

HEADLINE: **Trial Advocacy, Cross-Examination of Medical Doctors: Recurrent Themes**

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BODY:

It goes without saying that the cross-examination of an opposing medical expert must be carefully planned well in advance of trial. Preparation for this cross necessarily includes obtaining and reviewing all up to date medical literature regarding the medical subject at issue in the case. It also includes securing and reviewing testimony given by the opposing expert in other cases. Review of the written medical report prepared by the opposing medical expert is essential; equally important, however, is reviewing the report of your own medical expert or treating physician.

Once your homework is complete, you can begin an outline for the cross-examination itself. Initially, one must keep in mind that the process of discrediting your adversary's expert should be undertaken only if necessary. Sometimes, in response to a softer cross-examination, an opposing expert will concede or confirm many of the facts that you have proven on your case.

This article focuses on techniques to utilize when you attempt to undermine your adversary's expert.

In every personal injury case, recurrent themes exist which can be worked into your cross of the defendant's expert to both discredit him and support your argument on summation. Generally, by focusing on the expert's role in the case, that of a non-treating, one-time examiner of the plaintiff, you can negate his testimony and simultaneously bolster the opinions of your own expert.

Expert Not a Treating Physician

While it might seem obvious that the defendant's expert is not a treating physician, this fact must be pointed out on cross:

Q. Doctor, you treat patients, true?

Q. You have been treating them for more than 20 years, true?

Q. You have had the opportunity to observe them?

Q. To give them medication?

Q. To recommend medical treatment for them?

Q. But there is no question about this: you never once treated my client, true?

Immediately, you establish the doctor's function is nothing more than an examiner on behalf of the defendant. This is particularly useful where you are calling a treating doctor, who has seen your client over a period of years. Moreover, when the opposing expert makes a substantial portion of his income performing these examinations, you have begun to set up your collateral attack in that area.

Bn No Doctor-Patient Relationship

The fact that the defense medical expert is not a treating physician, and thus, not involved in the actual care and decision making regarding the plaintiff's injuries, can be brought to light in other ways as well. For instance, in

contrast to the treating physician, this doctor must concede that his examination created no doctor-patient relationship with your client:

Q. In treating your patients, you are aware that you have created a relationship with them, true?

Q. You have heard of the "Doctor/Patient Relationship"?

Q. That's a relationship that is sacred?

Q. So important is that relationship that you cannot divulge information without your patient's consent?

Q. But with respect to my client, there is no doctor/patient relationship, true?

Q. Your relationship is solely with the (defense law firm)?

Q. They are the ones who hired you in this case?

Examination Was Solely for Litigation

Continue with this line of questioning to reinforce to the jury that litigation is the only reason that this doctor is involved with your client:

Q. Unlike your own patients, you were not attempting to help the plaintiff?

Q. You were merely evaluating her?

Q. Your report was not something that you intended to send to a treating doctor?

Q. Your intent was to send it to a law firm, correct?

Q. The law firm representing the defendant?

Q. That's why the report is not addressed to any treating doctor, true?

Q. It's addressed to the defendant's firm?

Q. You certainly knew that you might have to come to court to testify about your findings?

Only One Examination

Having established that the witness has not been involved with your client as a treating physician, you can springboard into an attack on the expert's ability to accurately offer his opinion. Specifically, you can show that a physician hired by a defendant to perform an exam is getting a limited snapshot of a patient's condition, as opposed to a treating doctor who has had the opportunity to observe your client over a period of years:

Q. You pride yourself on the examinations you conduct on your own patients, true?

Q. Your examination of the plaintiff clearly was more limited than those you conduct on your own patients, right?

Q. You certainly never saw my client before the accident?

Q. Here you conducted one and only one examination?

Q. An examination which lasted less than 15 minutes?

Some doctors may resist conceding this line of inquiry, and instead will maintain that the examination that they performed on your client was the same one they would have done on a private patient. Here, it's important to have accurate notes regarding the exam, taken by the person in your office who accompanies the plaintiff to the doctor's office. The notes should include a review of the tests performed by the doctor, and the time at which the exam began and ended. When confronted with these notes, a doctor will be hard pressed to dispute the timing of the exam, or the details of the exam which occurred at least several months before his in-court testimony.

