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TRIAL ADVOCACY

Authoritative Texts and Cross-Exam of Medical Experts

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A powerful tool for cross-examining a medical expert is confronting him with an authoritative text. Although passages from medical texts, treatises and articles are normally excluded as hearsay, they can, in fact, be used in New York State Court for impeachment purposes by reading aloud a relevant passage after the expert recognizes the writing as authoritative. [FN1]

Expert Concession on Authority

The key is to get the expert to concede the writing is authoritative. Of course, this is a virtual impossibility with the standard seasoned medical witness who -- either through experience or attorney preparation -- will never concede a writing is authoritative out of fear of being confronted with the actual medicine.

Nonetheless the trial attorney should be prepared with the appropriate passage from the specific relevant text, just in case the expert makes the concession that it is a recognized authority. In that case, just as in any impeachment scenario, the discrepancy must be clear, the issue important and the attorney correct.

Regardless of whether or not you actually get to read from them on cross, authoritative writings are very important for preparation and knowledge. Just as a deposition can give the cross-examiner a factual and scientific basis for the cross, medical writings can give you a road map as to what the witness should concede. Learn from them, digest them, and be prepared to refer to specific areas of each writing for the rare instance that you can use them. Since most things in these writings are probably true, an honest expert will concede points contained within them, even without specific reference to the writings themselves. The dishonest witness can be made to look foolish, even if you never so much as read from the text.

Do not be discouraged by the expert who will not concede any of the writings you have are authoritative. Even if the medical expert denies that any of the writings are authoritative, you can still question the expert on medical facts contained in the writings.

But first, you have to make an attempt to lay the foundation that the writing is authoritative. Here is how not to do it:

Q. Sir, you'd agree with me that 'Cambpell's Operative Orthopaedics,' Ninth Edition, is an authority on orthopedics, wouldn't you?

A: No sir, I would not.

Q: Would you consider any text an authority?

A: Nothing is an authority on orthopedics, sir.

These types of responses may foreclose you from any further discussion of any writings. But done artfully, by asking questions that will elicit reasonable responses, you are well on your way to a successful cross with authoritative writings.

Here is an example of how to begin laying a foundation for an authoritative writing:

Q. Sir, you told us of your credentials on direct examination, didn't you?

Q. You are an associate clinical professor at New York Medical College, true?

Q. You told us you actually teach medical students a course in orthopedics, right?

Q. And you teach residents orthopedics as well, correct?

Q. In a classroom setting?

Q. And a clinical setting as well?

Q. There are certain books the medical students read as part of the course curriculum in orthopedic studies, correct?

Q. And books the residents must read as well, right?

Q. Books you actually have in your private office, true?

Q. And texts that are kept in the hospital's library for reference by attending physicians and residents as well?

Q. And, from time to time, even professors and physicians have to rely on these texts for information and consultation, true?

Q. Texts that are updated from time to time, right?

Q. Texts that are well-known in the profession?

Q. Texts that are well-recognized in the profession?

Q. You'd agree with me sir, that one well-known text in the area of orthopedic surgery is 'Campbell's Operative Orthopaedics,' Ninth Edition, true?

Some physicians are not willing to say a specific text is authoritative, since medicine is a constantly changing science and by the time the text comes out, it is already based on outdated data. Yet, the same physician may agree that a specific scientific study or article is a recognized authority because of its recency or

relationship in time to the medical treatment. Therefore, it is just as important to have scholarly articles available to use for cross-examination. These articles can be procured from the Internet and from such medical databases such as med-line and med-quest.

#### When Article Is Obvious Authority

The truth of the matter is, however, that most doctors are prepared to say that the writing you present them with is not an authority, even though it is clearly a recognized authority. Once you know the witness will answer this way with respect to any text or article you confront him with, you are on the path to discrediting the expert. All it will take are some well-prepared questions and a pile full of texts, treatises and articles.

Let us take a standard but hypothetical case involving a low-speed automobile accident in which your client sustained a bulging disc in the lumbar spine at L5-S1, with pain radiating down his left leg into the side of his foot. A typical defense in this type of soft-tissue case is that your client's bulging disc was caused by long-standing wear and tear and degeneration -- not by trauma -- and that regardless, there were no clinical findings during the adverse doctor's medical examination. Because the witness is trained to disagree with any writing you present him with as being authoritative, you should cross him this way:

Q. Sir, you testified on direct that a bulging disc is only caused by degeneration over time, true?

Q. And can never be caused by a traumatic event, right?

Q. Sir, that is absolutely false, isn't it?

Q. As a matter of fact, there is a whole body of literature stating otherwise, isn't there?

The court: objection sustained.

Q. Sir, you'd agree with me, wouldn't you, (as you pull the text from your litigation bag) that on the specific issue of bulging discs typically being caused by traumatic motor vehicle accidents, 'The Outcome Following Traumatic Spinal Cord Injury' by Piepmeister, 2002 is an authority?

A. No, I wouldn't agree.

Q. Well you'd certainly agree with this, that on the issue of a traumatic event as the cause of a bulging disc 'Rockwell on Orthopedics,' Third Edition is recognized as a scholarly and authoritative work?

A. No.

#### Tie in a Specific Fact in Issue

What you do is tie in a specific medical fact in issue with a particular writing you are trying to prove is authoritative. In other words, ask the witness about the

medical facts contained in the passage you wish to read before you ask about the article or book itself. If you get a concession on the point, you do not need to utilize the treatise to confront the expert for that area. If he contests the thesis of your question, your immediate reference to a medical text or article shows the expert that you are prepared to battle him, and that you possess the knowledge to challenge him on his turf.

