Medical Experts - Start to Finish.

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1. Scope of Discovery - In General.

The Indiana Rules of Trial Procedure provide the scope of discovery as follows: (1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (IRTP, 26(B)(1)).

2. Testifying Expert Witness.

There are certain provisions of the Indiana Rules of Trial procedure concerning discovery of expert witnesses and their opinions. The distinction is made between expert witnesses that are retained in anticipation of litigation or trial. The Rules provide that the identity of such expert witnesses and their opinions are discoverable as follows:

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (B)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(a) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (B)(4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

3. Consulting Expert Witness.

An expert witness that has not been formally retained in anticipation of trial is known as a consulting witness. Such a consulting witness, and the witness opinions, are generally not discoverable. The Indiana Rules of Trial Procedure provide as follows:

(b) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same

subject by other means.

The identity and opinions of a consulting non-medical expert witness are discoverable only upon the following showing:

a. The showing of exceptional circumstances;
b. Under which it is impracticable for the party seeking discovery; and,
c. To obtain facts or opinions on the same subject by other means.

However, the identity of a consulting medical expert is discoverable pursuant to Trial Rule 35(B) as a Report of a Licensed or Certified Examiner (commonly known as an Independent or Defense Medical Examination:

(B) Report of licensed or certified examiner.

(1) If requested by the party against whom an order is made under Rule 35(A) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examiner setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

4. Who Pays the Expert's Bill?

General guidance in the payment of fees and expenses with respect to the disclosure of an expert witness opinions is provided in the Indiana Rules of Trial Procedure. Absent a showing of manifest injustice, the party seeking discovery shall pay the reasonable fee for time spent in responding to discovery. The Rule provides as follows:

(c) Unless manifest injustice would result,

(i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (B)(4)(a)(ii) and (B)(4)(b) of this rule; and

(ii) with respect to discovery obtained under subdivision (B)(4)(a)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (B)(4)(b) of this rule the court shall require, the party seeking discovery to pay the

other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

5. What materials should you provide to the expert witness?

As set forth above, any information provided to an expert witness is discoverable. Such information may include notes generated from telephone calls or file reviews; e-mail; case summary; depositions; articles; and, attorney retention letters. An expert should be provided all materials necessary to lay a proper foundation for the expert opinion in a form that is admissible. Information that should not be provided to an expert witness includes confidential attorney client materials; attorney opinions as to the strength and weaknesses of the case; or, any information suggesting that the expert has an interest in the outcome of the case.

6. Expert witness engagement letter.

At the outset of retention of an expert witness, an engagement letter should be provided. The engagement letter should be used whenever an expert is retained. Typically, the expert will provide a contract or engagement letter of their own as well as a fee schedule. Such engagement letter specifies the experts role; billing schedule; and, other issues that are necessary for a compatible and productive relationship. Such topics to be included in an expert engagement letter are set forth below:

Dear Expert:

This letter will confirm that our office has retained you as a consulting expert only on the above captioned case. Enclosed with this letter is the retainer for your services and the following materials related to this case:

{herein insert detailed list of what is being sent: document, number of pages, dates, etc.}

In order to make sure that there is no misunderstanding of what our office expects from you by way of your professional services I would request that you comply with the following directives in your work on this case:

A. Preserve all written or computer generated material that you compile in your work on this case;

B. Keep all information in your file and all information that you obtain from my office or from any other source confidential as such information is to be used solely for the benefit of my client.

C. You agree to not consult with anyone who has any interest adverse to my client in this case

D. You agree to keep the fact of this consultation confidential

E. You agree not to prepare any reports or drafts of reports without first obtaining approval from myself or another attorney from my office.

F. You agree to return all materials of whatever nature that you compile in this consultation to my office at the end of this engagement.

G. You agree to utilize the methodologies and procedures considered to be reliable in your field of expertise in your work on this case.

7. How Will Experts Report Their Findings?

After an expert has reviewed the case, collected all information and formed an admissible opinion, the same will be shared with counsel in the following forms:

A. Telephone conversation.

B. Written report.

C. Discovery responses.

D. Deposition.

Such disclosure may include anatomical models, graphs, medical summary, medical illustration or other demonstrative aids.

