MCELHANEY ON LITIGATION

Enter Angus: His Initial Words of Wisdom Focus on Cross-Examining Expert Witnesses

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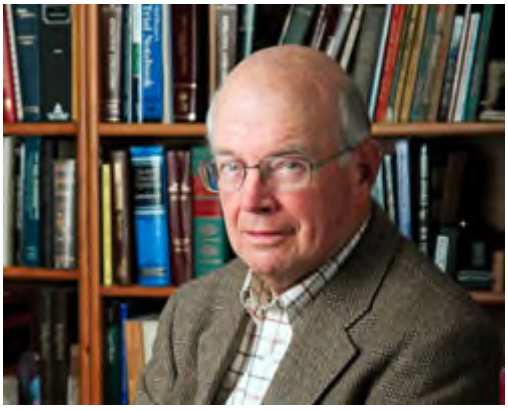

Photo of Jim McElhaney by Rick Allred

McElhaney's Greatest Hits: *Jim McElhaney's 25-year run as Litigation columnist for the ABA Journal will come to a close next fall. During those years, McElhaney's straightforward advice on trial practice became one of the most popular features in the magazine. The Journal is reprinting some of McElhaney's "greatest hits" from the past quarter-century. This article originally appeared in the Journal's March 1989 issue under the headline "Expert Witnesses." But what makes the column truly special is that it introduces Angus—we never got a last name—as the voice of wisdom and common sense on all aspects of trial work. From that point on, Angus became the central figure in a cast of characters that helped show what being an effective trial lawyer is all about.* ***Hear McElhaney discuss his real-life influences behind the Angus character in this podcast (http://www.abajournal.com/news/article/podcast_interview_episode_4).***

It was a Friday evening in the Brief Bag—just around the corner from the Court of Common Pleas—and Flash Magruder was pontificating about cross-examining expert witnesses. “There’s only one way to cross an expert,” Magruder said. “Punch him full of little holes and let all the air leak out.” Everybody laughed—except Angus.

“Flash, the trouble with that theory is that someone might actually try it,” Angus said.

“Why not?” said Flash. “Because,” said Angus, “it suggests that it doesn’t matter what you do—that the only thing that counts is how you do it.”

“And what’s wrong with that?” said Flash. “Remember the song *’Tain’t What You Do (It’s the Way That You Do It)*.”

“Look,” said Angus, “I have no quarrel with technique. If you don’t do it well, you might as well not do it. But before you ever get to technique, you have to know what your options are, and cross-examining witnesses is a perfect example. There are at least nine ways to cross-examine an expert witness, in addition to the approaches you can take with any witness—lay or expert.”

It was obvious that Angus was in rare form, so I got out my pencil. Here are my notes.

MAKE HIM YOUR WITNESS

First, do not attack any witness, especially an expert, unless it will help your case. Cross-examination is a lot easier if you and the witness do not disagree. True, you say, but so what?

Simply this: Say you represent the plaintiff in a case about traumatic brain injury. The defendant’s doctor has just testified on direct examination that your plaintiff’s seizures are not due to trauma, but to a congenital abnormality.

You can take the doctor head-on if you want, but maybe that will not be necessary. The doctor’s only adverse testimony is on the cause of the plaintiff’s injuries. He admits they are there; he only disputes how they arose.

Note that the defendant’s own doctor admits the plaintiff will be subject to sudden seizures for the rest of his life; that this form of epilepsy can only be treated, not cured; and that the plaintiff’s condition put him out of work as a machinist and means he can never drive a car again.

If you have a strong case on causation, you may decide it is better to make this witness your own on the issue of damages than to try to beat him down on the subject of cause.

ATTACK HIS FIELD

Attack an entire field of expertise? This one is likely to make you snort in derision—until you think about it a bit.

Just because the court lets a witness testify does not mean you have to dignify the field—which is what a lot of cross-examination does.

Say you are for the defense in an automobile case, and the plaintiff calls an accidentologist to the stand. If you are not going to call one yourself, you can go after the whole field:

Q: I'm a little confused here. How do I address you: Doctor, Mister or what?

Q: Now then, do you have a degree in accidentology from some college or university?

Q: In other words, you have never worked for the police or any other law enforcement agency?

