

# DISCOVERY TIPS AND DEPOSITION STRATEGIES

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## I. INTRODUCTION

This paper discusses discovery and deposition strategies for medical malpractice cases. It also addresses current procedural rules affecting the taking and use of depositions in medical malpractice cases.

Section II of this paper is devoted to discovery related issues and primarily focuses on the written forms of discovery. Depositions are discussed in Section III of this paper.

## II. DISCOVERY TIPS

Early discovery is essential to the plaintiff in a medical malpractice case. The plaintiff's first priority is to obtain the relevant medical records. Those records are essential to understanding the issues in the case and the required 120 day expert report.

After you identify the issues in your case, craft discovery to address those issues. For example, if you have a retained sponge case you may ask the defendant:

Please identify who you believe caused a sponge to be retained in Plaintiff.  
Please also state the facts that support your belief.

Discovery will do you no good if it does not address the issues in your case.

### A. Requests for Production

Be sure to ask for the following documents and physical evidence in every case:

- Policies and procedures
- Medical licenses, certifications, and accreditations
- Investigative reports or incident reports;
- Medical records, x-rays, tissue samples, blood samples, and other diagnostic studies
- Photographs
- Pleadings from other lawsuits the person/entity has been a party to
- Licenses applications and applications to professional associations
- Curriculum Vitae
- Medical school transcript
- Documents related to board certification
- Personnel file(s)

A sample set of requests for production to a doctor is included as "Exhibit A" to this paper.

### B. Interrogatories

Be sure to send interrogatories specific to your case. Questions about the following subjects apply to most cases:

- Persons involved in the subject treatment or procedure
- Identity of all physicians associations, and other business entities
- Hospitals privileges
- Complaint/grievance history
- Medical treatises, articles, publications authored
- History of drug/alcohol treatment
- Identity of insurer/policy information
- Date first notified insurer of potential claim
- Previous lawsuits
- Discussions with the patient/patient's family

A sample set of interrogatories to a  
**C. Physical and Mental Examinations**

Texas Rule of Civil Procedure 204 allows a party to compel another party to submit to a physical or mental examination by a qualified professional. A court may only order such an examination for good cause shown and only in situations where the mental or physical condition of a person is in controversy. TEX. R. CIV. P. 204.1 (b).

Mental examinations may not be compelled simply because the plaintiff makes a claim for mental anguish damages. *In re Doe*, 22 S.W.3d 601, 606 (Tex. App.—Austin 2000, orig. proceeding) ("A court may compel a plaintiff to submit to a mental examination only if *the plaintiff asserts a mental injury that exceeds the common emotional reaction to an injury or loss.*") (emphasis in original). Good cause requires the requesting party show: (1) examination is relevant to the issues genuinely in controversy and will or likely to produce relevant evidence; (2) reasonable nexus between the condition in controversy and examination requested; and (3) the information could not be obtained through a less intrusive means. *Id.*

The party requesting the examination must also follow specific procedural steps. First, the motion must be made no later than 30 days before the close of discovery. TEX. R. CIV. P. 204.1(a). Second, the order must be "in writing and must specify the time, place, manner, conditions, and scope of the examination and the person or persons by who it is to be made." TEX. R. CIV. P. 204.1(d).

The plaintiff is not the only party subject to the possible production of physical or mental health information. A plaintiff may move to compel an examination of the defendant's mental or physical state if the plaintiff meets Rule 204.1's requirements.

In *R.K. v. Ramirez*, 887 S.W.2d 836

doctor is included as "Exhibit B" to this paper. (Tex. 1994), the plaintiffs in a medical malpractice action moved to discover the medical and mental health records of the defendant doctor. After *in camera* inspection, the trial court ordered the defendant doctor to sign a release for the plaintiffs to obtain medical records. The Corpus Christi Court of Appeals reviewed the order on mandamus and reversed the trial court's order because the plaintiffs' pleadings did not support finding the doctor's condition in controversy. The plaintiffs amended the pleadings, alleging the doctor's medical and emotional problems affected the care he gave his patient and that the hospital's selection of an unfit and incompetent doctor proximately caused the plaintiffs' injuries. On mandamus, the Supreme Court of Texas held the plaintiffs were entitled to discover some of the defendant doctor's medical and mental health records.

**D. Written Discovery Before the Expert Report**

Chapter 74 places a stay on discovery in medical malpractice cases until the plaintiff serves an expert report and curriculum vitae as required by § 74.351(a). TEX. CIV. PRAC. & REM. CODE § 74.351(s). Three subsets of discovery are excepted from the stay: (1) written discovery under Rule 192.7; (2) depositions on written questions under Rule 200; and (3) discovery from non-parties under Rule 205. TEX. CIV. PRAC. & REM. CODE § 74.351(s).

**E. Substantive Discovery Issues**

You've filed your expert report and you generally have a theory of your case, what other things should you consider when sending out written discovery? Consider some of the topic areas discussed below. Also, don't be afraid

to ask your expert for insight on what documents and physical evidence might have been produced as a result of the incident.

### **1. Missing Physical Evidence**

Do not forget to request physical evidence like tissue samples as soon as possible.

In *Murphy v. Mendoza*, 234 S.W.3d 23 (Tex. App.—El Paso 2007, no pet.), the Mendozas filed suit against two pathologists and a hospital claiming the pathologists were negligent in reading Mr. Mendoza’s bladder biopsy. The Mendozas claimed the pathologists incorrectly concluded cancer was present in both his bladder and his prostate which were both removed as a result of their conclusion. The Mendozas’ attorney requested the original slides from the biopsy for their expert to review. However, the hospital informed them the originals had disappeared. As a result, the Mendozas’ expert was forced to use recuts of the tissue to render his 120 day expert report.

