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Cross-Examination of the Defendant's Medical Expert

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CROSS-EXAMINATION OF THE DEFENDANT'S MEDICAL EXPERT

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Nothing could be more bitter than the rancid taste of failure in cross-examination. And that failure surely results when the lawyer asks just one question too many and he gets one answer too many. Unless he is reasonably certain that his cross-examination of the defendant's doctor will accomplish one of four specific objectives, and unless he has his examination carefully planned his best cross-examination is probably none at all.

THE FOUR OBJECTIVES

The four specific goals of cross-examination of the defendant's medical expert are these:

1. To obtain concessions that will bolster plaintiff's theory;
2. To cast doubt upon the qualifications of the witness as a true expert;
3. To cast doubt upon the honesty or sincerity of the witness;
4. To show that there is no sound basis for the witness's opinion.

Before a prudent lawyer embarks on any of these excursions he recognizes that he must be thoroughly prepared. Chronologically, then, our discussion should begin not with the words "Your witness, Mr. Peepers," but more properly with the words "Your new client is in the reception room, Mr. Peepers. Shall I show him in?"

TRAINING AND PREPARATION

Necessarily, the lawyer who ventures into a case involving medical evidence must carry with him a special kind of equipment. He must have sincerity and industry, of course. But he must also have a certain fund of medical knowledge. Unfortunately, we lawyers were not taught even the fundamentals of medicine. Commendably, some law schools such as the University of Denver are now offering such courses to lawyers.

The lawyer who tries only an occasional case involving injuries to the person must spend far more time on preparation than the lawyer who possesses a medical background or has tried many such cases. It is to the untrained lawyer that this paper is addressed. Here are some of the projects which he must undertake long before the cross-examination of the defendant's expert begins:

1. He must interview the client so exhaustively that he will be intimately acquainted with all of the plaintiff's subjective complaints. To become acquainted with the medical history, he must look into previous lawsuits involving his client; he must acquire old hospital records or medical reports; perhaps he should examine into summer camp application forms. The sources of such information are as limitless as the imagination of the lawyer. But you can be sure the defendant has imagination too. And unless the plaintiff's attorney knows the full story he will be provided with some interesting surprises at the trial.

2. He must accompany his client to the treating physician's office as frequently as possible. This will help immeasurably to clarify the perplexing medical problems involved. The treating doctor can serve as the lawyer's teacher.

3. Usually, the lawyer will have his client examined by an expert. Perhaps this expert will serve as an additional witness at the trial. The careful lawyer will always attend this examination, listening closely to make certain that the history is consistent with the one the patient has previously given, watching the examination closely so that he will observe the various tests that are performed, questioning the doctor as to the purpose of each test, and taking notes for later study. The knowledge obtained in the doctor's office will be indispensable during the cross-examination of defendant's expert at the trial.

4. He must read the available literature. There was a time when a lawyer's only source of enlightment was the heavy and highly technical medical literature intended for the medical profession. But now there is a growing body of literature for the lawyer which covers most phases of traumatic medicine in simple and understandable language.[1]

5. When the plaintiff submits himself to examination by the defendant's medical expert, the plaintiff's attorney must be there. He should observe what books appear on the doctor's shelves. He should observe which tests the doctor performs and which he omits. He should make sure that the doctor obtains an accurate history so that the plaintiff is not later misquoted. He should observe the care with which the doctor performs his task—or the lack of it. He should read the doctor's certificates so that he will be apprised fully of the doctor's background and training. The careful lawyer will never miss this opportunity to "size up" the man with whom he will have to deal in court.

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1 See, e.g., the following periodicals: Current Medicine for Attorneys, Box E, Newton Center, Mass.; Journal of Forensic Sciences, Callaghan & Co., Chicago; Medical Trial Technique Quarterly, Callaghan & Co., Chicago; Trial Lawyer's Guide, Callaghan & Co., Chicago.

And the following texts: Gray, Attorney's Textbook of Medicine (3d ed. 1958); Houts, Courtroom Medicine, (1958); Lawyers' Medical Cyclopedia, The Allen Smith Co.; Piersol, The Cyclopedia of Medicine, Surgery & Specialties (Rev. ed. 1959); Schwartz, Trial of Automobile Accident Cases (3d ed. 1958); Trauma, Matthew Bender & Co. (1959).

THE TRIAL

Now we are in court. The direct examination of the defendant's doctor has been completed. We will assume that his testimony has been damaging to the plaintiff's case. Therefore an effective cross-examination is necessary. Turn back to the four objectives listed at the beginning of this paper and let us see what should be done.

1. *Obtain concessions that will bolster plaintiff's theory.*

Chronologically, this is usually the beginning of the cross-examination. The areas of agreement must be explored while the atmosphere is friendly. There should be no bullying of the witness. Most jurors resent an overbearing, hostile attitude on the part of the cross-examiner. Besides the answers will be far more helpful if the doctor is treated courteously. The subject matter of the questions must be carefully controlled so that the doctor will have no chance to expound on his theory of the case.

When the doctor is testifying from his notes, counsel should examine the notes. Perhaps there was an obvious fracture in the X-rays which was noted by the doctor. He should ask him to step to the view box and show the jury the fracture line. This will corroborate what the plaintiff's doctor has already said.

In most cases it is safe to ask the doctor whether the plaintiff's physician is a competent man, well-respected in the profession.

If the doctor has stated that the recent X-rays show that the fracture has healed perfectly, he should be asked if he will agree that the X-rays do not reveal whether or not there is lingering damage to the muscles and ligaments and to the soft tissue.

