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TRIAL ADVOCACY

Hypothetical Questions on Cross

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In our last article we suggested that hypothetical questions were an extremely useful trial technique when working with your own expert witness.

Although the Civil Practice Law and Rules (CPLR) do not require the use of hypothetical questions to elicit expert opinion, the use of such a questioning technique on direct examination serves two purposes:

- First, hypotheticals allow you, as the trial lawyer, to review and reinforce in the minds of the jury favorable facts which have already been brought out on your direct case.
- Second, by asking your expert to assume as true the facts which underlie his opinion, you provide immediate context and support for that testimony.

While this technique is one which can serve you well on direct examination, it can also provide a powerful tool for cross examination. If utilized properly, the use of a hypothetical on cross will allow you to either undermine the credibility of the opposing expert or allow you to make the opposing expert your own witness and present opinion evidence which supports your position in the case.

To correctly attack an opposing expert's opinion through the use of a hypothetical question, the witness must be carefully and methodically set up before the hypothetical question is even posed. The expert witness must be carefully boxed in and all doors of escape closed off before the attack is made. Once the proper set up has been undertaken, the expert will be put in the unenviable position of being stuck between a rock and a hard place. Indeed, the expert will be forced either to agree that your position is correct or lose credibility by trying to maintain an unsupportable opinion.

Take, for example, a typical medical malpractice case in which the defendant himself was asked whether he reviewed the prior medical records of his patient, the plaintiff.

In a not so unfamiliar response the defendant stated, 'I don't remember if I reviewed those records. It is my custom and practice to review the records but I did not make a note about it.' Needless to say, the defense calls an expert witness who says that there were no departures from accepted standards of medical practice.

'Voice of Reason' Questions

Before ever going near the hypothetical question, the skillful cross-examiner must lock the witness into his opinion. The best set-up is one brought out through the use of 'voice of reason' questions. Voice of reason questions are those designed and posed in such a way that if the witness disagrees with them, he immediately will be made to look foolish:

Q: Doctor, you've been teaching at a major hospital for more than 20 years, true?

Q: During that time you've taught both residents and medical students, correct?

Q: You've taught them the importance of taking an accurate patient history?

Q: You've shown them firsthand how to write up the history in the chart?

Q: You've taught them to fully note the patient's medical history, true?

Q: You've explained that these notes must include all relevant data, right?

Q: You've also taught them that they must let the medical chart reflect what they have done, correct?

Q: To the extent that they failed to take an adequate history you would find that unacceptable, right?

Q: To the extent that they omitted crucial facts from the chart you would correct your students, true?

Q: To the extent that they didn't note in the chart what they did that would be wrong, true?

Q: The goal, after all, is continuity of medical care?

Q: The goal, after all, is properly caring for the patient, true?

Q: The goal is to allow others reviewing the chart to see first hand what was done regarding the patient?

Q: After all, you would agree that if your resident failed to make appropriate notes that would be wrong, true?

Q: Indeed, if your resident didn't make any notes that would be a departure from accepted standards of medical conduct, true?

The witness has little choice but to agree with these basic questions. By setting them forth, however, you have committed this witness to the importance of obtaining an accurate history and properly recording it.

Giving Witness Only Two Ways to Go

Next, you can shift your line of questioning to the absence of any noted history in your case:

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Q: Doctor, when you reviewed the records in this case, one of the things you looked for was the history which the defendant doctor recorded, right?

Q: As we discussed earlier, if he reviewed the prior medical records, you would expect that he would make a note of it, true?

Q: Did you see any notation anywhere that the defendant made reflecting that he had reviewed the plaintiff's prior records?

Q: Did you read anything in this case which suggests that the defendant was aware of the plaintiff's medical history?

Q: Did you form an opinion with regard to whether or not the defendant had reviewed the plaintiff's medical history prior to examining him?

At this point, the witness only has two ways to go: he can either offer testimony that he has no opinion on the subject, or if he wishes to credit the defendant's story, claim that he believes the defendant did see the records because he testified that it was his normal practice to do so. If he chooses the latter course, you can go further with your set up:

Q: Doctor, you're not here as an advocate for the defendant, are you?

Q: Your job is to analyze the case, and give your unbiased opinion, true?

Q: You had never met the defendant before this case, right?

Q: You had no opinion about what type of doctor he was, right?

Q: But you assumed that he had read the prior records because that is what you'd expect of any competent doctor, true?