The defendants, of course, objected saying the expert’s reliance on recuts made his report speculative. The trial court disagreed, but the appellate court found a way to justify dismissing the plaintiffs’ claims since because their expert did not rely on the original slides which were lost or destroyed by the defendants.

### **2. Documents to Show Expert Bias**

Texas Rule of Civil Procedure 192.3(e)(5) allows discovery of evidence of expert witness bias. And while an expert witness may be questioned about payment for his services, the discovery of personal financial records sought solely for the purpose of impeachment may be denied. *Russell v. Young*, 452 S.W.2d 434, 436 (Tex.1970).

Interestingly, a witness who admits bias or prejudice may be more protected from

discovery than one who does not. See *Olinger v. Curry*, 926 S.W.2d 832 (Tex. App.—Fort Worth 1996, orig. proceeding) (discovery of expert witness’s tax returns not permitted when the witness admitted testifying for defendants 90% of the time). The *Olinger* court justified its decision, saying:

Subjecting an expert medical witness in a civil case to produce income tax returns merely to show that he is a “defense” doctor, particularly when he has admitted 90% of his work is for defendants, would permit experts on either side of the case to be subjected to harassment and might well discourage reputable experts from accepting employment in other cases.

*Id.* at 835; see also, *In re Weir*, 166 S.W.3d 861 (Tex. App.—Beaumont 2005, orig. proceeding).

Relying on *Olinger* and *Weir*, the plaintiffs in *In re Markis* sought discovery of an expert’s personal financial documents, expert reports, and correspondence from other unrelated cases after the expert denied having any bias in favor of defendants and admitted deriving significant income from litigation. 217 S.W.3d 521 (Tex. App.—San Antonio 2006, orig. proceeding). The *Markis* court refused to allow the discovery, saying:

The basic premise of such reasoning is flawed— the simple denial of bias cannot logically equate to evidence of bias. If that were true, essentially all experts, except those who frankly concede a bias, would

be subjected to discovery . . . .

*Id.* at 525.

So, the Texas Rules allow for a party to discover evidence of bias from an expert

### 3. **Peer Review Privilege**

The Texas Occupations Code provisions related to medical care providers confer a privilege on medical peer review committee records and proceedings. TEX. OCC. CODE § 160.007 ("Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged."). Exceptions are made for anti-competitive actions and civil rights proceedings. TEX. OCC. CODE § 160.007(b).

#### a. **Waiver**

Any person seeking access to peer review information must plead and prove waiver. TEX. OCC. CODE § 160.007(g).

In *Jordan v. Fourth Supreme Judicial Dist.*, surviving parents brought a medical malpractice action against the doctor treating their daughter when she died. They alleged the doctor negligently hired and supervised the nurse that attended to their daughter. The parents also joined the nurse's previous employers, alleging they failed to warn the public and future employers of her incompetence. During discovery, the parents sought hospital documents, including, the nurse's employment history, records of investigations into deaths at her prior place of employment, and minutes of committee meetings for the investigations. Many of the documents sought were in the possession of the Bexar County District Attorney due to a grand jury investigation of the nurse. The court found the defendants failed to carry their

witness. However, so far, experts who admit bias have not been subject to discovery and experts who deny bias have not either.

burden to prove no waiver occurred, and held the privilege was waived for the documents provided to the district attorney.

In *Terrell State Hosp. of Tex. Dept. of Mental Health and Mental Retardation v. Ashworth*, 794 S.W.2d 937 (Tex. App.—Dallas 1990, no writ), the court of appeals affirmed a decision that the state hospital defendant waived the hospital committee privilege attached to a psychological autopsy when it conducted a staff meeting to review the circumstances of a patient suicide to prevent similar events in the future. The document itself was not disclosed to the staff, however, portions of its contents and conclusions were mentioned by the hospital in a response to an inquiry by a state senator.

#### b. **Non-peer review documents**

Further, not all documents are subject to the peer review committee privilege. *See, e.g., Harper v. Cadenhead*, 926 S.W.2d 588 (Tex. App.—Eastland 1995), *subsequent mandamus proceeding*, 927 S.W.2d 24 (Tex. 1996) (documents submitted with doctor's application for staff privileges were discoverable in a medical malpractice action against the doctor and hospital over peer review privilege claims because the documents were kept in the regular course of business and the credentialing committee was not functioning as a peer review committee); *In re Highland Pines Nursing Home, Ltd.*, No. 12-03-00050-CV, 2003 WL 22682356 (Tex. App.—Tyler Nov. 13, 2003, original proceeding)(not designated for publication)(Information contained in nursing home personnel files was not exempt from discovery under medical peer review privilege).

### III. DEPOSITION STRATEGIES

When and if a plaintiff can take depositions in medical malpractice cases has been the subject of much debate. You need to

Originally Texas appellate courts were split on the issue of whether to allow pre-suit depositions in medical malpractice claims. The Second and Twelfth Courts of Appeals allowed Rule 202 depositions in healthcare liability claims. *In re Kiberu*, 237 S.W.3d 445 (Tex. App.—Fort Worth 2007, orig. proceeding); *In re Allan*, 191 S.W.3d 483 (Tex. App.—Tyler 2006, orig. proceeding) *rev'd*, 249 S.W.3d 416 (Tex. 2008). The Fifth, Eleventh, and Fourteenth Courts of Appeals did not. *In re Clapp*, 241 S.W.3d 913 (Tex. App.—Dallas 2007, orig. proceeding); *In re Raja*, 216 S.W.3d 404 (Tex. App.—Eastland 2006, orig. proceeding); *In re Mem'l Hermann Hosp. Sys.*, 209 S.W.3d 835 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding). The Sixth Court of Appeal applied a hybrid solution—allowing pre-suit depositions for questions not targeted at the healthcare provider. *In re Temple*, 239 S.W.3d 885 (Tex. App.—Texarkana 2007, orig. proceeding).

