International Association of Defense Counsel

Trial Academy

Cross-Examination of a Medical Expert

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CROSS-EXAMINATION OF THE MEDICAL EXPERT

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I. Introduction

It has long been debated whether cross-examination is an art or a science. In truth, cross-examination is probably a mixture of the two. While some people are born with more of a natural ability to cross-examine, others can develop the ability to cross-examine witnesses effectively through repeated practice of the art. The "science" side of cross-examination is more methodical and specific to the individual case. It requires a firm knowledge of the case, development of your theory of the case and the strenuous task of preparing thoroughly for the cross-examination before the case is tried. It also involves preparation which occurs during the trial, namely listening precisely to what the witness says on direct-examination.

Cross-examination of your opposing medical expert is extremely challenging yet exciting and undoubtedly can make or break your case. Why is it so challenging yet stimulating? For one, you in essence will "testify" through the opposing expert if you are conducting your cross-examination appropriately and effectively. There are three different methods or goals to cross-examination and which one or which combination

you will use with a given expert depends on your case, on the specific expert and on what you have been able to uncover (or not) in your preparation for cross-examination of that expert. These methods or goals include:

1. "Destructive Cross-Examination" – Through this type of cross-examination, more than anything you attack the witness or do damage to that witness;

2. "Constructive Cross-Examination" – Through this type of cross-examination, you attempt to elicit information consistent with your theory of the case and use the witness constructively to prove your case;

3. "Building Contradictions" – Through this type of cross-examination, your goal is to elicit contradictions between any or all of the following: (a) that expert witness' prior testimony in the case (i.e., through depositions, sworn statements, affidavits, etc); or (b) that expert witness' prior testimony in other cases (i.e., prior deposition and trial testimony from all over the country); or (c) between that expert witness and other witnesses in the case (i.e., either other plaintiff witnesses to show inconsistencies in their camp or defense witnesses to show that expert witness to be out on a limb – hopefully all alone).

Too often, attorneys are apprehensive and even fearful of cross-examination of the opposing medical expert. Rather than approaching the

cross-examination with trepidation though, you should always welcome cross-examination as an opportunity by which to prove your case and expose the flaws in the opposing party's case.

II. Pre-Trial Preparation of Cross-Examination

Even at the early pretrial stage, the attorney should concentrate on gathering and reviewing all information, medical and non-medical, that may provide fodder for cross-examination of the opposing expert. This information may come in a variety of forms:

1. The pleadings in the case – for example, an Affidavit signed by that expert witness;
2. Deposition testimony obtained from the expert during the case;
3. Depositions or sworn statements given by the expert in other cases;
4. Medical literature authored by that particular expert; and
5. Medical literature which may fall into the category of "learned treatise" or which is otherwise deemed either authoritative or "commonly referred to amongst peers" by the expert who you seek to cross-examine with said literature.

A. <u>Know the Medicine – Breathe it, See it, Believe it</u>

In order to effectively cross-examine an opposing medical expert, you must be well-versed in the medicine of the case. That is, not only must you understand the plaintiff's theory as to what happened (or did not happen) <u>and</u> what purportedly caused the injury or damages, you must also have in mind your defense theory by which to counter or refute plaintiff's position or theory of the case.

You should work with both your own team of expert witnesses or even your defendant physician in a medical malpractice case in order to better prepare yourself and be armed with all necessary areas of questioning. Of course, your cross-examination at trial is only as good as your preparation and your deposition (….if a deposition is taken – which depends on the jurisdiction and the circumstances, including client preference given the often considerable cost). Thus, your preparation for cross-examination of an expert witness should take place long before trial and preferably before any deposition is taken.

B. <u>Use The Medical Literature To Your Advantage</u>

The use of medical literature can be your best tool but it is often overlooked in the face of the time and energy that must be spent to use it

effectively for preparation for cross-examination. You should use literature for three things:

1. For contradicting the opposing expert with what has been described as either "authoritative" or something close thereto – to show that the expert's opinion is far from mainstream or that the expert has simply been "bought" and of course will agree with whatever is put to him or her on direct-examination;
2. To show that the expert has taken a position counter to his or her own prior writings - to show bias and to allow you to later argue (in closing) that the expert did not believe what he or she was trying to "sell" to the jury on direct-examination; and
3. To show that the medical literature strongly supports the defense theory of the case rather than what one or a few experts on the plaintiff's side is claiming to be the "standard."