Q: Because you know that failing to review prior medical records would be unacceptable?

The Hypothetical Question

Now, you can attack by using a hypothetical question:

Q: Doctor I want you to assume, in fact, that the defendant made no notes concerning any review of the patient's prior medical history. I want you to further assume that the defendant never reviewed or even looked at the patient's prior medical history. My question is this: Wouldn't you agree that the failure to review the patient's prior history is a departure from good and accepted standards of medical practice?

Here, the expert has a choice. He can either agree that there was a departure, thereby allowing you to make this witness your own or he can fight. If you get the admission that it would be malpractice, you now need only to convince the jury that your version of the facts (the doctor didn't read the other records) is true. If, on the other hand, the witness resists, the beauty of the 'voice of reason' set up

is that he can be made to look ridiculous.

Assume he answers 'No, it is not a departure.' Now, you can continue with your cross:

Q: Doctor, we know clearly that you expect your residents to make notes, true? Q: You expect them to note their review of the patient's history, right?

Q: You even take the time to note that you have reviewed the prior history?

Q: Here, we know not one single note was made by the defendant concerning his review of the medical history, true?

Now, by changing the tone of your voice and adding a touch of sarcasm the following questions can be asked:

Q: And, of course, you are telling this jury that no notes is the proper way to care for a patient, true?

Q: Obviously, not making notes is one of the best ways to ensure proper healthcare, right?

Q: Doctor, are you really saying to this jury that 'no notes is good practice'?

Hypothetical questions also allow you to commit the expert to a different outcome or opinion based on an assumed set of facts. If the cross-examining attorney believes that the jury will be persuaded by a different set of facts than those assumed by the opposing expert, the hypothetical allows you to argue that the opposing expert agrees completely with your position. Here, if the supportive facts used in your hypothetical more reasonably reflect the truth of the factual dispute at hand, an opposing expert can be turned into one who supports your final argument.

Take, for example, an economist called to the stand to offer an economic projection of the future medical specials in a damages case. A typical set of facts might be one in which the plaintiff has presented medical proof that the plaintiff, a 40-year-old man, will require physical therapy three times a week for life at a cost of \$120 per session. Based on these numbers, which the plaintiff's attorney has asked his economist to assume as true, an economic projection is offered. The expert economist offers his opinion that the future medical cost of physical therapy is \$3,001,517.

While a defense attorney has the option of calling his own economist and challenging those numbers on his direct case, the defense attorney does not have to wait for that portion of the trial to begin his attack.

Here, a hypothetical question can be posed on cross-examination in such a way as to challenge the numbers put up on the blackboard by the economist without questioning the integrity or credibility of the economist himself:

Q: Professor, in order to reach your opinion as to the future cost of physical therapy you assumed certain facts to be true, correct?

Q: One of the factors taken into your projection was the growth rate, true?

Q: In addition to these factors, you assumed the cost of an individual session of physical therapy to be \$120, true?

Q: You also assumed the plaintiff's life expectancy to be 36.2 years, right?

Here, the hypothetical question can be posed:

Q: Professor, I want you to assume the following facts to be true. Assume that we will call a physician on our direct case who will offer his opinion that the cost of physical therapy is not \$120 per session but is only \$95 per session. Assume further that this same physician will testify that based on his examination of the plaintiff as well as his review of the medical records that the plaintiff will need physical therapy, but will only need it one time per week. Assume further that this physician will testify that the plaintiff's life expectancy is not 36.2 years but is only 20 years. Assuming those facts to be true, what is your opinion as to the future cost of physical therapy?

A: Assuming a 7 percent annual growth rate in medical costs, the total number, following your assumptions, would be \$221,633.

By questioning in this manner, the defense attorney does not have to pick a fight with the plaintiff's expert. Indeed, his argument on summation will stress the fact that the opinion of the plaintiff's economist is only as good as the facts on which it was based. Moreover, if the expert's responses are in line with his own calculations, he has effectively simplified his argument for the jury: It needn't concern itself with dueling economic testimony, but instead, focus on the testimony regarding the cost of therapy coupled with the extent and duration of plaintiff's need for it.

Conclusion

Whether you are using hypothetical questions on cross-examination to force an opposing expert to assume facts inconsistent with his overall opinion or you are prompting a technical expert to re-tool his opinion based upon different data, this examination technique is an extremely powerful tool useful in defusing the power of an adversary's expert.

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