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**HEADLINE: Trial Advocacy, Cross-Examination Of A Medical Expert: Collateral Attack**

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**BODY:**

Expert testimony adds a unique facet to the trial. It permits witnesses who are retained by one side to offer information and educate the jury on issues which are beyond the scope of an ordinary juror's knowledge. Obviously, this testimony, if persuasive, can destroy your case; so you have to inflict as much damage as possible to the opposing expert on cross-examination.

One way is to attack the substance of the expert's opinion; another way is to attack the witness himself. We addressed the former in our last article.

To accomplish the latter, you have to convince the jury either that the witness is not qualified to give that opinion, or that his testimony should not be believed. Unlike the cross-examination of a lay witness which can show that certain testimony is incredible on its face, the cross of an expert witness cannot easily demonstrate that same improbability. For example, the cross of an eyewitness who maintains that he could see a person's eye color from 300 feet away clearly lacks credibility. However, a lawyer would be hard pressed to examine an expert about a CT scan of the head and expect to persuade the jury that he is lying about the existence of brain lesion.

**Impressions Can Be Key**

In complex cases such as those involving medical malpractice, which hinge on conflicting expert testimony, the jury is asked to resolve a pointed conflict, the subject matter of which is unfamiliar to them. In so doing, they must accept one expert's version and reject another's. The impression an expert witness leaves with regard to his qualifications and honesty carries the day. A typical jury will find it easier to evaluate which expert looks and sounds more worthy of belief than which expert's opinion is more meritorious.

While a plaintiff can score points with an impressive, forthright expert, the cross-examination of a defendant's expert - if it reveals that witness is dishonest or dishonorable - can anger the jury and provide the most lasting memories of the trial.

To challenge the expert's opinions, you must do more than just show that the witness is merely mistaken in order for the point to resonate with the jury. You want to show that the expert does not know, does not want to know, or knows, but does not want to say. Then the jury will have reason to disbelieve the expert and, therefore, reject his opinions.

The collateral attack is not a direct challenge to the substance of the direct testimony but rather is an indirect challenge to the expert himself, suggesting that his testimony is not worthy of belief. The collateral attack will afford you the opportunity to show many things about the paid expert: a bias toward the side that has retained him; an interest in the outcome of the litigation; an ongoing relationship with a party or law firm; and the monetary rewards the expert receives now and will receive in the future from forensic work and trial testimony. Demonstrating these things is a powerful way to diffuse the impact of a forceful direct examination.

**The Collateral Attack**

To prepare for a successful collateral attack, assemble a list detailing all you can learn about the expert's background including his education, medical training, residency, fellowship and work-related history. Find out whether the expert is board certified, whether he is affiliated with a teaching institute, whether he is currently active within his field, whether his privileges have ever been suspended, modified or revoked, whether he has

published in the relevant area, and whether he derives a substantial portion of his income from litigation. Specifically, you need to determine where and for whom the expert has testified, and obtain transcripts to ascertain admissions he has made during earlier collateral attacks. The information learned from these inquiries can open up entire lines of cross-examination.

Do not forget to save the collateral attack for when you need it most, either when the expert has hurt you on a critical point or is being particularly evasive. Then try launching the attack with the focus on the witness' devotion to litigation. Start with the set up:

Q: We can agree can't we, that there are doctors who devote themselves full time to treating patients?

Q: We can agree that there are doctors whose main concern is the health, safety and well-being of their patients, true?

Q: On the other hand there are doctors who devote a considerable portion of their work to litigation?

Q: There are doctors who devote a considerable portion of their work to testifying in medical malpractice cases?

Q: There are doctors who devote a considerable portion of their work to testifying in general negligence cases?

Q: There are doctors who devote a considerable portion of their work to testifying in compensation cases?

Q: There are doctors who devote a considerable portion of their work to testifying in products liability cases?

#### Eliciting an Admission

After exhausting all of the different types of cases in which such a witness can testify, make him admit that he has testified in all of them.

Q: In fact, you are one of the doctors that testifies in medical malpractice cases?

Q: You are one of the doctors that testifies in automobile cases?

Q: In fact, you are one of the doctors that testifies in bus accidents?

Q: You are one of the doctors that testifies in train accidents?

Q: You are one of the doctors that testifies in slip-and-fall cases?

Q: In fact, you testify for defendants in all types of general negligence cases?

Next, focus on the money the witness makes from testifying and examining claimants.

Q: We can agree that your legal involvement is a supplement to your income?

Q: In fact, you've testified five to 10 times per year for 25 years?

Q: Testified well over 150 times?

Q: In addition to testifying, you perform 10 to 15 exams a week related to litigation?

Q: Certainly, you appreciate the business from lawyers?

Q: Certainly, you look forward to working with them in the future?

Q: The reason you look forward to it is because of the fees you generate by appearing in court?

Q: In fact, you now have a standard fee for coming to court?

Q: But that fee varies depending on where you testify?

Q: If you testify in New York County, you charge \$7,500 for half a day?

Q: But if you testify in Suffolk County, you charge \$8,500 for half a day?

Q: In fact, for just examining a patient, you charge \$500?

