

## Under Attack!

Kenneth Satin, JD

Your private life is being examined. People are checking your background. Your credit is being analyzed and your professional record scrutinized. Your ex-spouse may be contacted.

These are but a few of the tools employed by the attorney seeking to undermine the testimony of a doctor in a personal injury case. After all, the testimony of the treating physician (and possibly an additional expert to bolster the treating physician's opinion) is the lynch pin of success in proving injuries suffered by a patient in an accident.

### Investigation

Investigation of the doctor by the defense may lead to evidence of reckless behavior, disregard of patients or medical incompetence. Health care providers are human. The public (and juries are drawn from the public at large) places doctors on a pedestal. Defense attorneys will do everything in their power to knock the doctors off that pedestal and attempt to limit the effectiveness of their testimony.

### Medical Negligence

A thorough defense attorney will run a check with one of the reporting services to determine if the identifying doctor has a history of medical incompetence. If a physician has any history of negligence and that evidence is admissible, the strength of the testimony will evaporate. Court records may be checked in the county where the doctor might practice, or lives, or had practiced or lived, with the hope of seeing if that particular doctor has ever been sued for malpractice. If so, the defense attorney will no doubt contact the plaintiff's attorneys in those actions and secure damaging information, whether informally or through the discovery involved process.

Employment history may be examined. The state board of medical examiners may be queried. Has the state board taken any public action against this particular doctor? Can transcripts be obtained?

### Physical or Mental Impairments

Is there a history concerning the doctor's mental or physical incapacities? Has the doctor been treated by a psychologist or psychiatrist, suffered from a mental illness or physical handicap, or experienced a drug problem?

A thorough defense attorney might even seek to find previous employees of the doctor to testify they have seen the doctor drinking, for example. How many empty beer cans were found in the garbage can in the office?

### Crimes

Has the doctor ever been convicted of a felony or misdemeanor? A private investigator might be hired to track down this information.

## "Ex" Marks the Spot

Doctors are human. They get divorced, file bankruptcy and are audited by the IRS. All of this information can weaken the strength of testimony.

If the doctor is having financial problems, the defense attorney might suggest that the doctor provided certain treatment strictly to make money, and that it wasn't medically necessary. Did the doctor recently sell property to order to raise cash? The defense attorney might run a deed/title search in order to ascertain this information.

The ex-spouse might also provide an abundant source of information that could not be otherwise ascertained.

## Certifications

What examinations has the doctor taken and when? If scores are exceedingly low, and if this evidence is admissible after the appropriate motions being made to exclude, this can weaken testimony.

## Counterattack

The goal is to uncover negative information in reverse that shows jurors why they cannot trust the testimony of the defense examiner as well. Defense experts often make a good living doing almost nothing but testifying for insurance companies.

This information can be used to advantage. Perhaps, in earlier depositions, inconsistent positions have been taken. A Lexis or Westlaw search may be of use, particularly if testimony was discussed in later appellate analyses.

Various plaintiff's trial lawyers' associations maintain deposition databases. Depositing can be secured of commonly used defense experts in order to find information which might be of assistance for purposes of impeachment.

Court reporters in a particular locale may be contacted to find additional depositions if an adequate supply is not in the database mentioned above. If a defense doctor is a frequently used expert, one deposition may lead the plaintiff's attorney to another.

Eventually, the plaintiff's attorney might be able to ascertain if the doctor has taken repetitive defense positions with respect to the facts. The plaintiff's attorney might ascertain how much money an expert has earned in testifying in negligence cases, particularly those involving the same insurance company.

Although the mention of insurance in a negligence case is usually not permitted by the court, there is a possibility that the court will allow it to show bias of a defense doctor. The impact on the jury of establishing that a defense physician has earned, for example, over a million dollars testifying routinely for defendants might have a significant bearing on the physician's credibility.

SEPTEMBER 1999