The split was settled by *In re Jorden*, 249 S.W.3d 416 (Tex. 2008), when the Supreme Court of Texas decided to prohibit citizens from investigating potential medical malpractice claims in favor of protecting healthcare providers from having to give oral depositions.

#### B. Notwithstanding Apparently Doesn't Mean Notwithstanding.

Chapter 74, specifically § 74.351(s), places limits on the discovery that can take place prior to filing the 120 day report. The plain language of § 74.351(u) provides an avenue for plaintiffs to obtain a defendant

be aware of the following cases as you proceed with your medical malpractice case.

#### A. Need to Investigate a Claim? *Forgetaboutit...*

healthcare provider's deposition despite the limits placed on discovery by 74.351(s). *See* TEX. CIV. PRAC. & REM. CODE § 74.351(u). It states, "Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served." TEX. CIV. PRAC. & REM. CODE § 74.351(u) (emphasis added). Amazingly, Texas appellate courts confronting the issue seem to have ignored this plain language, opting instead to dismiss the phrase "notwithstanding any other provision of this section" and read the word "deposition" to mean "deposition on written questions."

The issue was first addressed by the Beaumont Court of Appeals in *In re Miller*, 133 S.W.3d 816 (Tex. App.—Beaumont, orig. proceeding). After filing suit but before filing her 120 day report, the plaintiff in *Miller* noticed Dr. Miller's deposition. The trial court compelled the deposition, relying on § 74.351(u), over Dr. Miller's motion to quash. On mandamus, the appellate court ignored the introductory instruction of provision (u) and the plain, well-known meaning of the word "deposition." It then looked to provision (s) of the section and re-defined the word "deposition" to mean "deposition on written questions." This ultimately allowed Dr. Miller to escape deposition until after the plaintiff served her expert report.

The Houston First District Court of Appeals reached the same conclusion in *In re Huag*, 175 S.W.3d 449 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, orig. proceeding). Despite claiming to recognize the phrase "notwithstanding any other provision of this

section” for what it was, the court reached out to provision (s) of the section to justify denying the requested depositions. Dissenting Justice Hanks explained: “Going outside the subsection to interpret its effect renders the phrase ‘notwithstanding any other provision of

*In re Knapp Med. Ctr. Hosp.*, No. 13-09-00381-CV, 2009 WL 2398003 (Tex. App.—Corpus Christi July 31, 2009, orig. proceeding), involved a medical malpractice case against a hospital and its anesthesiologist alleging the two defendants caused the plaintiff to suffer cardiac arrest and brain damage. The plaintiff asserted both direct negligence and vicarious liability against the hospital, and served a report addressing the anesthesiologist’s negligence. As allowed under § 74.351(s) the plaintiff sought written discovery from the hospital prior to the 120 day report deadline. When the hospital refused to timely provide the written discovery, the plaintiff moved to compel the discovery and the deposition of a hospital corporate representative arguing the discovery was necessary to complete the required report. The court of appeal refused to allow the deposition, holding the plaintiff was required to serve the hospital with an expert report on the direct negligence claims prior to taking the deposition.

### C. Effect of Interlocutory Appeals

In *In re Lumsden*, 291 S.W.3d 456 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2009, orig. proceeding), a defendant doctor filed a mandamus proceeding to overturn an order denying his request to stay discovery until the resolution of his interlocutory appeal on the denial of his motion to dismiss. After the trial court denied the defendant’s motion to dismiss, the plaintiff served him and other defendants with deposition notices. On mandamus, the doctor argued § 74.351(s) required his

this section’ meaningless.” *Huag*, 175 S.W.3d at 457. The dissent also observed that no part of subsection (u) made: “(1) parties are immune from being deposed under this subsection or (2) the two depositions are limited to only non-parties.” *Id.*

deposition as a health care defendant stayed. The plaintiff responded, the section did not apply because she timely served an adequate expert report and curriculum vitae. The appellate court agreed with the defendant, and allowed him to further delay the case while his interlocutory appeal on the sufficiency of the expert report was pending. The expert report’s sufficiency was confirmed on interlocutory appeal three months after the mandamus decision. *Methodist Hosp. v. Shepherd-Sherman*, 296 S.W.3d 193 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2009, no pet.).

### D. Expert in the Hot Seat: Now What?

You’ve served your expert report, done some discovery, designated experts, and taken the fact witness deposition. It is now time to put the experts in the hot seat. The following cases give examples of areas to address when taking direct testimony from your expert and when planning a cross-examination of the other side’s expert.

#### 1. Qualifications—Generally

Texas Civil Practices and Remedies Code § 74.401 sets out the specific requirements for experts in medical malpractice cases against physicians. To testify about whether a doctor deviated from the standard of care the expert must be a doctor who: (1) is practicing medicine at the time of testimony or of the incident; (2) has knowledge of the standard of care for “diagnosis, care, or treatment” of the condition at issue; and (3) be qualified on the basis of training or experience to offer an expert opinion on the standard of care. TEX.

CIV. PRAC. & REM. CODE § 74.401(a). Doctors who train residents or students at an accredited school or serve as consultants to other doctors providing direct patient care are

In *Benavides v. Garcia*, 278 S.W.3d 794 (Tex. App.—San Antonio 2009, pet. denied), an OB-GYN practicing *locum tenens* (as a substitute for other OB-GYN's) was qualified to opine whether the defendant doctor violated the standard of care by failing to diagnose the plaintiff's pregnant wife with preeclampsia. The defendant argued the expert was not "actively practicing medicine" as required by § 74.401. The court disagreed, stating: "We believe allowing a locum tenens physician to act as an expert is not inconsistent with allowing consultants and teachers to act as experts." *Id.* at 797.