Moreover, because the expert does not want you to read from the writing, he is in no position to state that the writing is inconsistent with your question. But do not stop there. Show the witness' motivation to deny that your writings are authoritative by going in to a collateral attack:

Q. Sir, this isn't your first time in a courtroom is it?

Q. As a matter of fact you've testified in court before, haven't you?

Q. As many as 12 times a year for the last 10 years, true?

Q. That's about 120 times where you have testified on behalf of lawyers, right?

Q. And correct me if I'm wrong, but you were financially compensated for all those times you testified, right?

Q. Doctor, during those 120 or so times you were in court, you were cross-examined, weren't you?

Q. And you have certainly dealt with questions about whether bulging discs were degenerative in nature or traumatically induced, true?

Q. I take it you've consulted the literature on the subject?

Q. Sir, you know from your courtroom experience, that if you don't agree that a text is an authority, I can't cross-examine you on it, don't you?

The Court: objection sustained.

Q. Sir, you've been asked questions about textbooks before in court haven't you?

Q. Specifically asked whether a book is an authority on a certain subject?

Q. And you know, don't you, that I can't use a book to prove you're wrong unless you agree that it is a recognized authority in the field?

Q. Doctor, there is not a book published in the whole, wide world that you'd admit is authoritative, because then I could cross-examine you on it, right?

It should be clear now that the last thing this medical expert wants is for you to read a passage from any well-regarded medical text on the subject of his testimony. But don't give up the attack, since it is now clear that he will not concede the authoritativeness of any writing with which he is confronted. Go into another relevant issue in the case:

Q. Sir, you also said that a low-speed impact could not cause a disc injury, didn't you?

Q. It's your position that my client's bulging disc was not caused by this accident, true?

Q. And that is because, as you testified on direct, disc injuries can only occur from high-velocity impacts?

Q. Doctor, you would agree that on the subject of low-speed impacts causing disc injuries, 'The Investigation of the Traffic Accident Victim,' Second Edition, is a recognized authority?

Since you know the expert is going to deny the book is authoritative, do not ask him if he has heard of the book before he denies it is an authority. If he denies knowledge of the book's existence, you may not be permitted by the court to follow-up with questions regarding its authoritativeness. The more writings you confront the expert with that he denies are authoritative, the more evasive and dishonest he appears. More importantly, by implication, the expert will know that you have medical science on your side:

Q. Doctor, you also testified on direct examination that my client's complaints were not consistent with the injuries he sustained?

Q. By that you meant that his complaints of pain shooting down his leg into the outer or lateral side of his left foot were not consistent with a disc injury at L5-S1, right?

Q. You know that his complaints of pain are totally consistent with a disc at L5-S1, don't you?

Q. Sir, let's try this one: On the issue of whether a bulging disc at L5-S1 would radiate down the side of the leg and into the lateral aspect of the foot, you'd agree with me that 'Merritt's Textbook of Neurology,' 8th Edition, would be a recognized authority?

Expert: No Text Is Authority

There may come a time when the expert takes the position that no text, treatise or article is authoritative on a subject. If he does so, that may foreclose the foregoing type of cross-examination on specific writings. But there is still something you can do to undermine the witness' credibility. Show how dishonest his position is: get his admission that there are in fact writings that professors, medical students, physicians and patients rely on, on a daily basis, for state of the art medical treatment. Take an obstetrical malpractice case, for instance:

Q. Doctor, you just said that no writing is an authority on this subject of whether hypoxia during labor and delivery causes cerebral palsy, didn't you?

Q. Well, sir, you volunteered to us on direct that you train doctors how to become neonatologists, true?

Q. You are actually an associate professor of pediatrics at New York Presbyterian Hospital, aren't you?

Q. You're involved with the training of medical students as part of your duties, true?

Q. And perhaps, more impressively, you actually train medical doctors who are already practicing pediatricians to become neonatologists, right?

Q. In the course of your teaching, you certainly refer those doctors to the medical literature, don't you?

Q. In fact, you actually use some medical textbooks to teach medical students in the classroom, true?

Q. And young medical doctors in the field, true?

Q. You use them to help treat patients, right?

Q. Especially, the smallest of patients?

Q. For example, you have your students refer to 'Avery on Neonatology' to learn the standard of care in treating newborn babies, true?

Q. And 'Nelson on Pediatrics' as well?

Q. Some texts are certainly good enough to refer to in order to affect patient care, true?

Q. To help save their lives?

Q. But not good enough for the courtroom, right?

Using Text, After Text

The use of well-recognized, authoritative works is critical to effective cross-examination of expert witnesses. If the witness recognizes a specific writing as authoritative you can use that writing to impeach him on his medical knowledge and testimony. If he fails to recognize a specific writing as authoritative, you can still impeach him with a well-framed question about the writing's authoritativeness in relation to a specific issue in your case. If you deduce that the witness will refuse to admit that any writing is an authority, you can challenge him by pulling text, after text, after text out of your litigation bag and getting him to deny his knowledge of its existence or his recognition of its authority.

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FN1. The rule in Federal Court is far more liberal with regard to admission of

authoritative texts: 'To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of a witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits' ([Fed. R. Evid. 803\[18\]](#)).

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