

# Defense

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# Experts' Distortions

Civil trials are frequently a confusing mix of medical exams and technical jargon. It can be overwhelming for a plaintiff lawyer to figure out what each medical test measures and how to overcome a defense medical expert's testimony. But there is a more important question lawyers should ask first: Is the expert telling the truth? Ocala, Fla., lawyer **Dorothy Clay Sims**, who travels the country teaching other lawyers how to cross-examine defense experts, says too many times, the answer is no.

In her new book, *Exposing Deceptive Defense Doctors* (James Publishing, Inc., updated 2012), Sims urges attorneys to arm themselves with knowledge and aggressively fight experts who distort science. She spoke to *Trial* contributing editor **Courtney Davenport** about the importance of weeding out misused science.

## INTERVIEW WITH DOROTHY CLAY SIMS

**Q** You represented Casey Anthony, who was acquitted of charges that she murdered her daughter. How did science play a role in that trial? How important were the cross-examinations of the prosecution's experts?

**A** There were so many complex scientific issues that came up in the trial. There were new tests and new scientific approaches that I believe needed to be tested more before they could be relied on and presented to the jury as fact. For instance, the prosecution alleged for the first time ever that moving air in the trunk of a car was evidence of chemicals present consistent with human decomposition. The problem is that

scientists have no agreed-on standard as to what those chemicals are, and most of the chemicals known to be released in decomposition weren't present. There has also been no significant study of what happens in decomposing children versus adults, and few studies compare decomposition when a body is left above ground to how a body decomposes when it is buried.

If lawyers are presented with a new scientific issue, it's very difficult because they don't know where to go for direction. So our goal was to investigate the science and investigate the experts and the training of experts to determine weaknesses in the science that we could delve into in cross-



examination. And there were many problems with the prosecution's science, much of which was in its infancy.

**Q Why did you decide to write a book about deceptive defense doctors?**

**A** I was very angry that defense doctors were getting away with deceptive tactics and misrepresentations, and I felt like there needed to be accountability. I wanted to make sure lawyers know that this is happening frequently and that it is probably a lot worse than they imagine. Plaintiff lawyers need to know how to spot misrepresentations and what kinds of approaches work better to tease them out. I have spent years teaching other lawyers how to uncover expert witness misrepresentations, and I was concerned that if I didn't get the message out, many experts may get away with things they shouldn't.

**Q What are some deceptive practices you've seen?**

**A** Some of the tactics I've seen have been outrageous. Doctors claim to be experts in some specialty or say they have a formal medical degree and medical training when they don't. They claim to author articles they didn't write. On their curriculum vitae, they leave out ethics charges or suspended licenses in other states. Doctors will also say, for instance, that a patient flunked an exaggeration test when the test actually determines the existence of brain damage. In one recent case, the doctor altered a patient's answers during an exam. The doctor claimed to have conducted tests he never did, even though he knew he was being videotaped.

**Q How should plaintiff attorneys prepare to depose or cross-examine defense doctors?**

**A** Plaintiff lawyers have to start with the proposition that everything

the expert says is untrue and then make the expert prove it. You often find out the expert can't prove it. Some plaintiff attorneys choose not to depose defense doctors because they say it might give away their strategy or they already know what the doctor will say. I think the reality is that they feel overwhelmed by the science or figure the deposition is a waste of time because they're out-gunned. But a deposition is crucial to pin down the witness and avoid surprises at trial.

If the case is reasonably large, attorneys should spend five to 10 hours to research everything about the expert and then schedule four to eight hours for the deposition. Doctors will try to run out of time by rambling and not answering your questions, so you have to ask them over and over again until they do. Make sure you understand the medical condition, watch videos of the surgery, and have a visceral understanding of the technical terms so you can recognize when the expert relies on tests that don't apply or misrepresents possible conclusions.

I also encourage attorneys to bring a doctor to the deposition or have someone of the same specialty listening over the Internet, with notice to the defense. The doctor can privately communicate with you through an Internet chat when the expert is straying from or misrepresenting the science. Have other people find and read articles the doctor quotes to make sure the doctor is correctly representing the articles' findings.