Before any written report is issued, the following checklist may be used to lay a proper foundation for admissibility of the same:

1. First report should state: "Preliminary, based on incomplete information and subject to change."
2. Should cover as many Daubert keys as possible: general acceptance of methods and procedures used; is result testable?; error concept applicable to opinions; based on peer review articles if applicable and ATTACH ALL SUCH ARTICLES RELIED UPON BY THE EXPERT.
3. Report should cover all opinions
4. Expert understands his/her right and duty to supplement the report when opinions in the report change
5. Attached all applicable learned treatises to the final report that expert considers authoritative re the opinions expressed in the report; these can be read to the jury on direct and the opposing expert can be cross-examined about these sources.

A sample discovery request to an opposing medical expert is set forth below:

PLAINTIFF, [Client-First Name] [Client-Middle Name] [Client-Last Name]'S EXPERT WITNESS INTERROGATORIES
PROPOUNDED TO THE DEFENDANT, [Defendant-First Name] [Defendant-Middle Name] [Defendant-Last Name]

Comes now the Plaintiff, [Client-First Name] [Client-Middle Name] [Client-Last Name], by counsel, and propound the following written Interrogatories to be answered by the Defendant, [Defendant-First Name] [Defendant-Middle Name] [Defendant-Last Name], within thirty (30) days after service thereof, based upon his/her/their own knowledge, that of his/her/their attorney, anyone acting in his/her/their behalf, and anyone having an interest in the outcome of this lawsuit; said Answers to be prepared under oath and to be amended from time to time by the Defendant to the end that any new information may be promptly available to the Plaintiff.

I. PRELIMINARY INSTRUCTIONS

1. In answering these Interrogatories, you are required to furnish all information that is presently available to you that can be obtained through reasonable inquiry, including information in the possession of your attorneys or other persons directly or indirectly employed by, or connected with, you or your attorneys, and anyone else otherwise subject to your control.

2. Answer each Interrogatory separately and fully, in writing, under oath, unless it is objected to, in which event the reasons for the objections must be stated in lieu of the answer.

3. Each Interrogatory is intended to, and does, request that each and every part and particular thereof be answered as though it were the subject, and were asked by, a separate Interrogatory.

4. If these Interrogatories cannot be fully answered, answer to the extent possible, specify the reasons for the inability to answer the remainder, and state what

information and knowledge you have regarding the unanswered portion.

5. Pursuant to Trial Rule 26(E) of the Indiana Rules of Procedure, you are under a continuing duty to supplement your response to the following interrogatories with respect to any questions directly addressed to the identity of persons having knowledge of discoverable matters, or to be called as an expert witness at trial, the subject matter to which he is expected to testify, and the substances of his testimony, and to supplement responses to the following Interrogatories if you obtain information upon the basis which:

A. You know the responses were incorrect when made; or,

B. You know that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

II. DEFINITIONS

1. “You”, “your”, “yours”, or “Defendant” as referred to herein means Defendant, [Defendant-First Name] [Defendant-Middle Name] [Defendant-Last Name], its agents and representatives.

2. “Defendant” as referred to herein means Defendant, [Defendant-First Name] [Defendant-Middle Name] [Defendant-Last Name], its agents and/or representatives.

3. “Plaintiff” as referred to herein means Plaintiff, [Client-First Name] [Client-Middle Name] [Client-Last Name], his/her agents and/or representatives.

4. “Accident”, “incident”, or “collision” as referred to herein means the occurrence that gave rise to the Complaint filed in this cause and which occurred on [Matter-Incident Date].

5. “Lawsuit”, “Cause” or “Case” as referred to herein means the above-captioned matter pending in the [Court-Office/Company/Firm].

6. “Document” or “thing” is referred to herein has the same meaning as set forth in Trial Rule 34(a)(1) of the Indiana Rules of Procedure.

III. INTERROGATORIES

1. If any response to any of the Plaintiff’s Interrogatories to you is anything other than an unqualified answer, with respect to each such response, please state:

C. The basis for your denial or qualified response;

D. The name, address and telephone number of each person who possesses or claims to possess knowledge supporting or relating to your response;

E. The identity of each document you contend supports or relates to your response; and,

F. The authority, including but not limited to specific statutes, ordinances, cases or administrative rules that supports your response.

ANSWER:

2. State the name, address and phone number of each person you may call or expect to call as an expert witness or who will provide opinion testimony, including Dr. _____________ _______, at the trial of this case.

ANSWER:

3. With respect to any individuals you identify in your answer to Interrogatory No. 2, please include the following:

G. The subject matter on which the alleged expert is expected to testify;

H. The substances of the facts to which the alleged expert is expected to

testify;

I. The substance of the opinions to which the alleged expert is expected to testify;

J. A summary of the grounds for each opinion;

K. The identity of each and every document or thing the alleged expert inspected or examined that is related in anyway to this cause;

L. The name, address and phone number of each person with whom the alleged expert has discussed their opinion or any other matter related to this case; and,

M. The identity (including description and date originated) of each and every document or thing prepared by the alleged expert regarding their opinion or any other matter related to this case.