   For example, in a case involving back surgery (a lumbar diskectomy procedure) the physician inadvertently "knicked" the aorta and the patient bled to death and died on the operating room table. Plaintiff's theory of the case, while not necessarily overt, was that if a physician hits the major blood vessels lying towards the front of the patient's stomach while operating on

the back, it simply must be negligence. The defense theory of the case, on the other hand, was that injury to the great blood vessels is a known complication, albeit rare, of the procedure and can and does happen even in the absence of negligence. As part of the defense preparation of the case, the defense attorneys scoured the world literature to find each and every reference to support that "known complication" argument. While not plentiful, there existed a variety of articles and texts which made reference to the blood vessel injury as a recognized but rare complication. Armed with that literature, defense attorneys deposed all of plaintiff's experts and surreptitiously gained their endorsement of the articles and texts from which the references hailed. At trial, the references to the "known complication" stance were read to the experts on cross-examination and then blown up on boards for the jury to see during closing. Thus, in the right case, the literature can be your best ally and asset and, the most effective way to get it in front of the jury is through the mouths of opposing experts.

So, how to prepare for use of the medical literature during cross-examination?

First, start by reviewing the opposing expert's curriculum vitae to identify any and all articles, case reports, abstracts and textbooks offered, edited or contributed to by that expert. You should also order an IDEX/DRI investigation and look at the Jury Verdict Reports on Lexis/Nexis regarding all opposing experts.

Second, through Medline or other comparable search engine, you should be looking for literature to support your position and theory (or theories) in the case. There are a number of different computer databases which permit efficient, inexpensive searches for articles on specialized subjects.

Third, consult the standard text within the applicable specialty fields. There is typically a "bible" of a given specialty which should either be purchased or you should consult the pertinent portions of it. It will provide you with a learned treatise which may be either admissible in evidence or at the very least it can be used to cross-examine a medical expert.

Fourth, you must be ready to pre-commit the opposing expert to various textbooks, journals and literature during that expert's deposition during discovery of the case as described above. The goal is to commit the expert to certain journals and texts (containing helpful references for you) as

either authoritative or a lesser yet accepted standard such as "commonly referred to by colleagues and peers."

Thus, doing your homework in terms of the medical literature, both generally and authored by the opposing expert can make or break your case. You will need to make sure that you are using the applicable edition, i.e., the edition in "play" at the relevant time of the case, in order to guarantee that the court will allow you to cross-examine with those materials.

C. The Time For Trial Draws Near........

So, how to get ready for the cross-examination as the trial approaches?? The mechanics:

1. Study the opposing expert's Curriculum Vitae;
2. Review of all opposing expert's prior testimony from other cases;
3. Make list of categories/broad issues to be addressed during cross-examination;
4. Review of the expert's deposition from your case – highlight and make list by category using specific page and line references to use during impeachment at trial;
5. Begin organization of thoughts;
    a. Should only attempt 3-5 main points on cross;

b. Big issues – main headings to work from and fill in details; and

c. Synthesize attack points to outline form.

6. Prepare Trial Outline of cross-examination

7. Delivery – How to Hold/Grasp Jurors' Attention

Key = Visuals – Props:

Medical Illustrations, Animation, Diagrams, Models

But.....use them wisely: do not overwhelm the jurors, do not try to unduly "impress."

Use your props to "teach the medicine" and educate the jurors about your case.

III. Preparation For Cross-Examination At Trial

Preparation for cross-examination does not end until a witness finishes his or her direct testimony. Indeed, some of the most important information is gathered during direct examination. The effective cross-examiner will do three things during the witnesses' direct testimony:

1. Listen carefully to everything the witness has to say;

2. Note briefly everything the witness says that is beneficial to his case; and

3. Note everything the witness says that is contrary to other witnesses' documents or depositions.

Virtually everything that is said by a witness will fall into one of the three categories. It either helps the case, hurts the case or is largely irrelevant to the case. By characterizing the testimony during direct, you can be prepared to accentuate the positive, attack the negative and ignore the irrelevant.

