THE ART OF EFFECTIVE CROSS-EXAMINATION FOR EVERY TYPE OF WITNESS

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A. Introduction

O.C.G.A. § 24-9-64 provides parties with the right to a thorough cross-examination:

> The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him.

The purpose of cross-examination is to provide for a test of the intelligence, memory, accuracy, and veracity of the witness. An effective examination requires a combination of thorough preparation, identified goals, and a skillful examiner. A successful cross-examination of a defense witness can provide a trial lawyer with the highest of highs. Similarly, an unsuccessful cross-examination will deliver the lowest of lows. As the title suggests, effective cross-examination is truly an art, but this paper will provide some suggestions to help you more fully develop your skills.

B. Cross-examination of the adverse party

The approach to your cross-examination of the adverse party will be determined by the circumstances of your individual case, but there are two overriding principles of effective cross-examination that have been learned through years of painful experiences. These points apply equally to defendants and their experts. First, it is critically important that you establish clear goals to accomplish before you stand to face the witness. Typically, the cross-examination should be limited to undermining two or three points critical to the defense of the case and/or supporting two or three points critical to your side of the case.

Second, be humble and recognize your limitations. If a defendant or an expert is good, recognize that he or she is probably going to beat you, and don't give them the opportunity to do so. Pick one or two points to which the witness is already committed, effectively use those points, and sit down. It is neither realistic nor necessary to attempt to establish your entire case

through each defense witness. Be satisfied with what you know you can get, and do not overreach. This can be difficult, but it is the most important cross-examination advice I can give.

C. Cross-examination of the adverse expert in discovery and at trial

In anticipation of cross-examining an adverse expert, you should research the subject matter of the expert's testimony and the expert himself. You can become knowledgeable about the subject matter of the expert's testimony through independent research, literature review, and consultation with your own experts. It is also important to be thoroughly familiar with all facts of the case. There are multiple resources for gathering information on the expert witness. These include the expert's CV, which will provide a list of all writings and research; expert data bases through trial lawyer associations; inquiring about the expert on a variety of list serves; checking professional licensing organizations; the witness' own web page; and the web page of any university or organization that employs the expert witness.

Once you have thoroughly informed yourself about the subject matter upon which the expert will testify and you have exhaustively researched the expert's background, you are ready to proceed with a discovery deposition. The importance of the discovery deposition of the adverse expert cannot be overstated. It becomes the foundation of your cross-examination of that witness at trial. The subjects of cross-examination will fall into two categories: (1) substantive information on the subject matter of the witness' testimony, and (2) collateral issues unrelated to the subject matter of the expert's opinions.

Strategic decisions must be made prior to the deposition regarding how much of your hand you wish to show. For example, you may have excellent medical literature that directly contradicts the expert's opinion or you may have prior testimony by the expert that contradicts his testimony in your case. There will be occasions when you choose to confront the witness

with that information at his deposition and occasions when you do not reveal that information. If you believe the case is headed to settlement and the value will be enhanced by revelation of the information, it makes sense to confront the witness. On the other hand, if you are confident the case is going to trial, it is usually better not to reveal the contradictory information so that the witness will not be prepared for it at trial.

On deposition it is important to make certain the expert knows it is your desire to learn each and every opinion the expert holds regarding the subject matter of the case. In this part of the deposition you are not testing or challenging the expert's opinions, you are simply making sure that you know all opinions the expert will be offering upon trial of the case.

It is rare that an expert will know the minutiae of a case as well as a thoroughly prepared attorney. The expert's knowledge of the facts should always be tested. When the facts are different from those relied on by the expert in expressing his opinions, it is important to establish that the expert's opinions may change if the facts are different than he has assumed them to be.