ANSWER:

4. Identify any depositions the individuals you identify in your answer to Interrogatory No.2, have given in the past five (5) years, including the names of the parties, the state and county and the court where the action was pending, the approximate date of the deposition, the attorney or attorneys and/or law firm or law firms representing the parties, and who might have custody of the original or any copy of the deposition.

ANSWER:

5. Identify (additional definition below) each and every matter in which Dr. ____________ or any other individual you identify in your Answer to Interrogatory No. 2, has provided consulting services in a legal or insurance matter involving a claim for damages or personal injury, a claim for benefits under an automobile insurance policy, an Indiana Trial Rule 35 medical examination, which is the rule that provides that the plaintiff or insurance claimant may be examined by a medical provider usually chosen by the insurance company attorney or a similar medical examination done at the request of the insurance defense attorney and/or an examination of medical records and a report thereon. Included are any such services performed for any lawyer of a law firm, insurance company, or medical review service. Ths interrogatory is limited to such services provided during the past four (4) years and requests the identity of the injured party, the identity of any reports prepared, the identity of the state and county in which a lawsuit was filed in the matter, and the identity of the individual or entity, attorney, or law firm or insurance company which retained the witness for consulting services as described above.

ANSWER:

6. Identify and list the fee schedules and any contracts or agreements existing between the expert witnesses you have identified and any of the individual, entities, attorneys, law firms or insurance companies identified in your Answer to Interrogatory No. 5 with respect to the consulting services provided by the witnesses you have identified.

ANSWER:

7. Identify any matter in which any of the witnesses you have identified have given legal depositions or Court testimony in the past four (4) years, including the identity of the parties, the state and county, the court, the approximate date of the deposition or testimony and the present custodians of the original or any copy of a transcription of the testimony including either attorney, the Court or the witness you've identified.

ANSWER:

8. Have the witnesses you identified in your Answer to Interrogatory No. 2 filed tax returns, state and federal, for the past four (4) years which reflect any income the witness has

generated as a result of providing consulting services as identified in your Answer to Interrogatory 5? If so, in order to provide the jury with an idea of the percentage of income derived from this type of work, identify any 1099 and/or W-2 forms that the witness has received representing income for the matters identified in your answer to Interrogatory No. 3, including the source of the 1099 and/or W-2 forms and amount reported.

ANSWER:

9. Specific the total amount of money the witnesses have received from each of the following sources in the past four (4) years for consulting services described and identified in your Answer to Interrogatory No. 5:

14. Any attorney or law firm;
15. Insurance company;
16. Medical review service;
17. Worker's compensation insurance companies if records are separate from (a-c) above; and,
18. The percentage of the witnesses total income derived from above sources (a-d).

ANSWER:

10. Please state the name, address and relationship to you of each and every person who assisted you in preparing the answers to these Interrogatories and identify every document or thing you relied upon in preparing your answers to these Interrogatories.

Respectfully submitted,

DOEHRMAN & CHAMBERLAIN

8. Preparing the Expert Witness

A. Depositions

An expert, like any other witness, must be thoroughly prepared prior to deposition. Such preparation includes such obvious requirements as being familiar with the medical records; medical literature; testing (procedures and results); diagnostic studies (procedure, technology, interpretation); relevant treating physician or patient testimony; prior medical records or issues; differential diagnosis; and, the skill, expertise, qualifications and training that allows an expert to provide an opinion on an ultimate fact at issue.

Most physicians are not professional testifiers, meaning that their income is limited only to testifingin cases involving litigation. As a result, the basic deposition ground rules are necessary: only answer what has been asked; answer what is understood; do not argue; provide an answer that a layperson could understand; do not conjecture or speculate; give up points where necessary that do not affect ultimate opinion; do not disparage another practitioner or their treatment; give the benefit of the doubt (where necessary); the role of medicine is to help people get better, and, at times is an inexact science.

