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## A Few Words on Cross Examination of the "IME" Doctor

*"Expert opinion is only an ordinary guess in evening clothes."* -JUDGE CURTIS BOK

Cross-examination of the adverse medical expert often creates apprehension in not only the young lawyer but many seasoned pros as well. This intimidation factor, inuring to the benefit of the medical expert, is based on a false premise—that the contest between doctor and lawyer is taking place on the doctor's home court—in the realm of medical fact. Nothing could be further from the truth. In reality, the cross, when properly conducted, will take place on the lawyer's "home court" in almost every sense of the phrase. The examination literally takes place in the trial lawyer's home—the courtroom—and is conducted pursuant to rules that clearly favor the cross-examiner. The cross-examiner's ability to utilize leading questions as well as hypothetical questions in order to extract

beneficial responses with reference to topics that are dictated by the cross-examiner gives counsel an often decisive advantage.

Of course, nothing can give the cross-examiner more of an advantage than exhaustive preparation. No aspect of cross-examination is more critical. A skillful examiner can devastate an adverse witness but only if his or her guns have been loaded. Even the most talented marksman, possessed of the most forceful and compelling personality, cannot cause an empty weapon to fire. So, assemble your arsenal early, take careful aim and fire—but only when ready!

As a consequence of the false premise that doctors have the advantage because of their medical expertise, many lawyers follow the old adage about staying away from the medicine while pursuing only a collateral attack. This concession on the substantive facts of your case should be reserved only to the province of the lazy lawyer—and, lazy lawyers have no business trying cases! Jurors are often unmoved by an attack focusing predominantly on how often the expert testifies and gets paid. After all, you likely have an expert or treating physician getting paid for their time as well. Instead of leading with a collateral attack, unleash it after you have already undermined the expert on substantive grounds. Collateral attacks might be viewed as the icing on the cake of a good cross. So, make sure your cross is not all icing without the cake.

Whether at deposition or trial, the best way to effectively prepare to cross-examine the adverse physician is to (1) know everything about the medical issues of the case, and (2) know everything about the adverse expert. As for knowing the medicine, it is imperative for you, as the cross-examiner, to absorb, understand and organize all of the key details contained in your client's medical records. Then, immerse yourself in the medical literature. Speak to your experts to identify the authoritative medical texts relative to the issues of your case. For example, in an orthopedic case, you may want to study Campbell's *Operative Orthopaedics* or Rockwood & Green's *Fractures in Children and Adults*. For a neurological text, consider, for example, Merritt's *Textbook on Neurology*. Depending on your level of experience, you may also want to study basic anatomy texts for attorneys as a primer. Mastering the medical issues that define your case will give you a significant advantage over experts who, perhaps because of laziness or arrogance, prepare inadequately. This mastery will enable you to successfully go "toe to toe" with experts who prepare.

As for knowing everything about the adverse expert, begin by thoroughly analyzing the opinions and the bases for those opinions that she documents in her report, which you must be sure to have requested pursuant to Rule 1.360(b) of the Florida Rules of Civil Procedure. Consult with your experts for help in this regard. Then, identify prior cases in which the expert has testified through a Lexis or WestLaw search interrogatories and your deposition questioning. Obtain all discovery permitted pursuant to Rule 1.280(b)(4)(A)(iii). Prior depositions are invaluable and can be obtained from various sources, including calling the cross-examining attorneys identified in your computer research or by using [www.depoconnect.com](http://www.depoconnect.com), nationally, or the AFTL or DCTLA deposition banks, locally. In addition to prior testimony, do a search for any medical literature published by the expert. Seek to identify instances where the expert has taken a position contrary to the one being advanced in your case. Prior inconsistent statements can devastate an expert. However, even in the absence of prior inconsistencies, you will learn a great deal about the expert and how he testifies.

Once these weapons have been added to your arsenal, you are ready to cross the expert. Controlling the witness is paramount. You should do this by using almost exclusively short, leading questions that usually seek assent to one fact. Using this technique, you might begin by eliciting all of the key concessions that the expert is likely to voluntarily make. Find any helpful facts contained in the adverse expert's report—especially the hidden ones. Any failure by the expert to explicitly state that a test he conducted yielded an abnormal result can be used to show his lack of candor. If you are crossing at trial and the expert was deposed, elicit helpful concessions from his deposition. Similarly, if you have prior testimony, give the expert a chance to make the same concessions that he made in prior testimony. If he deviates from his prior testimony, hammer him with the inconsistency.

At trial, however, do not seek to simply discover concessions or opinions for the first time. Instead, compel them. Your goal at trial is not to discover the expert's opinions, it is to destroy them! One way to compel concessions the expert does not want to make is by "circling the wagons" on him. By this I mean, organize your attack from general to specific. Begin with general premises or propositions and gradually work your way to more specific conclusions that logically follow from those established premises. In other words, if you can get the witness to admit that fact "A" is true, you should be able to elicit an admission to fact "B," which follows naturally, and from there he must admit ultimate fact "C" or lose credibility. By the time the witness reaches the ultimate question, it should not matter which answer the witness gives. An affirmative answer provides an important admission and a negative answer negates the witness' reliability before the jury.

Using your newly acquired mastery of the medical issues and facts of the case, compel the expert to admit general facts that he cannot credibly deny and create a logical progression that leads inexorably to the ultimate concession you seek from the expert. You ought to have the expert admit general anatomical or medical principles, including the signs and symptoms that lead to a particular diagnosis. More often than not, the "IME" doctor has found that your client simply did not exhibit those signs and symptoms during his exam. You can then, at the very least, propound hypothetical questions that ascribe these agreed upon signs and symptoms to your client (that your client, in fact, manifested to her treating physicians, family members and friends) and compel the adverse expert to admit that if true, your client has "X" medical condition that will cause "Y" degree of pain on a daily basis and "Z" degree of disability.

Above all, in conducting cross, listen to the witness. Good cross creates its own opportunities. Poor listening by the cross-examiner squanders them, at best. At worst, it gives the expert the opening he needs to obliterate your case. So, listen carefully, as you control the witness and capitalize on the opportunities that you have created. If you prevail in this battle, you will likely win the war and win it in a commanding way. Indeed, you should win because the terms of the contest are dictated by you and the battle is fought on your home court!

Note: A complete discussion on cross-examination cannot be accomplished in a short article but, hopefully, the few tips above will prove helpful. Every issue of this newsletter will contain trial tips from various members of the trial bar.

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*Rob very successfully represented our family (our son) in a medical malpractice case involving a birth injury where our son suffered brachial plexus at birth.*

*Rob truly has a passion and an amazing talent for law. His commitment to his clients is truly unwavering and we are forever grateful for the dedication and care that he put into our son's case. Without a doubt it is because of Rob that our son will have opportunities in life he may not have had and will have the resources he needs to make his disability less of a hindrance for him.*

Sarah



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