In *Clark v. HCA, Inc.*, 210 S.W.3d 1 (Tex. App.—El Paso 2005, no pet.), the court did not allow hematologist to testify against treating physicians and hospital because there was no evidence he had training, experience, or familiarity with the drug at issue, other anticoagulant medications, deep vein thrombosis, and the diagnosis/treatment of compartment syndrome or hematoma (all issues in the case). The court explained the doctor's specialty in hematology "may well qualify him to render an opinion but the record is silent as to this current role as a hematologist or his experience" with the condition and medications at issue in the case. *Id.* at 8.

Conversely, in *Terry A. Leonard, P.A. v. Glenn*, 293 S.W.3d 669 (Tex. App.—San Antonio 2009, pet. filed), a nephrologist was allowed to testify against a family practice physician and a physician assistant in an acute care setting. The evidence before the court showed the expert had experience proscribing the drug at issue (Indomethacin) and with individuals suffering from the condition at issue (gout in an individual with renal disease).

Of course, in *Andrade Garcia v.*

"practicing medicine" for purposes of the statute. TEX. CIV. PRAC. & REM. CODE § 74.401(b).

*Columbia Med. Ctr. of Sherman*, 996 F.Supp. 617 (E.D. Tex. 1998), a medical school graduate who had not completed residency and not received her physician's license, was not qualified to offer expert testimony in a medical malpractice case.

## 2. Scope of Expertise—*Related Specialties*

In *Silvas v. Ghistas* 954 S.W.2d 50 (Tex. App.—San Antonio 1997, writ denied), the court held an orthopedic surgeon was qualified to testify to the standard of care for a radiologist. The court explained it was common knowledge that orthopedic surgeons and radiologists worked closely together and, as such, their specialties were sufficiently intertwined to allow testimony.

In *Wissa v. Voosen*, 243 S.W.3d 165 (Tex. App.—San Antonio 2007, pet. denied), the court allowed an orthopedic surgeon to testify as an expert on the standard of care for an anesthesiologist during a physical examination. The expert did not criticize the defendant's administration of anesthesia. Instead, it criticized the defendant's actions while performing the physical examination and history on a pre-operative patient. The court found the orthopedic surgeon qualified because the evidence showed he had vast experience completing pre-operative physical examinations and histories on patients in a similar condition as the plaintiff.

In *House v. Jones*, 275 S.W.3d 926 (Tex. App.—Dallas 2009, pet. denied), the plaintiff alleged injuries after the defendant doctor failed to adequately test for cancer after performing a needle biopsy on a shoulder lesion. The court allowed a medical oncologist to offer expert opinions on the standard of care

for an orthopedic surgeon based on evidence that obtaining and reviewing pathology reports as part of diagnosis and treatment was standard to both the field of oncology and the field of orthopedics.

In *Chistus Health Southeast Tex. v. Broussard*, 267 S.W.3d 157 (Tex. App.—Beaumont 2008, no pet.), a neurologist was precluded from offering expert testimony about the standard of care for an internal medicine doctor treating pneumonia. The

In *Chester v. El-Ashram*, 228 S.W.3d 909 (Tex. App.—Dallas 2007, no pet.), a patient filed suit after the defendant doctor failed to timely intubate him when he was admitted to the hospital with serious respiratory problems. The trial court granted no-evidence summary judgment against the patient after striking the patient’s expert witness. The patient’s expert testified he had not done an intubation procedure in the five years preceding the incident. The appellate court affirmed, holding the trial court did not err striking an expert who had not performed the subject procedure in several years.

In *Larson v. Downing*, 197 S.W.3d 303 (Tex. 2006), the Supreme Court of Texas affirmed a trial court decision to exclude the testimony of a doctor who had not performed the type of surgery at issue in eleven years at the time the claim arose. The court explained the expert was “too far removed from surgical practice and even from teaching.” *Id.* at 305.

In *Clark v. Mem. Hermann Hosp. Sys.*, No. 01-02-01139-CV, 2004 WL 440422 (Tex. App.—Houston [1<sup>st</sup> Dist.] Mar. 11, 2004, no pet.) (not designated for publication), a doctor who relinquished his privileges to perform cardiac surgery over ten years before the plaintiff’s claim arose was not qualified to offer expert testimony about mitral valve replacement surgery. The evidence showed the doctor had never even performed the type of valve replacement surgery at issue.

expert was also unqualified to testify about the standard of care for an attending physician’s discharge order. The only evidence of expert qualifications presented addressed neurological conditions, not respiratory conditions like the ones at issue in the case.

### **3. Recency Performing Procedure— When Experts Get Rusty**

### **4. Non-physician Experts**

Section 74.401(d) and § 74.402(d) provide a trial court judge may properly consider the expert testimony of a non-medical expert if the court “determines that there is a good reason to admit the expert’s testimony.” TEX. CIV. PRAC. & REM. CODE §§ 74.401, 74.402.

In *Packard v. Guerra*, 252 S.W.3d 511 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2008, pet. denied), the court allowed the expert report of a corporate lawyer to define and explain what the defendant medical association promised to do for the hospital emergency room (allegedly manage staff in the ER with doctors) and the level of responsibility each had in fulfilling that promise. The expert’s opinions supported the plaintiff’s direct liability claims against the defendant medical association. The court explained the lawyer’s report, “connected the dots” between the companies and doctors in the lawsuit, and not allowing such testimony would place plaintiffs in a “Catch-22” position when bringing cases against corporate health care entities with layered corporate structures and relationships.

### **5. Do Your Research— Using Treatise and Other Publications**

The Texas Rules of Evidence on hearsay



allow attorneys to cross-examine experts with treatises that are established as reliable authorities on the topic at issue. See TEX. R. EVID. 803(18). Statements admitted may be read into evidence but may not be received as exhibits. *Id.* Courts in medical malpractice cases have dealt with this rule in a variety of ways. In order to impeach an expert witness with a learned treatise, the witness must recognize the treatise as authoritative or have relied on the publication. *Carter v. Steere Tank Lines, Inc.*, 835 S.W.2d 176, 182 (Tex.

