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From the May 07, 2007 Lawyers USA.

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## Attorney carves niche cross-examining experts who say plaintiffs are malingerers

*By Patty Morin Fitzgerald Contributing writer*

Dorothy Clay Sims was so incensed by one medical expert who said more than 50 of

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her clients were malingerers that she devoted her career to unmasking the hired guns who masquerade as medical experts.

While working as a plaintiffs' lawyer at a five-lawyer firm in Ocala, Fla., Simms devoted years to studying the testing methods used to determine whether a person is faking his or her injuries. Her goal was to become so knowledgeable about the testing methods that she could quickly spot when a doctor was scoring the tests inappropriately to come up with the answer her opponent wants.

Because there is no one definitive test for malingering, many doctors are trying to promote their own tests as the industry standard, according to Sims.

"It's disgusting. People are being denied healthcare. People are dying because they're not getting healthcare," Sims said. "These tests the doctors make up with no science. I asked this one doctor, 'You claim my client doesn't have brain damage with what kind of test?' 'I made it up,' he said."

While conceding that some defense medical experts are honest, Sims believes the percentage is very low. She said that when she first launched her specialty, she returned from a deposition and was "shaking I was so mad."

"Then I decided I would make a plate of homemade cookies, and if they were honest, I would give it to them," she said. "In the last 12 months, I've done that twice. And I do depos every day."

### Defense lawyers not to blame

Sims has concluded that in many cases the fault is not with defense attorneys. She noted that many are directed to hire certain experts by their clients' insurance companies and are not aware of the inaccuracies or shady test results produced by their witnesses.

"It's not so much the lawyers themselves who are at fault. It's the doctors," she said. "When doctors spin medicine, lawyers don't know enough about medicine to catch it. The jury is impressed with a guy with 30 years experience, [even if he's] making things up. This stuff works for them."

Sims said she believes that defense lawyers are often taken by surprise when she demonstrates the shoddiness of their expert's methodology.

"In the real world it's difficult to keep on top of your cases and know the nuances of medicine too," she said. "I often see that they're surprised, too. I'm lucky my husband is a doctor and he can give me advice."

The number of true malingerers seeking her services is rare, she said, though it has happened. There have been times when she has rejected a case because the person's claims do not seem legitimate.

But she said it would be extremely difficult for someone to fake an injury over the years required for most cases to work their way through discovery, depositions and trial.

## Picking apart the expert

Sims recently worked on a case that involved an older gentleman who suffered head, neck, back and brain injuries in a 2003 car accident. In his lawsuit, the man claimed he suffered constant pain, especially after prolonged sitting or walking. He said he couldn't work due to fatigue, headaches, sleep problems and leg numbness that made it difficult to drive. He also claimed that his cognitive and emotional difficulties caused him to lose interest in social activities he had enjoyed with his wife prior to the accident and that she had essentially become his nurse.

Sims was hired by the plaintiffs' team to fend off challenges the defense planned to mount against these assertions.

During a background search, her own medical consultants uncovered an affidavit indicating the defense's medical expert had misrepresented findings in another case and presented it to the jury. With the defense expert's credibility shot, the plaintiff won more than \$2 million, she said.

Sims said her success isn't due to any special brilliance, but simply to the fact that she is accustomed to these doctors, their tactics and their language.

Based on her experience, Sims has a great deal of advice on how plaintiffs' lawyers can reveal the shoddy techniques and trumped-up conclusions of disreputable medical experts.

## Preparing for depositions

When Sims plans for depositions - which she takes all over the country - she uses a checklist of techniques that have worked repeatedly for her over the years. Based on this experience, she suggests that lawyers:

- Use the Freedom of Information Act to acquire background information about the doctor which can be used to impeach his or her testimony. Among the most damaging findings she's made was a doctor who was accused of taking narcotics from his patients and had been dismissed from his job at a university.
- Bring a laptop with an Internet connection so you can challenge the doctor to produce the articles he is using to back up his testimony. If he declines to find material, it's a safe bet there isn't any. This works particularly well in video depositions.
- Have a plastic bag on hand, and if you suspect the doctor has not reviewed the medical records, have them sealed in the bag and tell the doctor that you intend to have them checked for his fingerprints. "I had one case where none of the pages were dog-eared and they looked like they had never been touched. I asked him, 'Are you absolutely sure you reviewed these pages.' He said 'Yes.' So I pulled out the plastic bag and told him I was going to have the reports fingerprinted. "No wait, wait," he said, and he admitted he may not have reviewed them. This was a video deposition, so I had it all on tape."
- This can also work if you suspect a document has been altered in any way. Have it sealed in the bag and tell the doctor you intend to have the ink date-tested. "Then sit back and watch the fireworks," said Sims.
- In an attempt to appear unbiased, doctors frequently claim that they work nearly as often for plaintiffs they do for defendants. If you suspect this isn't true, present the list of cases he has worked on and ask him to mark the ones in which he testified for the plaintiff. The first time Sims used this, the doctor said that he testified about a third of

the time for plaintiffs. But when presented with the list, he was only able to identify about 5 percent of the cases in which he testified for plaintiffs, according to Sims.

