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Headline: Prep Is Key to Cross-Exam of Examining Medical Witness

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In any personal injury case, effective cross-examination is essential to win the battle of medical experts. The goals of an effective cross are to undermine the expert's opinion by showing that he or she does not have a sufficient factual basis to support that opinion and to attack his or her credibility.

While many lawyers prepare their examination of the opposing expert the night before the actual cross takes place, the well-prepared lawyer knows better -- a winning cross is prepared months in advance of trial.

Months Before the Trial

Before ever setting foot in court, you must conduct a thorough and exhaustive background check of the opposing medical expert. This check should include, at the minimum, an Internet search regarding the expert's licensure including any suspensions, revocations or modifications of his or her ability to practice medicine. In the age of the Internet, searches like these are easy to conduct. Companies have been created to assist with this type of search at a minimal charge. [FN1] Other sites offer this type of information for free. [FN2] In New York, for example, the Office of Professional Medical Conduct allows you to conduct a basic background search at no cost. The site, which can be accessed at <http://www.health.state.ny.us/nysdoh/opmc/main.htm>, provides information concerning medical licensure and any disciplinary action taken against the specific physician. The 'Blue Book' Medical Directory of the State of New York [FN3] also provides information concerning dates and details of licensure and board certification.

In addition to these resources, jury verdict reporters provide information that can facilitate a powerful collateral attack, including the answers to such questions as how often, where, when, and perhaps most importantly, for whom the expert has testified in the past. Some well known jury verdict publications include VerdictSearch (a division of ALM Media), New York Jury Verdict Review & Analysis, National Medical Malpractice Review & Analysis and New Jersey Jury Verdict Review & Analysis.

Once you have completed the jury verdict search, obtaining the transcripts of the expert's prior testimony on similar issues will allow you to gain insight into the manner in which the expert testifies and provide information which might serve as the basis for impeachment through the use of a prior inconsistent statement.

These resources allow you to check for any misleading information on the expert's C.V., his education, degrees, licenses, board certifications, or lack thereof. You should attempt to find out whether the expert is truly an expert in the field or merely a 'jack of all trades.' Try to evaluate the practical experience he has in the field, his relationship to the retaining attorney, his affiliation with an insurance company, and his monetary interest in the case.

An Internet search should also be conducted to determine whether the expert has his own Web page and, if so, whether the information stated therein is correct. Additionally, a search of the expert's publications may provide a fertile area for attack. Web sites such as PubMed (www.pubmed.com) or Google Scholar (<http://scholar.google.com/>) allow access to every publication by that expert. PubMed, which can be searched by author, is a service of the U.S. National Library of Medicine and includes over 17 million citations from MEDLINE and life science journals for biomedical articles back to the 1950s. Google Scholar, which also can be searched by author, allows one to search for, among other things, peer-reviewed papers, theses, books, abstracts and articles from academic publishers, professional societies, universities and other scholarly organizations.

Physical Exam of Plaintiff

An aspect of preparation for your cross that is often overlooked is the physical examination conducted of the plaintiff. It is well worth your time and effort to accompany your client to the examination. Not only will you gain valuable information concerning the history that was obtained from your client by the examining doctor but you have an opportunity to observe and time the actual examination itself. Equally important as to what was done by the examining doctor is what he did not do that he should have done. Issues to consider include whether or not prior medical records and radiographic studies were made available to the doctor, and, if so, whether or not he actually reviewed the materials prior to the exam. In addition, you should note if there were tests that he could have performed, but failed to conduct, and whether he made note of your client's complaints of pain.

The information gleaned from these methods, apart from the substance of the expert's report, can serve as the basis for a powerful cross-examination. Suppose, for example, in an orthopedic injury case involving a fractured ankle you learn by conducting a basic background search that the orthopedist is not board-certified by the American Academy of Orthopedic Surgeons. You also know by obtaining transcripts of this so-called expert that he has, in fact, represented in court that he is a board-certified orthopedic surgeon. This one misstatement can severely undermine the witness' credibility. Instead of asking point blank whether he was board-certified by the American Academy of Orthopedic Surgeons, take some time to set up the witness on cross before going in for the kill:

Q: Dr. K, you did your residency program at the Hospital for Joint Diseases in New York City, correct?

Q: That was a four-year program, true?

Q: There were a group of students studying with you in that residency program, true?

Q: Every one of those residents was studying for the board examinations, true?

Q: You knew that the board exam would be given at the end of the residency program?

Q: That examination was given by the American Board of Orthopedic Surgeons, true?

Q: That board sets the time and place where the exam would be given?

Q: You, sir, failed the board exam given by the American Academy of Orthopedic Surgeons, true?

A: The first time I took it.

Q: Are you suggesting you took the exam again?