Once at trial, the only purpose of your cross-examination is to convince the jury that the opinions offered by the adverse expert should not be accepted. Generally, cross-examination will focus on establishing that the expert's opinion is not worthy of belief because (1) the person is not truly an expert in the area; (2) the facts upon which the expert is relying are incorrect; (3) the expert is biased; or (4) the expert's opinions differ from generally accepted principles or widely held beliefs. The cross-examination at trial may be based upon all of these areas, only one of these areas, or a combination of the areas.

<u>Competency</u>: It is rare in the current environment that you will be able to attack an expert based on a lack of expertise because well trained and qualified experts are almost always found and presented against you. However, not every neurosurgeon is necessarily an expert in

the diagnosis and treatment of central nervous lesions, not every general surgeon is necessarily well trained and qualified in the performance of all surgeries that fall within the realm of general surgery, etc.

Facts: The facts are usually in dispute. When the adverse expert is basing his opinion upon facts assumed to be true by the adverse party, it is important to establish that if the facts are as you believe them to be, the expert's opinion would be different. Obviously, this approach is going to be effective only when it is more credible that the facts are as you contend them to be.

Bias: Bias of the adverse expert can be shown in a number of ways. Common areas of cross- examination include the following:

(1) The expert has testified only or predominantly for one side;

(2) The expert has previously testified for the attorney calling him as a witness;

(3) A significant percentage of the witness' income is derived from expert testimony;

(4) The expert is personally acquainted with the defendant;

(5) The expert is personally acquainted with the defendant's attorney;

(6) The expert is intimately involved with an insurance company (although simply being insured by the same company as the defendant is generally not admissible); and

(7) The expert did not review all information pertinent to his opinions.

Opinions vary from widely accepted views: Medical literature can be used very effectively to show that an expert's opinions are at variance with generally accepted research and widely held beliefs. However, the procedures for the proper use of medical literature on cross-examination can be confusing. I will explain our use of medical literature at trial below.

D. <u>The proper use of authoritative literature on cross-examination</u>

Georgia law allows a defendant or expert witness to be cross-examined by reference to a treatise in his or her field if the treatise has been proven to be an authoritative or standard treatise on the subject. <u>E.g.</u> <u>Mize v. State</u>, 240 Ga. 197, 198 (1977). One method of proving that medical literature is "authoritative" or "standard" is through cross-examination of the defense expert witness or the defendant physician. <u>See</u> <u>Pound v. Medney</u>, 176 Ga. App. 756, 762 (1985). In that situation, the defendant and/or his expert witness do not have to use the words "standard" or "authoritative" to establish a proper foundation. <u>Brannen v. Prince</u>, 204 Ga. App. 866, 870 (1992) (Birdsong, P.J., concurring specially) *citing* Rumsey, Agnor's Ga. Evid. (3rd ed.), § 9-6 (1991 Supp.). Instead, the trial court has the discretion to determine whether a proper foundation has been laid. <u>See</u> <u>Brannen v. Prince</u>, 204 Ga. App. at 870 (1992).

Examples of foundations previously held proper include the following:

(1) <u>Mize v. State</u>, 240 Ga. 197, 198 (1977): Witness testified that he was familiar with the text, had studied under the editors of the text, had used it in his studies, and that it was accepted as one of the many books in his field;

(2) <u>Pound v. Medney</u>, 176 Ga. App. 756, 762 (1985): Witness had not read journal article at issue. He was not required to qualify specific journal article as authoritative where he testified that the medical journal containing the article was "one of the best" and agreed that the journal was authoritative "in most things." Witness would not agree that the article itself was authoritative because it was included in the journal, stating "I would say it should be, but I will not say it is.";

(3) <u>Packer v. Gill</u>, 193 Ga. App. 388, 391 (1989): Upheld the trial court's ruling that expert witnesses could be cross-examined based upon statements contained in medical

textbooks that were shown to be standard texts. Although the opinion does not discuss the particular foundation laid, transcripts from the trial show that the experts testified they sometimes relied on the textbooks in their practices, that they had the textbooks in their offices, and that the textbooks were used in medical schools. Rumsey, