Coping With Depositions

I. Avoiding Depositions

A. Writing a comprehensive report

Most depositions of doctors are of Agreed Medical Examiners. However, lately I have been seeing more and more depositions of QME's for either side or treating physicians, especially where their opinion would be entitled to a presumption of correctness. Therefore, none of you is safe, no matter what the nature of your practice.

Generally, attorneys don't seek to depose doctors unless 1) they don't like the doctor's opinion and/or they believe that 2) the opinion is ambiguous and/or 3) there is a basis for attacking it or changing the doctor's mind. You can best avoid depositions by being as thorough and as specific as possible in writing your report, and making sure that you address all of the areas of inquiry presented by the individual or individuals who requested your opinion.

You may know what's important for workers' compensation cases in general, but your referral source knows what's important on this case. Particularly when you are reporting as an Agreed Medical Examiner, it is likely that the decision was motivated by the need for a neutral opinion on specific issues.

Most attorneys believe that some doctors deliberate leave things out of their reports so that they will be deposed and can earn an additional fee. This may be true in some cases, but for most of you, there are probably easier ways to earn money than to be put in the hot seat and grilled by a couple of lawyers.

B. Giving reasons for opinions on disputed issues.

If your report is conclusory and especially if it is difficult to understand why you came to the conclusions that you did from a reading of your report, there is a good chance that an attorney is going to ask you to explain in a deposition. Particularly in the area of apportionment of permanent disability where technically correct language is needed to meet legal requirements, you are likely to be deposed if your opinion is unclear.

C. Situations where depositions are unavoidable

If you served as an AME on a case with an "all or nothing" issue and if the stakes are high enough, one or both of the attorneys is probably going to want to depose you. If the defendant obtains *sub rosa* films or obtains evidence that seriously impeaches the applicant after your evaluation, you will be deposed and there is nothing you can do to avoid it..

II. Preparing for Depositions

A. Reviewing your report and other documents

Make sure that you carefully review your report and all of your notes prior to the deposition. If there are clerical errors that you did not previously discover, be prepared to identify them.

If you reviewed medical records in connection with the evaluation, and did not retain them, you have the right to ask that the records be sent back to you for your review prior to the deposition, if you feel this to be necessary. You are also entitled to be paid for reasonable preparation time in addition to the time you spent in the deposition itself.

B. Thinking about your opinion

Think about why you came to the conclusions that you did in your report, particularly in the areas of medical causation, apportionment and level of permanent disability, or other areas of dispute. Look over the letter from the attorney or attorneys that accompanied the referral for any special instructions. If you performed an evaluation at the request of either the applicant or the defendant, and if you reviewed the opinion of the opposing doctor and came to a contrary conclusion, think about the reasons for your disagreement and make sure that you are able to articulate them.

III. Surviving Depositions

Non attorneys often believe that there is some kind of trick involved in responding to questions posed by an attorney in a legal proceeding. This may be true with a small percentage of highly skilled and highly experienced attorneys. However, it is not true for the majority of lawyers. Deposing a doctor requires a greater degree of legal skill than questioning lay witnesses at trial. Generally, the attorney is just as nervous about facing the doctor as vice versa, and may know exactly where he wants the doctor to go, but have no idea how to get him there.

A. Law v. Medicine

Keep in mind that a really smart attorney will try to draw the doctor into the area of law, rather than trying to attack the doctor in the area of medicine. If the attorney starts out trying to argue with you about medical practice, you probably don't have a heavyweight. When it comes to medical questions, no attorney will be a match for you.

When cross-examining a witness, lawyers are entitled to use leading questions. A leading question is one in which the question suggests the answer. Most questions that begin with, "Isn't is a fact that..." or "Wouldn't you agree that..." are leading questions and the attorney is hoping that you will answer with a simple yes. If you are not sure what you really would be saying if you simply agree, put the answer in your own words. Tell them, "If what you are asking me is that...., then I would agree with that statement."

B. You don't have to have an answer for everything.

Your best weapon is thorough preparation, thorough knowledge of your field, and honest responses. Don't hesitate to say that you don't know the answer to something, if you really don't know. There are plenty of questions for which there is no answer. If a question is posed and you would feel more comfortable reviewing your notes or other documents before responding, don't hesitate to say so. Lots of attorneys will the ask the "Wouldn't you agree..." type of question, prefaced by a statement such as, "Since you stated in your report that...". If you're not sure that's exactly what you said, ask them to refer you to the specific area in your report where you said that. If you know that's not what you said, say so.

C. Changing your opinion

Don't be afraid to change your opinion if you are presented with new facts or something is called to your attention that you previously overlooked. Changing your opinion or admitting to an error in an isolated area will make your opinion more credible, overall. When I read a deposition transcript in which the doctor absolutely refused to concede, even though he was backed into a corner or had been confronted with a gross inconsistency, it makes me wonder where else he might be wrong.

D. Probability v. possibility

Be aware of the distinction between possibility and probability. The standard to be applied is a reasonable medical probability which means more likely than not. Lots of things are theoretically possible, but are highly improbable. If an attorney asks you if something is possible, don't be afraid to say that yes, its possible, but not probable. I've seen a lot of depositions in which the attorney asks a succession of questions dealing with possibilities which the doctor reasonably answers in the affirmative. Then he slips in one "probable" and changes the subject as soon as the doctor agrees.