A: I never took it again.

Q: You told us you were board-certified in orthopedic surgery?

A: Yes, it was by the American Academy of Neurological and Orthopedic Surgeons.

Q: That group allows you to take the exam at your convenience on weekends or holidays, true?

Q: That group allows you to take the exam from your own place of business?

Q: You are familiar with the Medical Directory of the State of New York?

Q: Also known as the Blue Book?

Q: When you look your name up there, you are not listed as being a board-certified orthopedic surgeon, true?

Q: In fact, sir, you have never been board-certified by the American Academy of Orthopedic Surgeons, true?

Articles Published by Expert

Assume further that the opposing expert will render an opinion concerning your client's ankle injury. You know, having conducted an extensive background check, that the expert has never published at all on any medical topic or has published very few articles, none of which deal with ankle injuries. Rather than asking one question designed to elicit this fact, take the time to explore the issue with the expert on cross:

Q: Doctor, you are aware that there are orthopedists who deal exclusively with ankle injuries, true?

Q: Indeed, they have limited their practice to this one area, true?

Q: You are aware that there are medical publications concerning the treatment of ankle fractures?

Q: You are aware that there are publications concerning the most recent trends in the repair of ankle fractures, true?

Now, move in for the kill by asking low-risk, open-ended questions -- questions to which you already know the answer because you have done a publication search:

Q: How many articles have you written concerning the treatment of ankle fractures?

Q: How many articles have you written concerning the repair of ankle fractures?

Q: How many articles have you written concerning fractures of the lower extremity?

Q: How many articles have you written concerning fractures in general?

Q: How many articles have you written concerning anything in the field of orthopedic surgery?

The Actual Physical Exam

Having taken the time to go to the physical exam of your client, conducted by this so-called expert, you learned that no X-rays, CTs or MRIs were available for review. After reviewing the expert's report you also learned that no reference was made concerning a review of any radiographic study.

Here, the information gained well in advance of trial will serve as the basis for a powerful attack on cross. Once again, resist the temptation to question without providing an appropriate set-up:

Q: You have taught younger, less-experienced physicians for many years, true?

Q: You have explained the proper, appropriate methods of making solid diagnoses, correct?

Q: You would expect them to review the patient's medical information before rendering a diagnosis or opinion, right?

Q: To the extent they rendered an opinion without reviewing such information, that would be improper?

Q: In fact, you, sir, would not tolerate it if a medical resident failed to review the patient's medical information before rendering a diagnosis?

Q: That would be tantamount to guessing, true?

Q: That would be tantamount to malpractice, correct?

Q: But of course, you tell your residents to render an opinion without looking at the X-rays?

A: No sir.

Q: Don't you tell them to reach a diagnosis, but make sure not to look at the radiographic studies -- - the MRIs or CTs?

A: No.

Q: That would be completely inappropriate, wouldn't it?

Q: But that's exactly what you did here, isn't it?

A: The X-rays were not available when I saw the plaintiff.

Q: Did you say to anyone, at anytime, I will not render an opinion until I see those X-rays?

Q: So what you did here is exactly what you would not expect your residents to do, true?

Q: That's the way you conduct a fair evaluation, true?

Transcripts of Testimony

Particularly useful are transcripts of testimony the doctor has given when he was called as a witness for the plaintiff. In those situations, the doctor may have acknowledged the painful sequelae of a particular injury, whereas, as a defense witness he wishes to deny the same. In such an instance, obtaining these transcripts can provide compelling results:

Q: Doctor, you testified on direct that the ligament in my client's foot was which was torn is basically unimportant to the function of her foot, true?

Q: That it required no treatment, correct?

Q: That it would not impact upon her ability to walk normally?

Q: And that it would get no worse over time?

Q: And of course, that would be your opinion regardless of how you came to see this woman?

Q: Even if she had come to see you as a patient, as opposed to at the request of the defendants in this lawsuit, you'd feel the same way about her injury?

Q: Doctor, you testified in the case of Carter v. Johnson, true?

Q: In that case, the plaintiff, Mrs. Carter had sustained a similar injury the one my client suffered here?

Q: And you had actually treated Mrs. Carter and came to court to testify on her behalf?

Q: Well, in that case, when asked about the effects of such an injury, isn't it true that you were asked the following question and that you gave the following answer:

Q: How does the torn ligament in Mrs. Carter's foot affect her?

A: It is a continuing source of pain and discomfort for her, particularly when she is on her feet for a long period of time, and it will get worse as she gets older.

Conclusion

As in most aspects of trial work, the devil is in the details when it comes to preparing an effective cross-examination of an opposing medical expert. The hours spent searching for avenues of attack for your cross, undertaken long before the witness takes the stand, will frequently net case-changing results.