

**CROSS-EXAMINATION OF EXPERT MEDICAL
WITNESS**

by

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I. Goals

Medical experts provide essential information for the jury in medical malpractice cases. Jurors have common sense and based on the facts of the case, they may have leanings on key issues. In cross-examination you have latitude beyond direct examination. In most instances, your goal in questioning an adverse party's medical expert witness will be to undercut that witness's credibility by confronting the witness with facts which favor your position in the case. Confrontation with medical principles that support your contentions in the case is also useful.

Another goal is to obtain favorable admissions as to underlying facts or issues of treatment. Questioning whether factual assumptions are credible or demonstrate a bias is another fruitful exercise during cross-examination.

"Collateral attack" is common where contradictory testimony has been given by the witness in another trial, or a contradictory statement has been made in a publication. Asking if the witness has changed his position as to the case theory may be useful.

II. Preparation

Effective preparation enhances your prospects for success in cross-examination of the medical expert witness. Time spent in preparing for your cross-examination should provide you with more options for an effective cross-examination.

A. Pre-Trial Research

1. CPLR 3101(c)

Serve a demand for disclosure of expert witness information pursuant to CPLR 3101(d). In a general liability case you can demand the identity of your opponent's expert witnesses. The name may be omitted in a medical, dental or podiatric malpractice action. Demand from your opposing counsel:

- (a) The testimony, which your opponent's medical witness will give at trial;
- (b) The qualifications: educational background, and medical specialty of the expert witness;
- (c) National board certification or fellowship training of the witness; and
- (d) The basis of the expert's testimony, including the facts or documents upon which the witness will rely.
- (e) The Expert Witness Disclosure you serve for your medical witness(es) should raise issues that are the cornerstones of

your defense. If you plan to assert that plaintiff's theory that there was a two year delay in diagnosing a pelvic mass is without merit because the tumor was fast growing and could not have been diagnosed more than six months prior, you should raise those issues in your Expert Witness Disclosure.

Your adversary's response to this demand should outline the substance of the expert's anticipated testimony. Objections to the lack of detail in an expert disclosure should be raised when you receive the document or the trial judge may rule you waived the objection.

2. Rule 701

Where your case is pending in the United States District Court, Federal Rules of Civil Procedure 701 governs expert witness testimony. Your opponent must provide a "report" authored by the expert witness. This report should outline in detail the testimony the witness will give at trial. The federal judge will commonly permit a deposition of the expert witness. The party seeking the deposition must bear the cost of the expert's appearance fee for the pre-trial deposition. Such depositions can provide valuable information for cross-examination at trial. Where you have the opportunity to depose the expert witness prior to trial, you should not only seize that opportunity, but also thoroughly question the witness as to the basis of any opinions he will offer. Also ask for any

treatises upon which he may rely. Also ask him to identify any relevant publications he has authored. At trial, federal judges will not permit the expert witness to deviate from the opinions stated in the witness's report or deposition.

In contrast, in the state courts, one cannot effectively cross-examine an expert witness with an attorney's CPLR 3101(d) expert witness disclosure unless the witness will acknowledge participation in its composition or contribution to its content. Many witnesses sidestep such interrogation by denying knowledge of the document. It is difficult, if not futile, to attempt such questioning with your opponent's expert witness disclosure in state trials. In federal court, the expert can be vigorously cross-examined on the substance, and even nuances of their own report.

3. Affirmation Offered to Oppose Motion for Summary Judgment

Plaintiff's counsel most often deletes the name of the expert witness whose affirmation is offered to defeat defendant's motion for summary judgment. In my experience plaintiff's counsel use the same expert at trial. Expert witnesses uniformly acknowledge authoring the affirmation in opposition. Such affirmations are treasure troves for cross-examination. Enlarge a copy so the jury can follow your cross-examination.

4. Treating Physicians

Where the plaintiff's attorney or defendant's attorney intends to call a treating physician, the records of treatment must be obtained and thoroughly scrutinized. Treating records can prove a fertile ground for cross-examination, particularly if the witness's notations of history, physical findings, complaints, impressions or diagnoses, differ from the testimony offered at trial. The witness can also be cross-examined on omissions from the chart, i.e. the patient not making certain complaints, or that the doctor did not document certain tests or examinations.