B. Cross and Direct Examination Techniques

Numerous studies have demonstrated that juries learn by way of audio, visual and tactile clues. In today's electronic environment, most individuals have a computer, a mobile phone and cable television. As a result, the attention span of an average juror may be limited. i.e. The "Clicker Generation". Thus, it is important to make any direct or cross examination, interesting,

brief, easily understood and to the point. Counsel should avoid complex narrative description. Rather, if the issue involves a test measuring the range of motion of a patients spine, a demonstration or model may be used to satisfy the audio and visual tactile clues. If the issue is the movement of a brain within a skull causing a traumatic brain injury, pass a model of the skull to the jury so that they satisfy their visual and tactile cues by touching the rough spikes on the inside of the skull that caused injury.

A useful line of questioning on re-direct examination may include the following:

Q. Doctor, having heard the questions asked by Attorney Jones, have your opinions changed in any manner.

Q. Is it still your opinion, based upon your skill, education, experience and training, as well as seeing thousands of patients, that Mr. Smith suffered a traumatic brain injury as a result of the May 15, 2005 car crash.

Q Is it your opinion, based upon a reasonable degree of medical certainty, that Mr. Smith's brain injury is permanent.

Q. Is it your opinion, based upon a reasonable degree of medical certainty, that Mr. Smith's confusion, dizziness and mood swings are permanent symptoms of his brain injury.

C. How to Use a Videotaped Deposition During Trial

An attorney must make a decision whether to call the expert witness live at trial. Such a decision may include the weighing of factors including the costs associated; the attitude of the witness being forced to testify live as opposed to voluntarily appearance; the uncertainty of when the witness will be called; the necessity of the jury to visually see the witness testify in response to questions; whether any issues occurred at trial which were not covered in the video deposition; and, the witnesses schedule and or patient load. After weighing such issues, a video deposition may be the best alternative to live testimony.

If a video deposition for use at trial is the best alternative, the attorney taking the deposition must be as prepared for the deposition as the attorney would be at trial. Typically, a discovery deposition is taken before the video or trial testimony. Before either deposition is taken, it is imperative that the attorney taking the deposition meet with the doctor prior to the deposition to solidify the physicians opinions. At the meeting, it is important to have all questions prepared and exhibits (as well as demonstrative evidence) ready for admission.

Prior to the video testimony, it is suggested that the parties attempt to stipulate to the admission of certain exhibits; medical records; medical bills; diagnostic studies; and, medical illustrations. During the trial deposition, have the expert demonstrate, by way of anatomical models, surgical hardware, diagnostic studies, the injuries, surgery, etc. Such stipulations may be informal; reduced to writing; or, obtained by way of request for admissions. Such agreements will reduce or eliminate objections or other testimony that may require the videotape to be redacted prior to showing to the jury.

At trial, the video deposition is played as if the witness is present in the courtroom. An attorney may announce that the next witness is "Dr. Jones, who will testify on behalf of the Plaintiff in lieu of the witnesses live testimony." If any exhibits are introduced at the video deposition, it is necessary to move the same into admission in live court. Be certain to prepare an exhibit binder or have copies available to publish the same to the jury. Also, publish a copy (or the original) of the deposition. Be certain that the tape (or other media) does not have a

defect which would prevent its dissemination to the jury.

A sample testimony outline, for purpose of video testimony is provided below:

DOCTOR VIDEO DEPOSITION QUESTIONS

I. Name

Medical Doctor

Location of Practice

- Office
- Where on staff

Education

- Experience, education, training and qualifications to provide medical servcies to patients.
- College (Major)
- Medical School
  - Specialty
- Internship
- Residency
- Other training

License

- State Issued
  - How long
- Other states
- Maintained licensing

Area of Practice

- Specialty
- Standards
- # Patients treated in career
- Due to busy patient load, unable to testify live at trial.
- Examinations

Certifications

Professional Associations

II. Patient

- How many occasions did you see the patient?
  - Referred by
  - What specialty is __________
  - Why was the patient referred?
  - Complaints

First office Visit

- Date
- Obtain History

    - Age
    - Complaints
    - What other information
- Conduct Physical Exam
    - What tests
        - How work Results conclusion
        - Results
        - Conclusion
- Based on history and exam, what inquiries did ________________ at that time.

What is
- Injury

Exhibit 1 - Medical Records
- Obtained from your office
- Please identify
- What are they
- Patient
- Whose handwriting
- Personal knowledge of facts contained herein
- Documents generated and kept in normal, ordinary course of business

- Go through records,
    - What procedure; how Performed; expected result
    - Where was procedure performed
        - Example 2 - Hospital
        - Example 3 - Registration
        - On Staff where
        - How long
    - Why performed; how long is procedure
    - Familiar with record keeping
    - Handwriting
    - Normal custom to make notes during procedure
    - Are these your notes