E. Provocative attorneys and lying applicants

Never allow yourself to get emotionally involved with a provocative attorney who becomes overly aggressive with you. In the first place, an emotional reaction will impair your ability to think clearly. Secondly, if your anger becomes obvious, you may well be accused of bias. Remember that even in those cases in which you are the QME for either the applicant or the defendant, you are theoretically not supposed to be an advocate for your referral source. Rather you are an independent expert.

You don't have to allow yourself to be abused, but that sort of thing can be dealt with without losing your temper. Watch your choice of words, also. You can speak in the most reasonable tone of voice, but the only thing that will be apparent from a written transcript is what you actually said.

Likewise, don't overreact if you find out in a deposition that the applicant lied to you about something and then decide that he or she must be a phony. Particularly if you are serving as an Agreed Medical Examiner, you must maintain a neutral demeanor. Although lying is never commendable, some lies are not terribly significant. For example, if the applicant specifically denied any prior back injuries, the fact that he injured his back in an automobile accident 10 years ago and made a complete recovery within six months, probably would not have called for a different opinion if he had been honest with you.

Another consideration is that surveillance films or damaging information may not be what they appear to be at the time. (Example - Marv Shapiro's case in which the investigator flipped the photograph.) Likewise, there will be cases in which the claims adjuster initially appears to be a sadist, but it later turns out that the refusal to pay was not so far off base.

Sometimes, its the attorneys who get into it with each other. This mainly presents a problem for Agreed Medical Examiners. The defendant schedules the AME's depo and the applicant insists that discovery is closed. The applicant wants to show the AME some document in a deposition and the defendant objects. The doctor is damned if he does and damned if he doesn't.

In these situations, your best recourse would be to request guidance from the WCAB. As an agreed upon doctor, you services are entirely limited to the scope of the agreement. (Example - Flores case.} If defense counsel wants to show films in a deposition and the applicant's attorney objects because this is his first notice, tell them that they either have to agree that you can see the films or get a ruling from the judge and come back on a later date. Its hard enough being the medical expert without having decide the legal issues as well.

F. The doctor/patient relationship

If you are the applicant's QME or treating physician and the defendant wants to take your deposition, do you have some kind of obligation to help the applicant? I believe that you do, but that the nature of that obligation is that of a doctor to a patient and not that of a medical expert to a litigant. An opinion that may maximize the applicant's recovery from his workers' compensation case, such as the imposition of multiple work restrictions, may not be in his best interests in terms of his working career. Applicant's attorneys will have a tendency to enumerate various work restrictions and then ask you whether their client should be restricted accordingly. Only agree with them if you honestly believe that such an opinion is in accordance with good medical practice.

III. Subpoena Related Matters - Your Rights and Responsibilities

A. Agreed Medical Examiners

If you are serving as an AME pursuant to the request of both parties, you should not have a problem with subpoenas or even be concerned about them. Generally, the attorneys will consult you about a convenient date and will schedule the deposition in your office. If you have any concerns about this, you can make it clear to the attorneys from the start that compliance with this procedure is a condition of your acceptance of the referral.

B. Treating physicians and Qualified Medical Examiners

Most attorneys will consult you on the date and time and schedule the deposition in your office, even if you are associated with the adverse party. A few years ago, there was a lot of harassment by deposition going on which has largely dissipated. However, once in a while you will get a provocative attorney who will have you served with a subpoena and a Notice of Taking Deposition in his office on a date and time that may be markedly inconvenient for you. What do you do in such a situation?

1. Notice and distance requirements

You must be given at least 10 days notice of the date and time of the deposition plus 5 days for mailing. You can only be served with a subpoena to appear at a location that is no greater than 75 miles from your residence within 150 miles if within the same county. Unless you live in a really big county, 75 miles is going to be the limit, but that's still a lot.

Normally, the opposing attorney will be willing to help you out in these situations. As a last resort, you can appeal to the WCAB. We do have a statute that allows sanctions for bad faith tactics and although I've never seen it invoked under these circumstances, it might be appropriate.

2. Motions to Quash Subpoenas

If the subpoena or the notice is improper in some fashion, you can ask the WCAB to quash it or find it to be null and void. You shouldn't have to incur legal expense to accomplish this. If you are the QME or treating physician selected by the applicant's attorney, that attorney should handle this for you.

3. Changing the date and/or place specified in the subpoena

Usually, a simple telephone call to the attorney's office will be sufficient to change the date, time or place of the deposition. Sometimes attorneys will notice the adverse party's doctor's deposition in their office on a given date simply because they're afraid the doctor won't be willing to discuss it with them. In these situations, they usually expect from the start to accommodate the doctor's schedule. After all, it's going to cost their client a lot more to pay you for the trip, rather than them.

4. Travel and expert witness fees.

You are entitled to mileage and expert witness fees in advance. If you are served with a subpoena, this is supposed to be given to you at the time of service. Deposition fees are $200 per hour for non AME physicians and $250 for AME's. Probably, a reasonable advance fee for an AME is $500, including an hour of preparation time and an hour for the deposition, unless there is some reason to believe from the start that the time will be more or less.

The party who schedules the deposition is responsible for your fees. Lots of defendants will be willing to simply pay the doctor directly for a deposition scheduled on behalf of the applicant because they know that the applicant will be able to seek reimbursement for the cost. However, if the defendant isn't willing to do this, the applicant's attorney must advance the cost. Telling you to get it from the defendant is not good enough.