5. Publications

You must check publications, articles, textbook chapters, websites and even newsletters authored by the witness. In some instances doctors will have patient newsletter or office brochures that contain interesting information. An expert witness can be contradicted when his testimony at trial is in conflict with the patient newsletter provided to patients by his office.

6. Transcripts of Prior Testimony

Transcripts of prior testimony from trial or deposition can prove effective tools for cross-examination where the prior testimony contains a contradiction. Unless you can obtain such testimony from a trial lawyer, professional association or insurance company archives, you will need to obtain such testimony from attorneys. Several law firms maintain extensive archives of

testimony of witnesses who testify frequently. One can consult the VerdictSearch New York at www.verdictsearch.com to identify cases in which the prospective medical witness has testified. Their reports identify the trial attorney and law firms on each case in which the witness testified. You can obtain copies of the testimony from the attorney who represented a party in the case, or from the court reporter. Obtaining transcripts can be time consuming, but the value of a transcript at trial can be significant. Most attorneys give priority to obtaining testimony from trials or depositions with allegations or facts similar to the case on trial. New York State Trial Lawyers maintain trial transcript archives. Defense Research Institute, (telephone (312) 795-1101), or e-mail at www.dri.org, is a good source for depositions taken by attorneys in other states. Transcripts should be carefully reviewed for statements the witness has made which are favorable to your contentions, or which contradict the witness's expected testimony in your case.

7. Consult Attorneys

VerdictSearch New York identifies testimonial history of expert witnesses. The law firms that retained and cross-examined the witness are excellent sources of first-hand information. Speak with an attorney who has cross-examined the medical witness. An attorney may provide insight or ideas that cannot be obtained from reading a trial transcript.

8. Internet Search

Websites can provide interesting material for cross-examination. Physicians who have websites may provide you with helpful information.

9. Records of Treatment of the Patient

An effective cross-examination will focus on the medical issues of the case. Facts in the hospital charts or records of treatment, which favor your client's position at trial, should be marshaled for cross-examination at trial.

10. Where plaintiff cites Academy Standards

Where plaintiff cites the academy, make sure to check the academy's ethical criteria for expert witness testimony. The witness may have violated the rules.

11. Check State Board Licensing

Very damaging information may be obtained from the state board licensing, including disciplinary orders.

B. At Trial Research

Before you start your cross-examination or during lunch recess, review materials the witness has brought to court. Experts I have crossed have brought medical textbooks and algorithms that have contradicted their testimony.

III. Cross-Examination at Trial

A. Let your goals structure your cross-examination.

The goals on cross-examination:

1. Obtain favorable admissions on issues of liability, injury and damages;
2. Question the competence, credibility, experience and capacity of the witness or integrity of your opponent's case. Effective cross-examination may well undercut the weight that the jury will give this witness's testimony; and
3. Obtain a basis for you to persuade the jury to disregard this witness's testimony or otherwise find for your client at the conclusion of the case.

B. Listen and Carefully Assess the Witness During Direct Testimony

At trial, during direct testimony of a medical witness, you must listen carefully. Note key points that you can successfully challenge. Note exaggerations made by the witness for you to confront the witness on cross-examination.

Use a checklist of points to cover on cross-examination. You should beware of being tied to a script as your notes may distract you from listening carefully to the witness. You must be alert to how the witness responds to your questions and seize upon responses, which you can exploit to score points for your client. Sometimes the witness may use an analogy or a phrase, which you can exploit to your client's advantage. Do so.

C. Pursue Favorable Admissions Prior to Impeachment

Certain medical witnesses may be honest enough to give you favorable admissions on cross-examination. Test the witness's credibility by asking the witness to concede certain facts. Some witnesses will be reasonable. Others will fence as advocates for their side.

1. Exploit favorable admissions:

- a. The records of treatment contain entries by the nurses which support your contentions at trial.
- b. Where there is a factual dispute, ask the witness to admit he has assumed one version of the facts. It is not the expert's role to determine facts. Thus, if two factual positions are equally credible why did the witness assume one over the other? You may raise a persuasive question as to the witness's integrity or objectivity. Ask the witness if objectivity is a pre-requisite for a medical expert witness to be credible.
- c. Underscore any unreasonable exaggeration. When the witness makes a statement the jury can see is unreasonable, challenge the witness.
- d. If the witness has a poor temperament, such as easily showing anger, exploit that weakness. "Doctor, you

seem a little agitated, are you emotionally involved in this case?” Jurors rarely look favorably on an angry or testy witness.

