. It must be shown that the act probably caused the injury." (citation omitted).

***Chau v. Riddle, M.D.*, 2008 Tex. App. LEXIS 8440 (Tex. App. – Houston [1st Dist.]).**

Plaintiff, who has a pre-existing condition, is not required to prove the degree of additional injury caused by Defendant's negligence as long as the negligence is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred.

[xiii] For further discussion on impeachment with prior inconsistent statements, see Pozner and Dodd, *Cross-Examination: Science and Techniques*.

[xiv] These were taken from a presentation by Jerry Galow in Austin, Texas.