IV. Methods of Cross-Examination

By the time the expert witness completes direct examination, the cross-examiner should basically have three things before him. First, he or she should have a summary of what the witness said prior to trial, either in other documents or depositions. This summary should contain quick and ready references to relevant statements.

Second, the attorney should have before him or her a list of all the things the witness said on direct examination that will help with the case. The notes should be as close to verbatim as possible so they can be read to the witness on cross-examination.

Third, the attorney should have a list of contradictory statements that the witness made on direct examination. Jurors almost always empathize more with the witness than with the lawyer. Accordingly, it is of the utmost

importance to at least begin your cross-examination in a very courteous, professional manner. Following a brief exchange of pleasantries, it is usually best to begin by getting the witness to repeat the favorable admissions he made on direct examination. After you have extracted all of the favorable material from the witness, it is then time to present contradictions in testimony.

A. **<u>For a "Collateral Attack"</u>** – Inquiry may be made as to the following:

1. <u>Painting the professional witness or "hired gun"</u>

- The number of times the witness has testified in court;
- The number of cases the witness has reviewed as an expert;
- The number of litigation as opposed to physical examinations performed by the witness;
- Prior contacts with, and cases reviewed for the referring attorney and/or the attorney's law firm;
- How the expert was first contacted and by whom;
- Does the witness advertise his or her services as an expert in a professional journal or list those services with an expert witness referral service;

- Percentage of appearances for plaintiffs as opposed to defendants;
- Percentage of annual income from medical-legal testifying;
- If the witness is from out-of-state, inquire as to the number of physicians in the witness' specialty in the locale of trial; and
- When was the witness first contacted (hopefully recently, in a case which has been pending for years).

2. <u>Financial Matters</u>

- Assuming the witness either charges a significant fee for appearing or has extensive experience testifying, in-depth inquiry into the area of witness fees may be appropriate. The fees may include amounts for review of the case, pre-trial deposition; conferences for written report and for trial testimony. Note: Be careful of the "boomerang effect" on your own experts though if you open this door of testimony.
- Percentage of witness' income obtained from medical/legal activities;
- Total income derived yearly for medical/legal matters;

- Total of income derived in the witness' career from medical/legal matters; and
- The percentage of the witness' professional time given to medical/legal matters.

3. Credentials

- Inquire as to whether the witness is board certified and in what specialties;
- The witness undoubtedly is not certified in areas which might also be applicable;
- Is the witness affiliated with a teaching institution;
- Did the witness pass all exams and certification requirements first time;
- General inquiry as to the witness' experience and expertise in the medical specialty in question;
- Has the witness published on the disease, condition or injury in question;

B. Is The Witness Well-Informed About This Case?

- Clarify precisely what materials the witness reviewed prior to testifying and when those materials were reviewed prior to testifying. Did your adversary send "everything" or was

the provision of the materials to the expert a selective provision of information omitting items that you can make appear significant to the jury.

C. General Tips

- Does the witness acknowledge as "authoritative" particular textbooks on the subject at issue? If the witness acknowledges the text as authoritative, you will often be permitted to read to the witness (and the jury) passages from the textbook which are helpful. If the witness refuses to acknowledge numerous textbooks as authoritative this may have a beneficial effect on your case under any circumstances, since the implication may be drawn that these numerous authors who side with your position. If one of the authors of the preferred authoritative textbooks is associated with the expert witness' own hospital or institution, and that fact is brought out, you make it more difficult for the expert to deny the authoritative nature of the textbook;
- If you know prior to trial who your adversary's expert is, then utilization of prior trial transcripts or deposition

transcripts to contradict statements made at trial are often effective;

- Establish whether the witness has previously testified as to a broad range of medical specialties or diseases (i.e., the all-knowing specialist);
- Contrast trial testimony with the witness' written report or notes that were taken during the review of the case. Frequently the notes of information are not found in the final report, which may be beneficial.

