

Examination of the Defendant by the Plaintiff's Attorney

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- Should the Defendant be the Plaintiff's First Witness?
 - So that defendant cannot later change underlying facts (upon which your expert will rely).
 - So that the jury's first impression of the defendant is under your questioning (before he lays out his qualifications and before he gets a chance to tell his own story).
 - In some cases, consider calling a witness before the defendant, such as a hospital administrator (preferably from the defendant hospital) to emphasize the importance of the medical records.
 - Where there are multiple defendants, in what order should they be called? Chronologically, the most liable first? The defendant who blames another defendant?
- Your Manner
 - You must appear fair.
 - Where to stand.
 - Soft v. Harsh. Depends on the particular defendant (arrogant? honest?), the particular jury (professional? blue collar?), and your own personality (aggressive? mild mannered?)
 - Control the witness. (You must understand medical terminology so the witness can't hide in it.) If the witness is not responsive:

- Have the question read back. Or just repeat it.
 - “That wasn’t my question; my question was this....”
 - Make an agreement: yes, no, or I can’t answer. Remind the witness of your agreement and/or of the opportunity for questions by his own attorney.
 - Pace back and forth?
 - “That means yes?”
 - Ask for the Judge’s help (but only as a last resort).
- Keep talking after a damaging answer.
 - Don’t repeat answers.

● Planning and Organizing the Questions

- Organize, organize, organize.
- Plan the order of your subjects and the order of the questions within each subject.
- Plan the wording of your questions.
- Medical Terminology
 - You should be the one to introduce and define medical terms rather than let the defendant display his knowledge. E.g., “A late deceleration is a drop in the fetal heart rate that....”
 - Be certain the jury understands the points you are making. E.g., “Late decelerations mean fetal distress; they mean lack of oxygen; they mean rescue the baby now.”

- Write out and have handy the literature or deposition page (and line number) you will use to contradict the witness.
- Number the pages of the hospital record.
- Get daily copy.
- Demonstrative Evidence.

● How Should the Questioning Begin?

- With qualifications? If so, how?
- With a statement from the opening of the defendant's attorney.
- With areas of agreement? If so, why?
 - Bolsters your own case.
 - Do use the defendant for agreement as to facts, causation, and even the standard of care.
 - Do so before you impeach the witness
- With an attack?
- With areas of lesser importance so that you can get a feel for how the witness answers questions? (Some agree with everything; some agree with nothing. With the latter type, use "the art of misdirection.")
- Did you carefully review the records and the depositions?
- Get a sense of how well he knows the facts. (Why is this useful?)

- Timing

- Build to a climax.
- Delay making a hard, direct attack until, little by little, you've chipped away at the credibility of the witness such that you believe that the jury would now condone a direct confrontation.
- Modulate your speed and your volume .Rhythm.
- Don't go beyond the issues you've selected.
- Watch out for overkill.
- Know when to stop - remember the ear story.
- End on a strong point and stop there (even if earlier than planned). Save some points for summation.

- Use of the Defendant's Deposition (and any other prior transcripts)

- With a thorough deposition, you know what the witness must say on every important point. Use these as the framework for planning and wording the questions you will ask.
- Set up the witness (by getting a clear answer and then closing all the escape routes), and then go for the contradiction.
 - Do you stand by that answer? Do you have a different answer today?
- After awhile, just reaching for the transcript may be enough to make the witness alter his answer.
- But don't be picky.

● Use of Medical Literature (Some Judges say you can't cross-examine the defendant with literature if you call him to the stand.)

➤ Don't forget to check what the defendant, his teachers, his colleagues, and his expert witnesses have written.

➤ Use *Medical Books and Serials in Print*. Use *Pub Med* (www.ncbi.nlm.nih.gov/sites/entrez?db=PubMed). Use publications of the relevant organization, e.g. ACOG, ASA, ACS, AAP, etc. Use Google Scholar (<http://scholar.google.com>).

➤ What to do if the witness denies a particular source as authoritative.

- The context of your question should already have made it clear what the source will say. "Doctor, you say the proper dose is 200mg and not 400mg; well, are you familiar with the textbook.... Or "On the subject of whether the correct dose is in fact 400mg, are you familiar with...."
- Emphasize the credentials of the author or widespread use of the text. Didn't the defendant learn from this text? Doesn't the defendant use this text when he wants to look something up?
- The name of the article may make the point for you.
- Make the source's words your own.

➤ What to do if the witness denies virtually all sources as authoritative.

- After your best sources, ask about every book and article you have. Pile them up.
- Ask whether textbooks are written to teach, not for lawsuits.
- Doesn't the defendant ever have to look something up? Doesn't he ever have questions? Does he already know

everything? Does anyone know anything except for him?

- “You know if you sit there and deny these texts as authoritative, this jury doesn’t get to hear what’s in them? And you know that the moment you admit one of these texts is authoritative, the jury can hear what they say?”
- Some courts will permit questions such as: “Have you read any text that says what you claim?” (Be sure there are none before you make this challenge!)

- Obtaining Concessions of Malpractice (Not: Would it have been good practice to do X. Ask: Was the failure to do X bad practice?)

- Even if only: Didn’t someone have to check the patient’s blood pressure that night?”

- If the defendant sets a standard of care, it’s virtually impossible for his experts to disagree.

- What to do if the defendant says: It’s a “known complication.”

- Sources of Outrage:

- Altered records. (Were you asked to review the chart before it was sent to us?)

- Arrogance (or the defendant who is angry).

- Laziness (the defendant who wouldn’t get out of bed).

- Lying (or a defendant who is hesitant or abrasive).

- The Golden Rule in Malpractice Cases: In one way or another, you must make the jury dislike the defendant; if the jury finds the defendant credible, likeable, and compassionate, the plaintiff will almost surely lose the case.