D. Credentials

Where the witness may be generally qualified, contrast any weaknesses in experience or publications, particularly if your medical expert witness or client has strong experience, research or publications. Where your opponent’s expert is not fully qualified to render the opinion offered, question the credentials. What is the witness’s specific experience with the subject matter in issue? This is not the time for discovery. Only ask question why you have material to impeach the witness, such as *Curriculum Vitae* or prior testimony from trial or deposition.

E. Explore What Witness Has Reviewed

Are there records that the witness has never reviewed? Has the witness reviewed depositions? If the witness has not reviewed a particular deposition, ask why not? Does the witness’s failure to be properly prepared? Has the witness overlooked important history in the record?

F. Witness’s Notes, Correspondence and Chronology

You should demand notes previously undisclosed, correspondence or reports in the witness’s possession. Use the lunch break or recess to review the notes to see what the witness may have highlighted. Some witnesses will note weak points or strong points for your case. Has the witness omitted certain events

from his notes or chronology? Some witnesses have generated reports, which identify the weaknesses in the case of the attorney that called him. This can be potent cross-examination. I once encountered an expert witness who brought a copy of a textbook chapter that contradicted his testimony on direct examination. Another expert brought an algorithm or protocol for treatment of ovarian cancer which coincided with the co-defendants treatment plan for the patient. Another witness on retrial did not bring page from Joseph Volpe's Neurology of The Newborn about which he was questioned at prior trial.

G. Records of Treatment

Review any notes of the witness's physical examination or treatment. There records and reports are excellent sources of statements and findings for cross-examination. Most expert witnesses have not reviewed the record as scrupulously as trial counsel or a conscientious defendant.

H. Witness's Report

The report of an examining physician must be exchanged. Focus on points which favor your case.

I. Depositions

Particularly with a medical witness who is testifying on the issue of liability, the witness's lack of familiarity with the testimony. The credibility of the witness may be undercut by lack of preparation. Did the witness ask to be provided with deposition of the parties or fact witnesses? Incidentally, pursuant

to CPLR 3117(a)(4), any party at trial may read the deposition of a physician without showing unavailability or special circumstances.

A critical assumption by the witness may show a misunderstanding of the definition of a departure from accepted medical practice. Some experts testify they would have handled a patient differently. The fact that doctors have a different opinion as to the method of treatment does not mean another method is outside the standards of accepted medical practice.

J. Prior Testimony

A large number of medical expert witnesses have testified in court on multiple occasions. Deposition testimony is routinely available from attorneys in New Jersey and jurisdictions that permit or require pre-trial depositions of expert witnesses. Absent special circumstances, New York State courts do not routinely permit depositions of non-party medical witnesses. Depositions in federal court cases are commonplace. Confrontation with a witness's inconsistent statement at a prior trial can rattle the witness and raise serious questions as to his credibility.

K. Medical Textbooks

Medical textbooks or learned treatises can be used to contradict a medical witness. As a foundation, the witness must acknowledge that the textbook or treatise is "authoritative." Witnesses commonly refuse to acknowledge textbooks or medical journals as authoritative. They do so at the risk of appearing evasive, disingenuous or ignorant of publications in their own field. Be careful to establish

a proper foundation before reading from a text. Labate v. Plotkin, 195 AD2d 444, 600 NYS2d 144 (2nd Dept. 1993).

Many lawyers write their quotations on paper when initially questioning the medical witness. This procedure avoids objections to your reading from a textbook without laying a proper foundation. It is also helpful to ensure all medical terms contained in the quotation are defined prior to reading the statement you wish to read.

The latitude with which you can question a witness about the textbook is at the discretion of the trial judge. Some judges allow more latitude in interrogating about a text or treatise. Lenzini v. Kessler, 48 AD3d 220, 851 NYS2d 163 (1st Dept, 2008). Is the text used at the medical school at which the witness teaches? Why is the text in the 30th edition if not accepted as a valuable resource for physicians?

If the publication has been edited by a faculty member of the medical school at which the witness studied, or a particular reputed institution, such as Harvard or Johns Hopkins, the witness's denial that the text is authoritative may undercut his credibility.

If the witness does not acknowledge a study from the *New England Journal of Medicine*, is it because the witness does not keep abreast of research and studies in the relevant field?