In *Durst v. Hill Country Mem. Hosp.*, 70 S.W.3d 233 (Tex. App.—San Antonio 2001, no pet.), the plaintiffs brought a medical malpractice suit against the defendant hospital after nurses caused a severe infection by following inappropriate procedures to insert an IV. At trial, the defendant offered testimony from multiple doctors as expert witnesses, and the plaintiffs sought to impeach those witnesses with learned treatises. The trial court refused to allow the impeachment, and the appellate court found the trial court committed harmless error if it committed error at all. The court justified its opinion on the grounds the plaintiffs' expert testified and referred to the learned treatises on the same issue.

Other cases on this issue include: *Kahanek v. Rogers*, 12 S.W.3d 501 (Tex. App.—San Antonio 1999, pet. denied) (Physician's Desk Reference was a learned treatise and not a compilation of market material); *Robinson v. Warner-Lambert*, 998 S.W.2d 407 (Tex. App.—Waco 1999, no pet.) (court could not take judicial notice that an article in a medical association journal met the learned treatise exception to the hearsay rule without expert testimony).

## 6. Bias, Prejudice, and Payment

Texas Rule of Evidence 613(b) allows parties to offer proof of bias to impeach the

App.—Amarillo 1992, writ denied).

In *Mauzey v. Sutliff*, 125 S.W.3d 71 (Tex. App.—Austin 2003, pet. denied), parents brought a medical malpractice action after their daughter suffered a respiratory disorder after birth. The parents were allowed to use tables from a learned treatise to cross-examine the defendant doctor. However, the trial court did not err by prohibiting the parents from displaying the tables on an overhead projector during cross-examination.

credibility of witnesses. TEX. R. EVID. 613(b).

The rule states: "If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted." *Id.* A party may cross-examine an expert medical witness about the number of times he has testified in lawsuits and his payments for testifying to establish bias or prejudice. *In re Plains Marketing, L.P.*, 195 780 (Tex. App.—Beaumont 2006, orig. proceeding) (citing *Russell v. Young*, 452 S.W.2d 434 (Tex. 1970)).

## 7. Miscellaneous Areas for Cross-Examination—*The Kitchen Sink*

Other areas to address when cross-examining an expert in a medical malpractice case include:

- Lack of medical board certification (*French v. Brodsky*, 521 S.W.2d 670 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1975, writ ref'd n.r.e.))
- Hospital privileges
- Medical record entries (*Moore v. Standard Fire Ins. Co.*, 461 S.W.2d 213 (Tex. App.—Amarillo 1970, writ ref'd n.r.e.))
- Prior criminal record (TEX. R. EVID. 609);
- Relationship to defendant healthcare provider



## EXHIBIT A

REQUEST NO. 1: All diagrams, photographs, videotapes and x-rays relevant to the incident made the basis of this litigation.

RESPONSE:

REQUEST NO. 2: Any and all statements made by the Plaintiff or Plaintiff's family members.

RESPONSE:

REQUEST NO. 3: Copies of all investigative reports or results of investigations regarding the incident made the basis of this suit.

RESPONSE:

REQUEST NO. 4: Any and all medical records generated in connection with the treatment given to Plaintiff, including but not limited to office notes, forms completed by you for submission to any third party (other than your attorney), x-rays, diagnostic studies and reports, prescription records, any correspondence from you or any person on your behalf, all statements of charges, invoices or receipts with respect to the treatment which Plaintiff received from Defendant.

RESPONSE:

REQUEST NO. 5: Originals of any x-ray, thermogram, mammogram, sonogram, tissue sample, slide or other diagnostic testing performed.

RESPONSE:

REQUEST NO. 6: A true and correct copy or complete list of each license, certification, or accreditation issued to Defendant at any time after graduation from medical school, including but not limited to information regarding staff privileges at any hospitals or other health care institutions.

RESPONSE:

REQUEST NO. 7: A copy of the pleadings from each and every lawsuit to which you have ever been a defendant.

RESPONSE:

REQUEST NO. 8: A true and correct copy of each application for license to practice medicine and each application for membership in a professional association which Defendant has completed.

RESPONSE:

REQUEST NO. 9: A true and correct copy of Defendant's curriculum vitae.

RESPONSE:

REQUEST NO. 10: A copy of Defendant's medical school transcripts showing the grades made by Defendant while attending medical school.

RESPONSE:

REQUEST NO. 11: The complete medical records of Defendant for the last three (3) years.

RESPONSE:

REQUEST NO. 12: License(s) or Certificate(s) to dispense and/or prescribe controlled substances and/or other drugs issued to Defendant by the United States Department of Justice and/or the Texas Department of Public Safety or from any other state.

RESPONSE:

REQUEST NO. 13: Any and all certificates and other documents relating to Defendant's specialty and/or sub-specialty board certifications in any field of medicine, surgery or other profession including,

but not limited to the following:

- (a) Application for certification;
- (b) Certificate(s) or document(s) of Board Certification;
- (c) Suspension, revocation or refusal of renewal of any certificate(s);
- (d) By-laws, rules, regulations or ethical codes or standards of any specialty and/or sub-specialty board in which Defendant is or has applied for and/or been issued a certificate; and
- (e) Correspondence with specialty or sub-specialty boards regarding any of the above.

**RESPONSE:**

**REQUEST NO. 14:** Any and all office procedure manuals concerning patient care and treatment in Defendant's office at the times relevant to the lawsuit in question.

