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The Keys to Cross-Examining Any Expert Witness

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The cross-examination of opposing experts is one of the great challenges in the art of trial advocacy. It is an essential element of persuasion. Because of recent changes in jurors' attitudes, many lawyers have reconsidered their approaches to various aspects of jury trials in injury or death cases. In that vein, we should reconsider the manner in which we cross-examine experts and what we hope to achieve by that cross-examination.

Our first consideration in the search for effective ways to persuade jurors through the use of expert cross-examination is to answer three questions:

1. Who the jurors are?
2. Who we are?
3. What matters to jurors?

While each of the above could be the subject of a book, we can make some quick general observations based upon experience, limited social research on jurors and far greater research of the public at large by consultants to political campaigns.

WHO THE JURORS ARE?

In 2008, it appears that jurors in injury and death cases are generally skeptical of plaintiffs' claims. The incessant drumbeat of the "tort reform" movement has resulted in repeated media impressions by potential jurors regarding frivolous lawsuits, fraudulent insurance claims, "liability crises" and the specter of higher insurance rates. Anecdotal stories, such as the McDonald's coffee cup case, remain in the public consciousness and promote the idea that tort plaintiffs are lottery winners instead of victims of negligence entitled to monetary remedies. In addition to these underlying impressions, the modern juror has more information about the court system at his or her disposal than ever before,

with access to more than 100 television channels and virtually unlimited information over the Internet.

Although they have watched dozens of different shows about the courts and lawyers and more information is available, they are not necessarily more informed. Much of this vast information is fragmented or unreal in its portrayal. Nevertheless, as trial lawyers, we must take into account that jurors have definitive impressions and expectations as to what happens in court. In 2008, most jurors expect that both sides will present experts. They are not surprised that lawyers hire experts, and they are not surprised that experts are paid a substantial amount of money to testify. In fact, they have seen talking head experts ad nauseum on television.

The Internet is enormously tempting to jurors, and we cannot be so naïve as to not think that on any jury at least one juror will research the case on the Internet. In fact, we can reliably assume that some of the jurors will Google the lawyers involved in the case. Therefore, we face a jury pool skeptical of us, and possibly our clients, armed with more information than ever and loaded with expectations that lawyers probably cannot meet.

WHO ARE WE?

When we enter the courtroom, we must understand that lawyers as a group are not held in high esteem. Our credibility rating is low; near the level of politicians and insurance salesmen. A substantial number of our citizens believe that, in injury cases, the lawyers benefit more than the clients. Further, it is the opinion of several well-known communication consultants that lawyers, as a group, are poor communicators. While members of the defense bar suffer the same credibility rating as plaintiffs lawyers, they have an advantage, in that they are not the lawyers seeking money and have not been the subject of the vilification by the tort

reform industry. Nevertheless, all lawyers entering the courtroom must face the fact that they do not enter with credibility. They must earn credibility.

There is also the question of your client's credibility. Plaintiffs suffer from a general skepticism because they are viewed as being in the case for money. As one plaintiff's trial lawyer put it to me recently, "Jurors just don't want to believe our clients." Depending upon the client, defense lawyers can suffer the same problem. For example, the current public opinion of HMOs, the tobacco industry or the pharmaceutical industry is quite low.

WHAT MATTERS TO JURORS?

It would be wonderful if we actually knew the answer. The reality is we simply don't know. Individuals receive and process facts in so many different ways and have such diverse life experiences, it is impossible to get a real handle on this. Focus groups make it clear that jurors often become engaged in issues that lawyers do not even see as relevant to the case. Even with more extensive voir dire, it is still difficult to ascertain any really detailed information about the jurors themselves.

There is one area, however, we can agree matters to all jurors: credibility. The believability of every participant in the trial is a major component in the winning or losing of every case. We know this by experience, but the notion can be easily tested by looking at the political arena. The general mantra of the public in their relationship with government officials and the legal system is, "Be clear with us, be straight with us."