Exam Is Remote in Time

Not only is the examination a one-time opportunity for the defendant's expert, but it, by necessity, occurs well into the litigation, long after the accident itself. This, too, provides fertile ground to undermine the doctor's ultimate conclusion:

Q. When you treat patients, they often come to you shortly after an injury occurred?

Q. You then have an opportunity to view first hand the extent of the trauma?

Q. You can lay out a course of treatment, true?

Q. You can even continually adjust your differential diagnosis?

Q. And even adjust your course of treatment?

Q. But with respect to my client, you saw her two years after the accident?

Q. And all you were able to focus on were the complaints on that one day at that one time?

This last question is crucial in situations in which plaintiffs with chronic problems tell the defendant's doctor that they are feeling well on the day of his examination. It is undisputed that people who suffer from arthritis following trauma and/or surgery will enjoy good days and endure bad ones. Where the defendant's doctor saw your client on a pain-free day, the point must be made that such a finding is not inconsistent with a person who suffers from the sequella of his injury on a regular basis.

Don't Pit the Treating Doctor Against the Examining Physician

In fact, it is only through serial visits over a lengthy period of time that a doctor can form a full, fair and accurate opinion of a patient's condition. Here, there is a stark difference between a treating doctor who has had the opportunity to evaluate over time and the one-time examiner you are now questioning. Indeed, all of the techniques set forth above should lead you to this comparison, weakening the defendant's position while strengthening your own:

Q. Certainly you are aware that (plaintiff's doctor) has had the opportunity to evaluate the patient numerous times over the last two years?

Q. Certainly, he has had more of an opportunity than you to evaluate the patient?

Q. Unlike you, he has actually rendered treatment?

Q. Unlike you, he has actually taken X-rays?

Q. Unlike you, he has actually prescribed medications?

Q. Wouldn't you agree that his continued examination over the course of a two year period puts him in a better position than you to offer a medical opinion?

In a sense, your entire cross-examination to this point has led up to this final question. If, by chance, the witness actually agrees with this point, you have gotten him to tell the jury that your doctor is simply more worthy of belief than he is. If, as you must expect, he denies that your doctor owns any advantage over him in offering the jury an opinion, the force of your attack up to now will cast doubt in the jury's mind about his credibility. Moreover, now is the time to challenge his believability in other ways.

Lack of Publications

One area where the doctor may be vulnerable is his failure to publish articles or papers on the subject matter on which he is testifying. You can bring this out in an attempt to prove that he is something less than an authority in his field:

Q. You are aware that there are several journals devoted to publishing articles about your medical field?

Q. And you know that doctors, such as yourself, publish the articles and papers?

Q. They serve the purpose of educating other doctors, true?

Q. They contribute to the quality of care that physicians offer their patients, right?

Q. You, yourself, rely upon these publications in order to stay informed and up-to-date in your field, correct?

Q. In fact, you teach others to read these materials, right?

Although you have been asking leading questions throughout your cross-examination, this situation presents an excellent opportunity to use low-risk, open-ended questions. In doing so, you can work from the specific to the general to force the expert to continually emphasize his lack of publications:

Q. Sir, tell the jury how many articles you have written on traumatically induced lumbar herniated disks?

A. None.

Q. Let's broaden it out. How many articles have you written about disk injury?

A. Zero.

Q. How many articles have you written about spinal cord injury?

A. None.

Q. Well, how many articles have you written about low back injury?

A. None.

Q. How many articles have you published in your 20-year career about back injuries?

A. None.

Q. Sir, please tell the jury how many articles you have published in your field in your 20-year career?

Rather than having led the witness through his answer, he is now forced into the position of informing the jury that he has not published in his field. When used judiciously, the open-ended-question on cross can enhance the power of your message. Moreover, if the doctor is well-published, but not in the specific area in which he is testifying in your case, you can use that fact to suggest that his expertise lies elsewhere.

Frequent Testifier

Another way of attacking the expert's credibility is an inquiry into the number of cases with which he has gotten involved as an expert. If your jury verdict search reveals an expert who frequently testifies on behalf of defendants, this fact opens another line of inquiry. Indeed, it is not hard to show the amount of money that the doctor makes performing these exams and coming to court. Remember that a doctor must concede he performs at least 20 exams for each time he actually has to go to court and testify. By multiplying those numbers, you can show that this doctor is beholden to the defendants and must offer opinions supportive of their positions.

On the other hand, an expert who has previously testified for plaintiffs may have given testimony about the injury your client sustained in which he predicted a far grimmer prognosis than he now projects as a defendant's expert. You can use this material in two ways: first, on the medicine itself to show, by his own admission, how devastating the injuries can be, and second, to impeach his credibility generally by revealing that his opinion is influenced more by the side for whom he's testifying than by the true medical facts of the case.

Conclusion

It bears repeating that the types of attacks outlined above may not always be necessary. When, however, you run across an expert with an agenda to deny the severity of your client's injuries, the combination of good homework and smart presentation can lessen the impact such testimony holds.