**RESPONSE:**

**REQUEST NO. 15:** Any and all documents, memoranda, records, manuals, booklets or written material of any kind used by, owned by you on or before the date you first treated Plaintiff setting forth or pertaining to the procedures, methods, techniques, or guidelines with regard to treating patients exhibiting the signs and symptoms exhibited by Plaintiff.

**RESPONSE:**

**REQUEST NO. 16:** All documents, notes, records, reports, or written materials of any kind which support your contentions in this case.

**RESPONSE:**

**REQUEST NO. 17:** Any and all published treatises, periodicals, books, or pamphlets (or portions or excerpts therefrom) that you refer to or referred to, concerning treatment of patients exhibiting signs and symptoms similar to those of Plaintiff.

**RESPONSE:**

**REQUEST NO. 18:** Any and all contracts, agreements, documents, reports, memoranda, records, or written materials of any kind which specify the contractual relationship that existed on the date of the incident made the basis of this lawsuit between you and any other medical practitioner, health care institution, medical corporation, professional corporation, P.A., P.C., or health care practitioner.

**RESPONSE:**

**REQUEST NO. 19:** All documents, notes, records, or written materials of any kind pertaining to the privileges granted you by any hospital (and in effect at the time of the occurrence made the basis of this suit).

**RESPONSE:**

**REQUEST NO. 20:** All documents, notes, records, reports, or written materials of any kind pertaining to any investigation or inquiry into your conduct by any hospital committee, State Board of Medical Examiners, County Medical Society, any agency dealing with substance abuse, and/or any government agency.

**RESPONSE:**

**REQUEST NO. 21:** All documents, records, transcripts, recordings, and/or memoranda you provided gratuitously to any hospital committee, peer review committee, medical organization committee, or similar group that reviewed the medical records of Plaintiff and any documents, letters, or memoranda between you and any such committee.

**RESPONSE:**

**REQUEST NO. 22:** Any and all medical records pertaining to Plaintiff which are in your possession or subject to your control.

**RESPONSE:**

REQUEST NO. 23: All documents which would reflect your present net worth.

RESPONSE:

REQUEST NO. 24: Any videotapes of any surgery performed on Plaintiff.

RESPONSE:

REQUEST NO. 25: Any videotapes used to explain or demonstrate surgeries to your patients.

RESPONSE:

REQUEST NO. 26: All documents pertaining to the reputation, character, credibility, arrest, trial, or conviction of the Patient or any Plaintiff or any member of the family of the Patient or any Plaintiff, or any person listed by any Plaintiff as a person with knowledge of relevant facts or as one of Plaintiff's witnesses.

RESPONSE:

REQUEST NO. 27: Every document containing or referring to any agreement, settlement, "gentleman's agreement" or understanding with any other person concerning the subject matter of this suit.

RESPONSE:

REQUEST NO. 28: Every document and tangible thing (including all exhibits or demonstrative aids) you intend to offer into evidence or display before the jury during any phase of the trial of this case.

[NOTE: You need not produce enlargements or duplicates of documents produced in response to any other request in this request. Also, if you have entered into an agreement with all other counsel for exchanging such exhibits at a mutually agreeable time, you need not respond to this request except as required by such agreement.]

RESPONSE:

REQUEST NO. 29: All policies and/or procedures used by your office to bill insurance companies and/or Medicaid and/or Medicare at the times relevant to this lawsuit.

RESPONSE:

REQUEST NO. 30: Your personnel file with any entity with whom you were employed at the time of the incident in question.

RESPONSE:

REQUEST NO. 31: All correspondence between you and any other health care provider who treated Plaintiff.

RESPONSE:

REQUEST NO. 32: All correspondence between Plaintiff and you.

RESPONSE:

REQUEST NO. 33: All learned treatises you may offer at the time of trial.

RESPONSE:

REQUEST NO. 34: All incident reports, unusual occurrence reports or similar reports relating to the care and treatment of Plaintiff.

RESPONSE:

REQUEST NO. 35: All applications and renewal correspondence, including but not limited to, supporting information such as letters of recommendation and reference, submitted by you in applying and/or the maintaining of medical staff or other privileges at any hospital with whom you presently



have privileges.

**RESPONSE:**

**REQUEST NO. 36:** All adverse Reaction Reports, Drug Experience Reports or similar reports relating to the care and treatment of Plaintiff.

**RESPONSE:**

**REQUEST NO. 37:** Written, taped or transcribed statements from Plaintiff and/or Plaintiff's family.

**RESPONSE:**

**REQUEST NO. 38:** All documents you contend bears Plaintiff's handwriting and/or signature which relate to the incident in question.

**RESPONSE:**

**REQUEST NO. 39:** All documents you contend bears the handwriting and/or signature of any member of Plaintiff's family.

**RESPONSE:**

**REQUEST NO. 40:**

Photographs, etc.: Photographs, slides, illustrations, motion pictures and/or video tapes which relate to or depict the following:

- a. Any aspect of your care and treatment of Plaintiff;
- b. The condition of Plaintiff, before and/or after the occurrence forming the basis of this lawsuit;
- c. Demonstrating the occurrence forming the basis of this lawsuit;

- d. Demonstrating any occurrence similar to the occurrence forming the basis of this lawsuit; and
- e. Other operations, procedures or treatments like or similar to that performed on Plaintiff.

**RESPONSE:**

**REQUEST NO. 41:** A list, written inventory or other written record of the video tapes, slides, etc. which you maintain in your video/audio library.

**RESPONSE:**

**REQUEST NO. 42:** Any written medical, hospital, anesthetic or surgical information or literature given to Plaintiff by you, or available to Plaintiff, in your office. (Example: medical/hospital brochures).

**RESPONSE:**

**REQUEST NO. 43:** All lists of medical terminology abbreviations used by you, for the care of patients like or similar to Plaintiff with conditions like or similar to those for which they were admitted to the hospital.