If the doctor has observed that the patient's complaints are purely subjective, plaintiff's attorney should ask whether it isn't true that frequently a positive diagnosis is based solely upon a patient's complaints and that medical science just hasn't advanced to the point where there is a medical test which will reveal the presence or absence of every ailment.

Most good cross-examinations stop at this point always ending on a carefully planned high note. But if the damaging edge of the expert's testimony has not yet been dulled, then it might not be imprudent to proceed with one or more of the other three objectives.

2. *Cast doubt upon the qualifications of the witness as a true expert.*

In most cases the defendant's expert is a man of long experience

and extensive credentials. Usually he is older, has had more war experience, is on the staffs of more hospitals, has delivered more lectures, and has a lower number on his specialty board certificate than does the plaintiff's doctor. This is no accident; it is one of the reasons why he was chosen. To attack the qualifications of this man is suicide and can only reflect upon the plaintiff's own case. It is far better to admit that the doctor is qualified in his field before the medals and ribbons are strewn about the courtroom floor.

Even when the doctor seems less impressive the best advice is caution. I once plunged into the background of a general practitioner in a case involving a leg injury only to discover that the "gp" had been modest about thirteen years of specialized experience in traumatic and industrial medicine with a large west-coast shipyard. Before plunging into these waters the examiner should inflate his water wings with a thorough advance knowledge of the doctor's background and its vulnerability. I believe that the average juror in most areas indulges a strong presumption that a man who is licensed to practice medicine is qualified; it will take a strong case to change his mind.

3. *Cast doubt upon the honesty or sincerity of the witness.*

This excursion should also be avoided unless the examiner believes that he has a good chance to prove that the witness is insincere. There are a few doctors who have become known as "insurance company defense doctors" or "plaintiffs' doctors." We reserve these uncomplimentary appellations for those witnesses whom we know by past experience identify themselves intentionally with one camp or the other. The tag implies insincerity of purpose. The motive of the doctor may be money. It may be power or influence. In the case of the defense doctor it may be a resentful or vindictive attitude toward people who seek compensation for personal injuries. The analysis of the expert's attitude is not for this writer but for someone in another field. Nevertheless, the problem is a real one; it does exist. This type of witness poses a special problem and a special challenge to the cross-examiner. In such a case the only successful tactic may be to "get rough" with the doctor in order to expose his motives, his remuneration, the intimacy of his business and social connections with the defendant or the defendant's attorney. This cannot be done without research. The answer may be found at the local golf or country club or even in a bar. Where impeachment of the doctor's testimony looms as a possibility, it is prudent to take a deposition well in advance of the trial in order to develop leads for investigation into every aspect of the doctor's background. Testimony he has given in other cases may be useful as it may point up a pattern of testimony or inconsistent statements under oath.

Except in these extreme cases, it is bad taste for the examiner to attempt to reflect upon the doctor's motives. The jury will feel that way too. I believe it is almost always a bad tactic to ask such a question as: "How many times have you examined for attorney Jones within the past four years?"[2]

There is another reason why the plaintiff's attorney should re-

2 McNenar v. New York, C. & St. L. R.R., 20 F.R.D. 598 (W.D. Pa. 1957).

frain from attacking the doctor's credibility. We are all concerned with what seems to be a growing rift between doctors and lawyers. Doctors complain of all kinds of abuses at the hands of lawyers, both real and imagined. Some of these complaints are justified. And sometimes the doctor's testimony is not as lacking in credibility as the lawyer imagines it to be. The same doctor may be the plaintiff's witness in tomorrow's trial. It is best if the "get tough" policy is reserved only for doctors who really have it coming. Fairminded doctors will understand and agree with this approach.

4. *Show that there is no sound basis for the witness's opinion.*

Here again, careful preparation is the touchstone. It is in the doctor's office at his examination of your client that you discover whether five or fifty minutes were spent on the case; whether the doctor performed the necessary and accepted tests; whether he obtained a complete medical history and recorded it accurately. Or the doctor may have examined carefully and may have his facts straight; but his opinion may be bucking the tide of what is considered to be good medicine. The lawyer has a duty to show that the doctor's opinion is in the minority. One way to accomplish this purpose is through the use of basic medical texts with which the doctor is familiar.

Doctors have been advised to dodge the medical text approach. One "authority" tells them: "Never recognize any doctor or book as an authority. . . ."[3] A doctor will sometimes say he never heard of the particular book. But this false testimony will be exposed when he is challenged with the news that the same book is on the doctor's shelf behind his desk (the attorney saw it there). Or perhaps the plaintiff's expert has already testified that this particular book is a basic work in the field, highly reputable, is used in the leading medical schools, and is must reading for the doctor who considers himself informed on the subject at hand. Only a foolish and dishonest doctor will attempt to use the "I never heard of it" approach with an attorney who has prepared his cross-examination.

CONCLUSION

The specialized language of medicine is a double-edged sword for the plaintiff's lawyer. He must understand the "lingo" so that he can cope with it during the cross-examination. But if he uses too many medical terms himself the jury may feel that the examiner is trying to appear erudite. The examiner must be well-prepared but must assume an attitude of inquiring humility. Sincerity and integrity are far more important in today's courtroom than art and showmanship. Television trials notwithstanding, a jury will resent a "tricky" lawyer with an oily approach.

Some lawyers in their fierce and understandable partisanship for their client's case, will blind themselves to the fact that the vast majority of doctors are honest and dedicated practitioners and come to court with no ax to grind. Attempts to humiliate or discredit such a doctor can only meet with disaster since it is unalterably true that any doctor who knows his business and who states his opinions forthrightly is going to come away looking far better than the lawyer who vainly attempts to "break him down."

3 Wesson, A Physician's Primer for Defendants, 8 Clev.-Mar. L. Rev. 254, 258 (1959).