

# New York Law Journal

## Winning With Failures and Omissions

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**By Ben Rubinowitz and Evan Torgan**

In crafting the cross of a witness, the trial lawyer must look beyond the obvious. Instead of just focusing on what was said, the trial lawyer should explore that which was not said, but should have been said. Instead of focusing only on what was done, the lawyer should focus on what was not done, but should have been done. It is these omissions and failures that often lead to the most compelling arguments on summation. The problem is that most lawyers are fearful of the unknown. If, for example, the omission or failure was not explored during a deposition and the area remains a mystery, too many lawyers are afraid to inquire. The old adage "never ask a question to which you do not know the answer" comes into play. While adherence to that adage may, at times, be justified, there are exceptions to every rule. With a goal oriented strategy that includes both patience and a proper set up, the unexplored area of inquiry may very well lead to a powerful line of cross that serves to challenge the witness, discredit him and create an otherwise unknown, but powerful, argument for summation.

To illustrate this strategy consider a medical malpractice case in which a patient, a 70 year old businessman, went to his doctor, a urologist, complaining of urinary urgency and frequency. At the top of the urologist's differential diagnosis was the concern of prostate cancer. To rule out cancer the urologist properly suggested a transrectal biopsy of the prostate and appropriately made his recommendation known to the patient. The patient complied, underwent the biopsy and was told by the doctor that the results would be ready in about a week. After a week passed the

results came back positive for cancer. The urologist tried calling the patient two times, but he was unable to get through to the patient and did not notify him of the positive biopsy results. The urologist noted in his record that he "attempted to contact the patient twice." Unfortunately, more than 15 months passed before the patient was made aware of the results of the biopsy. Needless to say, the patient suffered from metastatic disease which would eventually claim his life.

Here, the plaintiff's lawyer is faced with a seemingly difficult scenario. It is conceded that the doctor timely and appropriately recommended and ordered a biopsy and diagnosed the cancer. In addition, the doctor's notes make clear that he attempted to contact the patient not once but two times to notify him of the results. The affirmative facts, or those which are known, tend to suggest that the doctor was a concerned physician; however, the job of the plaintiff's lawyer is to show the opposite -- that the urologist was a less than concerned and caring physician. To drive this point home the plaintiff's lawyer must work with the omissions and failures -- those things that the urologist could have and should have done that would have led to a better outcome.

#### CROSS EXAMINATION

To highlight the failures on the part of the urologist the plaintiff's lawyer must avoid moving in for the kill too quickly. That strategy will almost always backfire. Imagine the following questions and answers on cross:

- Q: Doctor, did you ever tell the patient the results of the biopsy?
- A: I called and tried to tell him twice.
- Q: Doctor, did you ever speak with him?
- A: Yes. I told him to call me in a week but he didn't call me.

- Q: But did you tell him the results?
- A: No. I followed up and I tried to contact him which is more than he did. He never contacted me.

Needless to say, by moving in for the kill without the proper set up the doctor is on the winning side of the argument. Now, consider the more powerful line of inquiry, by slowly, carefully and patiently setting up the witness and pointing out those things which were not done that should have been done. The best way to start the inquiry is to ask "voice of reason"<sup>1</sup> questions designed to elicit agreement on cross:

- Q: Doctor, can we agree your most important concern is the health of the patient?
- Q: Can we agree you would never do anything to cause injury to the patient?
- Q: Your goal when treating this patient, Mr. Mann, was to help him, correct?
- Q: You suggested a biopsy to find out if he had cancer?
- Q: You suggested the biopsy because you knew that early detection would often lead to a better outcome?
- Q: You knew that prostate cancer could be life threatening if left untreated, true?
- Q: You knew that it could spread to other areas of the body, true?
- Q: The patient complied with your recommendation, true?
- Q: He underwent the biopsy you recommended, true?
- Q: And you knew within one week that the results of that biopsy came back positive for cancer, correct?
- Q: You knew within one week that immediate treatment was necessary, correct?

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<sup>1</sup> "The Voice of Reason: A Powerful Approach to Cross Examination," New York Law Journal, August 19, 2002.

- Q: You knew within one week that the more time that passed between the diagnosis and the treatment of the cancer the more likely it would be that the cancer would spread, true?
- At this point the cross examiner must work with the negatives, carefully recognizing and pointing out the limited effort made by the physician, and continuing the line of attack by exploring and exploiting the omissions:
- Q: You knew that if untreated this type of cancer could cause death?
- A: That's why I tried to call him twice.
- Q: But you knew that you never spoke with him, true?
- Q: You knew that he was not told the positive results of the biopsy, true?
- Q: You knew that as time passed he was not being treated, correct?
- Q: So we can agree that your efforts in "trying" to call did not help the patient at all, true?