**RESPONSE:**

**REQUEST NO. 44:** The following documents relating to your charges for professional services rendered and medical and drug products furnished to Plaintiff:

- a. Bill or statement of fees;
- b. Ledger;
- c. Health insurance claim forms;
- d. Charge slips, charge tickets, billing memoranda and other supporting documentation relating to the charges or bills assessed by you to Plaintiff; and

- e. List of explanations of billing codes which you use in bills, ledgers, statement of fees, correspondence, checks, receipts or other materials relating to your billing system.

**RESPONSE:**

**REQUEST NO. 45 :** Insurance Agreements or Information Regarding Self-Insurance: Any policy or policies of liability or professional liability insurance, primary, excess or otherwise against which Defendant has made or may make a claim for a defense and/or coverage because of facts alleged by Plaintiffs on file in this cause, as well as any documentation or information regarding self-insurance arrangements of Defendant. If any such policy is an aggregate limits policy, then produce the correspondence from any claimant and suit papers for claims brought within the policy year.

**RESPONSE:**

**REQUEST NO. 46:** The following written notice of claim letters to you sent pursuant to Texas Civil Practices and Remedies Code Chapter 74.

- a. The written notice of claim letter sent to you by Plaintiff or Plaintiff's attorney in this lawsuit;
- b. All letters sent to you from any patient or their relatives making complaints, criticisms or claims against you relating to the care and treatment of patients within the past five years.

**RESPONSE:**

**REQUEST NO. 47:** Summaries and Voluminous Writings, Etc.: (a) Any charts, summaries or calculations of the contents of any voluminous writings, recordings or photographs as defined by TEX. R. EVID. 1001, which cannot conveniently be examined in court, and which you may offer as evidence at the trial of this cause pursuant to the TEX. R. EVID. 1006 or any other law; and (b) the contents of voluminous writings, recordings or photographs which you may present in the form of such summaries, charts or photographs as described in (a) above.

**RESPONSE:**

**REQUEST NO. 48:** The following physical objects and/or tangible things which you have preserved which relate to the occurrence or damages in question:

- a. All tissues, tissue blocks, fluids, and/or slides containing tissues or fluids in your possession pertaining to Plaintiff;
- b. Written inventory of stored tissues and fluids pertaining to Plaintiff;
- c. Test results, raw data, notes and rough file relating to (a) and (b) of this Request; and
- d. Any and all medical, surgical and/or other hospital equipment devices, machinery, instruments or any other physical objects and owners and/or operators manuals for same.

**RESPONSE:**

**REQUEST NO. 49:** If you are aware of any facts or information, or if you hold any opinion, which does or might implicate any pre-existing, co-existing or subsequently existing condition or conduct which caused or contributed to cause the occurrence(s) in question made the basis of this lawsuit, then any materials and documents including, but not limited to all letters, documents, reports, memos, notes, photographs, objects or other tangible thing which in any way relate(s) to the facts, information or opinion in question.

**RESPONSE:**

**REQUEST NO. 50:** All documents regarding, discussing, or pertaining in any way, to any policy or procedure manuals pertaining to any care procedure or medication administered to Plaintiff.

**RESPONSE:**

**REQUEST NO. 51:** All documents regarding, discussing, or pertaining in any way to any internal or external standards, policies, procedures, or requirements following by you or observed by you during the course of your care of Plaintiff.

**RESPONSE:**

**REQUEST NO. 52:** Any and all personal notes or log books kept by any person who treated or provided any medical care to Plaintiff.

**RESPONSE:**

**REQUEST NO. 53:** A copy of the personnel file of all nurses and technicians or other employees who cared for or were present during the care of Plaintiff.

**RESPONSE:**

**EXHIBIT B**

**INTERROGATORY NO. 1:** Please state your full name, current residence address, current work address, work and home telephone number, date of birth, social security number, and medical license number(s).

**ANSWER:**

**INTERROGATORY NO. 2:** Please set forth in detail the procedure(s) you performed on and/or the treatment(s) you rendered to or ordered for Plaintiff, stating:

- (a) The procedure/treatment selected, and why it was selected, including any and all signs, symptoms, or conditions demonstrated by Plaintiff;
- (b) Alternative procedure/treatment modalities available and, if alternatives existed and were ruled out, why those alternatives were ruled out;
- (c) Every reason known to you for that care, treatment and/or operation.

**ANSWER:**

**INTERROGATORY NO. 3:** Describe in detail all symptoms, physical signs, x-ray results, laboratory test results, electrocardiographic results, and other objective test results which you referred to, considered, and/or relied upon in making your decision to utilize the procedure(s) and/or treatment(s) described in your response to the preceding Interrogatory.

**ANSWER:**

**INTERROGATORY NO. 4:** Identify all health care providers, including physicians, nurses, and/or other medical personnel, who assisted you in rendering medical, radiological, pathological and/or surgical services to Plaintiff.

**ANSWER:**

**INTERROGATORY NO. 5:** At the time of the occurrence in question, if you were associated with, employed by, or involved in any way with any partnership, professional corporation, or other medical practitioner, please identify each such person or entity, the effective dates of the arrangement, whether such arrangement was oral or written, and details of such arrangement, including, for each professional corporation or professional association, the state of incorporation, the registered agent's name and address, the date of incorporation, and the date of dissolution, if applicable.

**ANSWER:**

**INTERROGATORY NO. 6:** If you have been convicted, within the last ten (10) years, of a felony or a criminal offense involving moral turpitude, then state the nature of each such offense, and the date and place where you were charged or convicted of each such offense.