**Q You mention in your book that many dishonest defense medical experts seem to have traits of obsessive compulsive disorder, sociopathic tendencies, or narcissism. Why is it useful to recognize these traits when dealing with the expert?**

**A** If you understand how someone is going to behave, then you



**If lawyers learn how to ask the right questions at the right time with the right witnesses, they can keep out a lot of misrepresented science that is making its way into the courtroom.**

understand how to communicate with him or her. You can understand the kinds of things that will set them off, for example, and avoid those things if you're trying to get them to admit basic facts. Many attorneys will back away if a doctor becomes aggressive or inappropriate.

If lawyers understand that this doctor is coming from the standpoint of a personality trait that's not particularly helpful, it helps the lawyers stand their ground. If an attorney says, "you have not answered my question, and I'm going to keep asking it until you do," instead of moving on to another subject—which I've seen many attorneys do—then doctors who are narcissistic, for instance,

are going to explode with anger. That inappropriate behavior is a message to the jury that the individual may not be a trustworthy expert and may have traits that interfere with the ability to accurately and fairly look at data and report it.

**Q There are so many medical tests, some valid and some not, that doctors point to in support of their claims. What should lawyers do to make sure they understand the tests and can recognize misleading medical jargon?**

**A** The best advice I can give is to go out and have a full psychological evaluation and a physical examination performed on yourself. If you go through what your clients go through, you'll never forget the experience or what you've learned. Even if the tests you are given are not exactly the same as the ones your clients will undergo, they are likely to be similar. You'll understand the principles on which the testimony is based, and you'll understand how the defense experts' characterizations are misleading.

Often, a simple Internet search for a test will lead to the test developer's website. So if a doctor is testifying at deposition that he or she administered a test to see if your client is faking an injury, you can quickly Google the test and determine that it's really a brain-injury test that cannot measure whether a plaintiff is faking.

**Q You devote a long chapter in the book to the defense argument that the plaintiff is exaggerating or malingering. Why is this defense so damaging?**

**A** I think that a juror may go into a lawsuit being suspicious of a plaintiff who is seeking compensation, so there is a potential for bias from the beginning. If the defense expert claims

the plaintiff is dishonest and says there's some scientific magic bullet to prove it, it's something a potential juror may be willing to believe. But so many times, it's absolutely not true.

It's important that a plaintiff attorney understand the tests that are used, and then if the expert starts saying the plaintiff is malingering, the plaintiff lawyer can pulverize that argument by getting the expert to admit that he or she is basically calling the plaintiff a liar. Then question the expert: When did he lie? How did he lie? Where did he lie? Often the expert can't give a single example. Many times, if you go down that road, the defense attorney will object that you are asking the doctor to speculate. That is exactly the point—that the entire opinion is speculation.

**Q What types of visual aids are helpful in cross-examining a defense expert?**

**A** It's really helpful to purchase articles that are authored by the expert, referenced on national websites for the specialty the expert is claiming to represent, or conducted by scientists at the university the doctor teaches at or attended that relate to the subject at issue.

Create a chart that lists all of the symptoms with the objective tests that support them and ask the doctor if he or she denies that all of the symptoms are consistent with the plaintiff's condition. Also ask if there is another, single cause that can account for all of those symptoms and is more likely. They often can't do it.

**Q How should plaintiff lawyers prepare their own medical experts after the defense expert is deposed?**

**A** First of all, you need to tell the experts every potential weakness of your case—for example, if the plaintiff

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has preexisting similar complaints. Make sure the expert tells you everything that could come up at trial, even if it's not something you want to hear. If there is any questionable science or weakness that will hurt your client, you need to know as soon as possible so you can be prepared to deal with it.

Your expert needs to be very familiar with the traditional diagnostic criteria for the condition. Experts also need to understand the weaknesses of the opposing expert's report so they can be prepared to talk about them.

I always suggest videotaping the defense exam and showing that tape to your expert. For example, show a neurological exam to a neurologist. The defense doctor may write on the exam report that the plaintiff's reflexes were normal, but your expert can see that the doctor never checked the reflexes.

**Q Is the interplay between science and the law as daunting as it sometimes seems?**

**A** It's not as hard as it seems to figure out the science, especially with the easy availability of information on the Internet. Lawyers just have to know they can do it and they should do it. If lawyers learn how to ask the right questions at the right time with the right witnesses, they can keep out a lot of misrepresented science that is making its way into the courtroom. **📖**