At this point the specific failures or negatives must be explored:

- Q: Once you realized that after two tries that you couldn't get through, did you send a letter telling him to call you immediately?
- Q: Did you send a postcard?
- Q: Did you even consider a letter or postcard?
- Q: You had his email address correct?
- Q: Did you send an email?
- Q: You had his cell number, right?
- Q: Did you send a text message?

- Q: You had his wife's phone number as an emergency contact in your records, true?
- Q: Did you think to call her and ask her to have him call you?
- Q: In fact doctor, the truth is that after two attempts to contact Mr. Mann you decided to wait, true?
- Q: You knew if you waited the cancer could spread, correct?
- Q: You knew if you waited the cancer could cause death, true?
- Q: But the cancer didn't wait did it doctor?
- Q: As you waited the cancer grew, true?
- Q: Waiting only made things worse, true?
- Q: It allowed the cancer to spread, true?

In this instance the cross examining attorney came out on the winning side. This tact does not just work for plaintiff's lawyers. Focusing on the negatives works equally well for defense lawyers. Imagine the same strategy used by a skilled and patient defense lawyer. Here, the patient's own failures and omissions must be highlighted to create a powerful argument on summation that personal responsibility is not just meaningful but a substantial and significant factor in allowing the disease to spread:

- Q: Mr. Mann, you were told by the doctor that he was most concerned about one thing, true?
- Q: The doctor told you he was concerned about cancer, correct?
- Q: He told you that early detection could likely lead to a better outcome, true?
- Q: He told you that time was of the essence not just in early detection but early treatment, true?

- Q: That is why you had the biopsy done right away, true?
- Q: You were specifically told that the biopsy results would be ready in about one week, correct?
- Q: You knew the doctor's phone number, true?
- Q: You had emailed with him previously, correct?
- Q: You knew the doctor's office address, correct?
- Q: Not once did you pick up the phone and call the doctor's office, correct?
- Q: Not once did you send an email to the doctor asking for the results?
- Q: Not once did you send a letter to the doctor's office asking for the results, true?
- Q: In fact, you didn't make any attempt whatsoever to find out the results of your own biopsy, did you?
- Q: As a businessman do you agree that personal responsibility is important?
- Q: You made a decision not to contact the doctor, true?
- A: I assumed he would call me.
- Q: Did the doctor ever say "Don't call me or my office to find out the results?"
- Q: Did the doctor ever say "Do not email me for the results?"
- Q: Knowing that this was your biopsy you didn't even take 20 seconds out of your life to pick up the phone and call, true?

## SUMMATION

The failure to do something that should have been done or to say something that should have been said serves as a powerful building block for argument on summation. When combined with appropriate rhetorical questions during summation the trial lawyer is in the best position to

emphasize the failures and omissions as the key to the case. Imagine the defense lawyer's summation on this point:

Why is it that the plaintiff, Mr. Mann, feels compelled to blame others for his own failures? Why is it that Mr. Mann won't accept personal responsibility for his own failures? Isn't the answer clear? It is much easier to blame others for his own failures. It is much easier to point the finger at someone else. But if he really wanted to know who is to blame for the spread of his cancer Mr. Mann should look in the mirror. He was told about the importance of early detection. He was told about the need for early treatment if the results were positive. He was given the office number. He was given the doctor's email. He knew where the doctor worked. He was told to follow up. He was told to call. But not once did he call. He was told the results would be available in a week. Not once did he call. He was told that cancer could be life threatening if left untreated. Not once did he call. The only one who tried was his doctor. The only one who followed up was his doctor. Failures and omissions-- look in the mirror Mr. Mann.

In response, the plaintiff's lawyer must acknowledge that weakness spelled out by the defense lawyer during summation. But he must also must highlight the significant omissions on the part of the defendant urologist:

My adversary just told you that "the only one who tried was his doctor." Really? Did the doctor try? Who had actual knowledge that Mr. Mann had prostate cancer? The doctor. Who had direct knowledge that if left untreated it would kill? The doctor. Who had direct knowledge that he had not contacted his patient? The doctor. Who knew that by waiting the cancer would spread? The doctor. So ask yourselves this: Was it reasonable for the doctor not to send a letter? No! Was it reasonable for the doctor not to send an email? No! Was it reasonable for the doctor not to send a text? No! And most importantly was it reasonable for the doctor to do nothing for 15

months when he knew his patient's cancer was spreading? No! No and No! It was the failure and omissions by the doctor to follow up, to notify, to ensure Mr. Mann knew of the cancer that will, unquestionably, cause his death.

When preparing for cross the trial lawyer should scour the record for failures and omissions -- those things that were not done, but should have been done. By working with the failures and omissions, an attorney can, among other things, successfully challenge a witness' account of the events, discredit the witness or establish departures from good and accepted practice. A cross, carefully crafted to highlight and establish those failures and omissions will create cogent, compelling and successful arguments for summation.

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