**ANSWER:**

**INTERROGATORY NO. 7:** State the name(s) and address(es) of each hospital, clinic, or other health professional facility or institution with which you hold or have ever held medical staff privileges or other affiliation, including your service as a student, house officer, or medical staff member, and as to each such hospital, clinic, or other health facility or institution, indicate the nature of your medical staff privileges or affiliation, the inclusive dates thereof and your title(s). Also state if any of your privileges have ever been denied, suspended, revoked, amended, restricted, altered, or modified in any manner whatsoever, regardless of whether the modification, amendment, etc., was in writing or oral.

**ANSWER:**

**INTERROGATORY NO. 8:** If you have ever had a complaint or grievance filed against you with any federal or state medical or drug licensing or certifying agency, board or entity or any medical, surgical or other professional society, association or organization, then state:

- (a) the name(s), address(es) and telephone number(s) of the organization(s) where each

complaint or grievance was filed, and the date(s) each complaint or grievance was filed;

- (b) the name(s), address(es) and telephone number(s) of each person or entity who filed each complaint or grievance against you;
- (c) a detailed description of the nature of each complaint or grievance against you; and
- (d) the final disposition of each complaint or grievance, and the date(s) of each such disposition.

**ANSWER:**

**INTERROGATORY NO. 9:** List all medical articles, journals, treatises, medical books, abstracts, speeches, and/or presentations that you have authored and/or contributed to, including the full library citation for each.

**ANSWER:**

**INTERROGATORY NO. 10:** State the name and address of each and every medical doctor, osteopath, or other practitioner of the healing arts, specifically including but not limited to psychiatrists, psychologists, or other counselors seen by you in the three (3) years period prior to the incident in question.

**ANSWER:**

**INTERROGATORY NO. 11:** If you have been examined and/or treated for any alcohol-related, drug-related or substance abuse-related problem within the past ten (10) years, please state the nature of said problem and the dates of said examination and/or treatment.

**ANSWER:**



**INTERROGATORY NO. 12:** State the following with regard to your qualifications as a doctor, and/or other professional status:

- (a) Name and addresses of all colleges and/or universities attended, and date of attendance and graduation; and
- (b) Name(s) and address(es) of medical school(s) and/or other professional schools attended, date(s) of attendance and graduation, and any degree(s) or certificate(s) you received; and
- (c) Name(s) and address(es) of all hospitals or other institutions where you served an internship and date(s) of internship training and completion; and
- (d) State and describe any other post-doctoral education and/or training, including any residency(ies), fellowship(s), preceptorship(s) or other training, which you have received in medicine or any other field, the date(s) of such education and/or training, the date(s) of completion, and any degree(s) and/or certificates) you received; and
- (e) State and describe any other medical, surgical, and/or other professional qualifications and training which you have acquired, and which is not described above, including, but not limited to, all continuing medical and/or professional education or development programs which you have attended or in which you have participated; and
- (f) Please state if you received a grade of "D" or "F" (or their equivalent) while attending medical school.

**ANSWER:**

**INTERROGATORY NO. 13:** Please state the date on which you, or anyone acting in your behalf, first notified your professional liability insurance carrier of the occurrence in question, and/or the possibility that a claim arising out of the occurrence in question might be made.

**ANSWER:**

**INTERROGATORY NO. 14:** Other than your lawyers and insurance company representatives, identify every person with whom you have discussed, or with whom you have corresponded, regarding Plaintiff's case, care, treatment, injuries, condition, and/or lawsuit.

**ANSWER:**

**INTERROGATORY NO. 15:** If you consumed any alcoholic beverages or drugs within twenty-four (24) hours of operating on Plaintiff, please state the nature of the alcoholic beverage and/or drugs, the quantity consumed, and the identity of those people present at the time of said consumption.

**ANSWER:**

**INTERROGATORY NO. 16:** If you have ever been a party in a lawsuit, including a medical malpractice lawsuit, other than this case, then identify each lawsuit by name of the parties and the court number, the place (state and county) where each suit was filed, and the nature and date of each lawsuit.

**ANSWER:**

**INTERROGATORY NO. 17:** State whether anyone discussed the incident(s) with the Patient or any member of the Patient's family, and, if so, please identify each person involved in each such conversation, state the time and place of each and every such occasion, and state what was said by each person involved in said conversation.

**ANSWER:**

**INTERROGATORY NO. 18:** Identify any and all documents relating to the incident(s) described in Plaintiff's pleading that have been destroyed, lost, or altered (i.e., changed in any manner after the document was dated) since the incident(s) occurred, and state when and under what circumstances the destruction, loss, or alteration occurred.

ANSWER:

INTERROGATORY NO. 19:

- (a) For each Board certification that you hold, state the specialty, the correct name and business address of the granting entity, the date you first achieved this status and dates of any subsequent renewals.
- (b) If you have ever unsuccessfully attempted Board certification, state the specialty, the correct name and business address of the corresponding certification entity, the date(s) of the unsuccessful attempt(s) and the reason each was unsuccessful.
- (c) For each certification that you hold (including, but not limited to, BCLS, ACLS, or ATLS), state the type of certification, the correct name and business address of the conferring entity, the date you first achieved the certification, and dates of any subsequent renewals.
- (d) If you have ever unsuccessfully attempted any certification (including, but not limited to, BCLS, ACLS, or ATLS), state the type of certification, the correct name and business address of the conferring entity, the date(s) of the unsuccessful attempt(s) and the reason each was unsuccessful.

ANSWER:

INTERROGATORY NO. 20: Do you claim that any expert designated by the Plaintiff is not qualified pursuant to *Robinson*? If so, state the basis for any such claim.

ANSWER:

INTERROGATORY NO. 21: Do you claim that any expert report filed by the Plaintiff is not sufficient under Texas Civil Practices and Remedies Code Chapter 74? If so, state the basis for any such claim.

ANSWER:

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# **DISCOVERY TIPS AND DEPOSITION**

## **STRATEGIES**

Andrew B. Sommerman

Special thanks to Heather Long