Obviously, you can continue this line of questioning by adding up the amount of money the witness has made in the last year and shocking the jury with that amount. You might be able to point out that most of the expert's income is derived from litigation.

#### What 'Real' Doctors Do

Continue undermining the credibility of the expert by showing that real doctors make rounds in hospitals, but that this doctor makes rounds in courtrooms:

Q: You are familiar with the term grand rounds true?

Q: This is where a doctor goes around the hospital to check on his different patients, correct?

Q: You, on the other hand, have gone around to different courts in our state, true?

Q: You've testified in Brooklyn?

Q: You've testified in the Bronx, Queens and Staten Island?

Q: You've testified in Westchester and New City?

Q: You've testified in Poughkeepsie and Albany?

Q: The reason you went there had nothing to do with treating patients?

Q: But it had everything to do with your devotion to litigation?

Q: Or testifying for attorneys?

Q: It had everything to do with supplementing your income?

Point out that the expert neither treated your client nor consulted with any of his doctors. Next focus on your adversary's relationship with the expert.

Q: Now this isn't the first time you've met my colleague?

Q: You've worked for his firm in the past?

Q: You've testified for his firm at least 10 times in the past?

Q: You've conducted more than 25 examinations of claimants at their request?

Q: You'd agree that this business relationship is a profitable one?

Q: One that you hope to continue in the future?

Gathering Fodder

Even something that seems innocuous can serve as fodder for a collateral attack.

For example, suppose you learn that the expert is not board certified. Rather than simply asking that question directly, you can stress the importance of board certification through the use of expansive and thorough questioning, using it as a tool to undermine the credibility of the opposing expert.

Once you learn that the certification process is designed to provide assurance to the public that a medical specialist has successfully completed an approved educational program which is designed to assess experience, skill and high quality patient care in that speciality, you can use that knowledge to your advantage. If the expert did not pass the test issued by the given board, it does not affect his medical license. It simply means that he does not possess the degree of skill and experience necessary to be given the status of diplomate and certified as a specialist. With this small amount of information, you can severely damage the credibility of the expert:

Q: Doctor, you are familiar with the term "board certified" correct?

Q: You are aware that there are various speciality boards recognized by the American Board of Medical Specialties?

Q: You are aware that there are various speciality boards recognized by the American Medical Association?

Q: Within your field there are specific requirements that must be met to become board certified?

Q: These requirements include a specific course of study?

Q: One that includes training in an accredited residency program?

Q: A residency program designed to train specialists within the field?

Q: You went through such a residency program correct?

Q: The certification process also requires passing two tests true?

Q: One written and one oral exam?

Q: We can agree that a good portion of the residency program was devoted to preparing you for these tests true?

Q: In fact, you spent more than six months studying for the boards?

Q: You knew, didn't you, that you would be evaluated by senior specialists within your field?

Q: You knew that they would test you on your degree of knowledge and skill in radiology?

Q: You knew that if you possessed the requisite degree of knowledge that you would pass?

Q: Conversely, you knew that if you didn't possess the requisite degree of knowledge you would not become board certified?

Q: We can agree that many residents within your program passed the boards true?

Q: Today, you told us that you are board eligible correct?

Q: What that means is that you did not pass the board certification exam?

Q: What that means is that you have not been given the status of diplomate?

Q: What that means is that you were not recognized by the senior specialists within your field as possessing the requisite degree of knowledge and skill?

#### Your Expert vs. Theirs

Here you can pit the opposing expert's lack of qualifications against your own board-certified expert. Moreover, you can get your opponent's expert to bolster and validate the qualifications of your own expert. For example:

Q: Would you agree with me that a doctor who is board certified is a recognized authority in the field?

Q: That they have been recognized to possess certain knowledge and skill?

Q: You are aware that our consulting radiologist is board certified?

Q: You are aware that not only did he study for the exam but he successfully completed the exam?

Many of these professional witnesses have lectured to lawyers at various bar associations seminars, law firm programs and Continuing Legal Education classes. This information alone can form the basis of a compelling collateral attack:

Q: Doctor, we can agree that your involvement in legal cases spans more than a decade, true?

Q: In that time, not have you only written reports and testified for attorneys, but you've assisted them in other ways?

Q: You've lectured to lawyers at bar associations?

Q: You've spoken at Continuing Legal Education classes?

Q: You've spoken at law firms?

Q: You've taught them how to prepare the medical aspects of their case?

Q: You've shown them how to structure their examination?

Q: How to work with anatomical exhibits?

Q: How to work with medical illustrations?

Q: In fact, you've gone so far as to tell them what to anticipate on cross, true?

Q: You've suggested ways to deal with problem areas in the case, correct?

Q: You'd agree with me, that has nothing to do with your job as a radiologist, right?

Q: But it has everything to do with your devotion to litigation?

Q: With helping the lawyer, correct?

## Attack Is Twofold

By exposing the opposing expert as something other than the beacon of truth that your adversary presents him as, you fulfill a twofold purpose: creating mistrust of the opposition, and enhancing your own credibility.

While your summation may ultimately focus on what the substance of the expert's opinion was, a strong collateral attack provides the jury with the answer to why the opposing expert testified as he did. The jury will reject the substance of the testimony simply because the expert has been exposed for what he is: a witness who will say anything for the right price.