ATTACK HIS QUALIFICATIONS

The range in this option is wonderful. It covers training, experience, accomplishments and awards. No matter how well-qualified the witness, there always is a higher level he has not reached. Approached subtly, you can even get the witness to accredit your own expert's standing. Of course, it is a mistake to slam a witness gratuitously, but if the witness asks for it, then the jury will appreciate what you do.

How do you know if the witness is asking for it? One place to look is his resumé. That is what Keith E. Roberts Sr. did when an orthopedic surgeon actually included a junior high school citizenship award in his resumé. This is how it went:

Q: Doctor, I see here that you attended Thomas Jefferson Junior High?

A: Yes.

Q: And it says here that they gave you the Bronze Buffalo Award. Is that right?

A: Yes.

Q: Doctor, I don't suppose there was a Silver Buffalo Award, was there?

A: Well, yes—there was, actually.

Q: But you didn't win it?

A: No.

Q: Tell me, Doctor, was there a Gold Buffalo Award?

EXPOSE HIS BIAS

Of course, any witness can be biased because of friendship or enmity, but experts are special. They can be biased because of money—their fees for testifying. Because bias is never collateral, it is always a proper subject for cross-examination; and if it is denied, it may be proven with other witnesses.

Keep a sense of proportion. Just because a witness gets paid for his time does not suggest his integrity is for sale. But witnesses who spend a disproportionate amount of time in court or who charge large fees are surely vulnerable to attack.

ATTACK HIS FACTS

An expert witness is an explainer. And while the explainer may be unimpeachable, his explanation is no more reliable than the facts he is relying on. Attacking the information is particularly suited for the expert witness who has done no factual investigation himself, but relies entirely on the reports of others. It does not have to be hostile to be effective.

Q: Doctor, can we agree that your opinion can be no better than the information on which it is based?

A: Well, yes, I guess so.

Q: If the information you have is not accurate, then the opinion would have to suffer, too?

A: Of course.

Q: Which is why you would rather gather information yourself than have to trust a source you've not worked with before?

A: Absolutely.

Q: But you were not given an opportunity to do that in this case?

A: Well, not exactly. No, I wasn't.

A word of warning: Do not be like the hack adventure-story author who has a character leave a gun in his sock drawer in Chapter 1 and then forgets about it. If you point out the possibility of unreliable facts, there better be something you can point to later on, or the jury will feel cheated.

VARY THE HYPOTHETICAL

Changing the hypothetical is closely related to attacking the facts on which the expert relies. You are permitted to change the facts around to see at what point they alter the expert's opinion—depending on whether the question on direct examination originally was asked as a hypothetical.

You may insert facts you feel were left out on direct or take out facts you feel should not have been included.

But watch out. This does not mean you are free to invent facts, like some first-year torts teacher, just to see how the witness responds. You must have a factual basis for all your changes. If the basis for your question is not already in evidence, you must be able to connect it up later.

IMPEACH WITH A TREATISE

The point is simple: If the expert differs with others in his field, he may be wrong, and one way to attack him is with a book or article by a recognized authority that disagrees with what the witness has said on the stand. The expert may have relied on the treatise in forming his opinion, or at least recognized it as being authoritative in the field.

Unfortunately, this puts the witness in charge of his own impeachment. Properly prepared, few experts would admit that any works were truly authoritative. So Rule 803 (18) of the Federal Rules of Evidence lists three ways to establish that a learned treatise is authoritative: from the witness himself, from some other witness or by judicial notice.

ATTACK THE EXPERT HEAD-ON

The most difficult and dangerous way to cross-examine an expert is by fighting him on his own ground. You can do that in any number of ways, such as trying to show he erred in his factual investigation, his computation or his logic.

But be careful. This is a game that is easy to lose, so you should not play it unless you must. It is usually better to base your cross-exam on some combination of the other options.

At that point, Angus stood up and paid his bill. “Well,” he said, “I’ve got to get home.”

“Wait a minute,” said Flash Magruder. “You said there were nine ways to cross-examine an expert, but I counted only eight. What’s the ninth?”

“Easy,” said Angus, putting on his coat. “Punch the witness full of little holes and let all the air leak out.”

Hear McElhaney discuss his real-life influences behind the Angus character in this podcast ***(http://www.abajournal.com/news/article/podcast_interview_episode_4/).***

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