If another medical witness has acknowledged a text or journal as authoritative, their credibility may be enhanced in the jury's eyes when a subsequent witness refuses to acknowledge the same text or journal.

It has been said that impeachment with a textbook or journal article goes solely to the credibility of the witness. Statements read from the textbook or journal article are not read for the medical truth stated but solely to challenge the witness. If the witness agrees with the statement, it is evidence. Where the witness disagrees with a statement in an authoritative text, the distinction that this disagreement goes only to his credibility is subtle. This distinction affects precisely what you can say in your summation. While a text cannot be used to bolster a witness's testimony, reading from an authoritative text may strengthen the cross-examiner's case by giving credibility to his medical contentions while ostensibly attacking the credibility of the witness.

Textbooks and learned journals cannot be read purely to bolster. However, where a witness has been confronted with a statement taken out of context, other portions of the text or article may be read by opposing counsel to show the proper context.

L. Witness's own Publications

Where the witness has edited a textbook or authored journal articles, significant time should be expended in pretrial preparation looking for quotations to contradict the witness.

M. Factual Assumptions of the Witness

Is the witness's direct testimony based on assumptions which demonstrate bias? Has the witness assumed a version of the facts which favors one side in the case?

N. Style of Cross-Examination

1. Be opportunistic

Focus on the points that favor your case. When the witness says something erroneous, hold his feet to the fire. Slowly emphasize the error and ask the witness to acknowledge he was wrong.

2. Magnify Misstatements

In a recent cross-examination of a rehabilitation expert witness in the *Reilly* case, the witness had the wrong diagnosis for the patient in this notes of the physical examination he performed. This error demonstrated the witness's lack of knowledge of the patient. It had significant implications because the witness formulated a life care plan that contained surgeries for spastic quadriplegic, a condition the child did not have. Issues of credibility of plaintiff's attorney were also implicit in this witness's new and more expensive life care plan.

3. Develop Weakness

In a recent trial, the plaintiff's obstetrical witness brought no notes to the trial. This point was emphasized during his cross-examination and during subsequent cross-examinations with witnesses who brought notes. After the trial, the jury indicated they felt the witness deliberately did not bring his notes and which they felt diminished that against credibility.

4. Control the Testimony

If the witness is not responsive, demand "yes" or "no" responses. You must control the witness in cross-examination

5. Flexible Approach

There are attorneys whose only style of attack is bellicose. Sometimes you get more with sugar than vinegar. Having previously confronted neuroradiologist J. Robert Kirkwood with a contradictory statement from his own textbook on neuroradiology in a subsequent case, I merely carried his textbook to the podium as a potential tool for cross-examination. The witness offered so many favorable admissions I had no need to confront him with his textbook. Sometimes a brief conciliatory cross-examination that gains favorable admissions is more effective than a long drawn out confrontation. Why attack a witness who has helped your case?

O. Contradiction of Other Expert

Obtaining an admission from a witness that contradicts your opponent's other medical expert can be valuable. If plaintiff's expert in neurology concedes the plaintiff suffered a stroke or infarction, plaintiff's pediatric neurologist should be asked if he agrees. It is helpful to the defense when one plaintiff's own experts disagree with another of plaintiff's experts. Where your opponent's experts testify to apparently different theories of injury, you have an excellent basis for an effective summation.

P. Do Not Drag Out a Witness Too Long

An excellent cross-examination can be spoiled by several questions too many. I have an excellent cross-exam spoiled by a few too many questions. It is always nice to start and end on a strong point where you score an unexpected home run, sit down.

Q. Use Imagination

Hearing an obstetrician testify the baby's head puts pressure on the uterine opening during ambulation on direct exam. I started my cross-exam by requesting the witness draw the baby's position in utero. The child was on transverse lie, i.e. sideways so the head was not pressing on the opening. The witness was startled when I asked him to draw. I had hoped he would draw the baby in the wrong position, but the sketch was a reminder to the jury his thesis of pressure from the head did not apply to this delivery.

R. Key Points

On occasion, save a key point for your summation. It will be too late for the witness to explain.

IV. After Cross-Examination: Prepare for Motion or for Summation

After cross-examination, always order the transcript of the expert witness. The plaintiff's attorney will need this to show he has proved the elements of a *prima facie* case. The defense attorney will need the testimony to see if the plaintiff has failed to prove a *prima facie* case. Send this testimony to your expert witness.