- Collect pamphlets in the doctor's waiting room to see if they describe symptoms that mirror your clients' complaints - then use them to challenge the expert.
- Check with organizations for plaintiffs' attorneys in the area to get the names of past cases the expert has testified in. Then get transcripts of those depositions to see if there have been any inconsistencies in his or her statements over the years that you can exploit.
- Have a court reporter present at the deposition to create a digital transcript that can be searched quickly on the computer. If there is a discrepancy with prior testimony, you are better able to challenge the doctor. If you cannot afford a court reporter, use a tape recorder.
- Acquire any books or articles the doctor has written and quote from them. During one deposition Sims caught a doctor disagreeing with something he had written in his own book.

### **Evaluating the raw data**

Many researchers have tried to sell tests they have developed as the definitive test to determine malingering, but the one used most often is the MMPI (Minnesota Multiphasic Personality Inventory). Sims said this test is "well-validated" and effective if used the right way.

But, it can often be unreliable when it is a case of a "good test in the hands of a bad doctor."

So when confronted with the MMPI, Sims asks the expert how he or she administered and rated the test and compares that with the instructions to expose any inconsistencies that could render the results invalid. This often requires you to demand to see the test booklets and all the raw data.

Another thing to watch for is experts who administer the test several times with different results, then use only the results that favor the defense position.

When tests other than the MMPI are used, lawyers should ask several additional questions:

- Was the test version and scoring culturally appropriate for the plaintiff?
- If the test was given verbally, were the questions worded to elicit a specific answer?
- Was the test older and scored based on outdated criteria? Sims noted a phenomenon known as "the Flynn effect" which shows a steady rise in average IQ scores since 1972. She says this same effect applies to similar psychological tests, which means that if a plaintiff claiming brain damage is given an old test, his score might make his cognitive function appear artificially high.

Sims said that another common test - the Folstein Mini-Mental State Examination - is often not scored properly. This verbal test, which is also used on suspected Alzheimer's patients, is often not given in its entirety and therefore not reported accurately.

The expert battle frequently comes down to a face-off between medical and psychological tests, according to Sims. She has had defense experts totally dismiss

medical results and argue the only valid measure is the psychological battery.

She worked for one woman who suffered three herniated discs in her neck in a car accident that required surgery. Although both a discogram and an EMG (electromyography) indicated disc damage, Sims said the opposing expert's response was "That doesn't mean anything." He had used the Waddell Test and stated the woman's pain was self-inflicted, caused by her own "hysteria."

But when Sims asked whether he had administered and scored the entire test, the answer was, "No." This allowed Sims to make the point, by quoting the test's author, that the doctor had used the test incorrectly, rendering his results suspect.

Likewise, the Halstead-Reitan Neuropsychological Battery has strict protocols that can be used to determine if the results obtained are valid.

Another tool designed to unmask fraud is Rey's 15 Item Memory Test, but it tends to falsely report malingering if a client is elderly or has a low IQ, according to Sims.

One of the more outrageous tests she's encountered is the Lees-Haley Fake Bad Scale, which, according to Sims, finds women to be malingerers far more often than men and raises the subject's malingering score if she wears glasses or has hot flashes from menopause. In fact, Sims said, she has convinced one judge (a woman) to disallow the test.

Questions or comments can be directed to the features editor at:  
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## **Doctor in a box - Software cuts cost of challenging medical experts**

In addition to her frequent lectures to lawyer groups, Dorothy Clay Sims has developed an online company designed to help lawyers challenge medical experts.

The company is called MDinaBOX.com, Inc.

She started the company a year ago with her husband, a doctor, while on a trip volunteering for a nonprofit organization in India. Her husband had health problems requiring tests, and they saw how inexpensive medical care was there compared with the United States.

"And they were just brilliant," she said of the doctors in New Delhi.

Doctors here charge \$300 to \$1,500 per hour as expert witnesses, Sims said, compared with the \$20 to \$45 per hour, plus bonuses, she pays to communicate with doctors there. She charges her clients \$75 to \$125 per hour for the consults. Many are of these doctors are board certified, but sometimes she'll hire internists to discuss gynecological issues.

Using Skype, a video conferencing computer program that allows users to speak with each other, MDinaBox allows a doctor in New Delhi listen in at a deposition through the lawyer's laptop, and when the opposing expert says something that is not correct,

the Indian doctor instant messages the lawyer with a question she can ask to trip up the witness.

It's a method that's not always popular with opposing counsel.

"If you tell them you have a doctor on live IM, they're uncomfortable because it's new," she said.

But she insists that her consultants' qualifications shouldn't matter because they're not testifying.

On the MDinaBOX.com website, Sims offers a videotaped example of how her service works, showing herself questioning a doctor in this country using information privately IM'd to her from a doctor in India. The young US doctor becomes confused with her directed questioning and ends up contradicting his initial testimony.

We see the defense counsel almost call off the session because there had been no prior discussion about another doctor listening in over the computer.

"I was given no advance notice of a doctor listening in," says opposing counsel. "I object and move we cancel this until we discuss this issue."

But Sims isn't thwarted so easily.

"I object to you canceling this as it has been scheduled for a long time," she says on the video, emphasizing that there is no requirement that opposing counsel be notified about someone listening in who is not testifying.

"This is absurd. Alright, but please do not do this to me in the future," says the opposing counsel.

Sims said she's pleased with the results of her new strategy and that only about a quarter of her cases fail to be settled after the deposition. Her company has attracted roughly 115 customers, eager to find a less expensive way to obtain medical advice during depositions.

The main office of MDinaBOX, Inc. is in Ocala, Fla., and has five full-time employees. Her New Delhi office has a coordinator, eight researchers who do background checks on medical witnesses and 28 doctors who are independent contractors.

- Patty Morin Fitzgerald

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