D. Specifics of Your Case

- Highlight those areas where the expert agrees that the care rendered by a client was appropriate;
- Establish that the witness has had the benefit of utilizing hindsight in reaching a conclusion as to what was appropriate, a luxury that your client did not have;
- Attempt to obtain a concession that the defendant physician who actually examined the patient was in the best position to make a "judgment" with regard to appropriate testing, diagnosis and treatment;

- The series of physicians in a hospital has treated the patient in a manner similar to the care rendered by your client. That is actually brought out to paint the picture that your client's view of the case was shared by others and/or that the "correct" diagnosis, treatment, etc., was a difficult one at which to arrive;
- Was the alleged deviation from the accepted practice a "proximate cause" of an "injury to the Plaintiff?" This important question provides several areas of potential cross-examination:

  - Would the "correct" diagnosis require the same care and treatment regardless of when diagnosis was made?
  - Was the "delay" in diagnosis relatively brief?
  - Was the "disease" one of slow progression? (i.e., the "delay" played little or no role)?
  - Is the plaintiff in essentially the same condition as he or she would have been even if the earlier diagnosis had been made?

- Did the true disease condition under any circumstances limit the plaintiff's life expectancy or ability to engage in any activities?

- If culpable conduct of the plaintiff is an issue in the case, obtain an acknowledgement from an expert witness that the patient's failure to seek additional care and/or follow instructions or advice contributed to the "end result."

E. Try To Avoid Beginning Questions With The Phrase "Isn't It True, Doctor Or Other "Canned" Language?

Certainly most, if not all, questions asked on cross-examination, should be leading questions. It is better to simply make a statement and then follow it with a short declarative question, such as, "Is that correct?" For example, ask: "You admit you ran a red-light. True?"

F. Impeachment Techniques

1. When you present the witness with prior inconsistent statements, make the witness himself or herself utter the prior statement.

For example, "Mr. Expert, you will recall that on line 2 of page 35 of your deposition, which you now have before you, I asked you the question, "Have you ever been arrested?" "And what was your answer?" By making the witness read the prior inconsistent statement himself, the jury hears two

different answers from the witness' own mouth and is generally believed to be more effective.

2. When confronting a witness with impeachment material, take a little time to try to cut off all avenues of retreat before presenting the witness with the document chosen to be incorrect. This is commonly referred to as building a "box" around the witness.

3. Remember that sometimes there are exceptions to the old rule that you should never ask a question on cross-examination to which you do not already know the answer.

4. When confronted with a witness you believe to be lying, try jumping him around in his story. Start him in the middle, then ask about something that happened at the beginning. Also, keep the questions coming at a rather rapid pace. This will prevent the witness from fabricating material to fill in gaps and you may well trip him or her up on his own story.

VI. Conclusion

Some General Closing Comments:

1. Regarding credentials, if the expert is not specialized, stress it. What is his or her "true" specialty – is it outside of the issues in the case?

2. Show the jury the opposing expert can be wrong – you might even ask something as blunt as "Doctor, have you ever been wrong?"

3. Peel the onion – Show that the expert is there as an advocate only – not a scientist.

So, how does the jury judge the credibility of witnesses? They judge the witnesses, especially experts they know are getting paid well, based on (1) qualifications (2) intuition or common sense (3) personality of the expert witness and last but not least, (4) the credibility of the attorneys presenting and cross-examining the expert witness.

There is no rigid formula for cross-examination. To excel, one needs to practice the art on a regular basis. An effective cross-examiner will collect and thoroughly review all documents from the statements and depositions on which the witness has spoken and listen carefully to the witness' testimony on direct examination. The cross-examiner can then seek to highlight all favorable testimony and inferences, and attack the witness with prior inconsistencies. The most artistic of cross-examiners will find a way to attack the opposing expert while at the same time bolstering their own case through the mouth of that expert. This combination of art and science takes finesse, skill and much practice.