The most effective way to cross-examine an expert is to create questions about the expert's credibility. One crack in a witness's credibility can overshadow all of their testimony. Therefore, most of your effort must be focused on destroying the credibility of the opposing expert.

The groundwork for your credibility attack and the most effective place for that attack is

in the voir dire on the witness's qualifications. There are several areas where this attack can be effective. For example, you could show:

- The witness misled the jury about his/her qualifications.
- The expert overstated his/her qualifications.
- The expert is not really qualified in the area the witness is being called to testify on.

CASE EXAMPLES

In a recent case, a board certified neurosurgeon at a major hospital was left stammering and explaining when the cross-examiner revealed that the expert had allowed his membership in one of the two national neurosurgical societies to lapse. The organization's characterization was that he was "expelled." The questioner not only surprised the witness by pointing out that he did not tell the jury he was "expelled" but, moreover, he intended to mislead the jury by submitting a curriculum vitae which included the organization he no longer belonged to. It was devastating even though the witness was fully qualified. Even though the proponent produced evidence that membership in any of these professional groups proved nothing about a doctor's qualifications, the die was cast and there was no turning back. Interviews with the jurors afterward showed they completely devalued the expert's testimony.

In a pediatric case, a fully qualified and certified anesthesiologist who was also a professor at an Ivy League medical school, was forced to admit he hadn't actually given a child anesthesia in more than 20 years. He compounded his error by trying to make up for his lack of pediatric experience by testifying he had given anesthesia to a few small adults. He knew a lot about anesthesia, but his testimony was completely discounted.

In a third case, a pediatric intensivist, who had done hundreds of intubations, was caught because the case was about the use of a particular paralytic drug that he had admitted he used fewer than 10 times in his career. He did say he had read a lot about it, but you can imagine how little that mattered.

The common thread in all these cases is that the proponents of the experts did everything they could to show that the expert was ultra qualified. In so doing, the expert's qualifications were overstated, creating the small opening opposing counsel needed to diminish credibility.

SUCCESSFUL CROSS-EXAMINATION

The foundation for each of the examples above and any cross-examination is exquisitely detailed preparation. The essence of the cross-examination is preparation and the ability to listen. With detailed knowledge of your opponent and your case, the cracks will appear if you listen to the testimony. This necessarily implies that you cannot prepare the actual questions. In most cases you cannot. Assuming the opposing lawyer is competent, he or she will have thought of your basic and most obvious areas of attack. The expert will be well ready to parry these inquiries.

We all have heard of the "Ten Commandments of Cross-Examination" popularized by the late professor, Irving Younger. These are fine basic rules, but strict adherence to them will result in a cross-examination that sounds good but does not necessarily persuade. While it would be nice to be able to "never ask a question unless you know the answer," you should consider whether blind adherence to such rules restricts the opportunity of the trial lawyer to defeat an experienced expert witness.

To the contrary, with careful preparation, the trial lawyer can be so knowledgeable that when the credibility crack appears, the lawyer will know it and attack it. Success requires confidence and the willingness to take a few chances. To accomplish this, the lawyer must have an encompassing knowledge of his opponent on the stand. If, for example, the opposing expert is a physician, the trial lawyer must be intimately familiar with the medicine of the case. The cross-examiner should always physically meet with his own experts, reviewing the anatomy, physiology and procedures involved. If an operation is at issue, you must watch it on videotape with your expert handy to ask questions. If instruments are involved, you must have touched them with your own hands. Similar efforts must be made whether your opponent is an engineer, economist or accountant.

You must also have the most detailed knowledge of the record in your case. This is one area that you can know more than the expert.

You must research the expert personally. Find every resource on the Internet and review all relevant articles from the CV. Find abstracts and book chapters. Find articles by his co-authors and colleagues. Check the Web site of his hospital and practice. Obtain as many prior transcripts and reports as possible. Write to your colleagues and inquire on

your listservs. There are sources everywhere. The Internet cannot be underestimated as a resource. I recommend learning how to fully use its resources. With the detailed knowledge of the expert's background, prior testimony, writings and an all-encompassing knowledge of your case, you will be armed and ready.

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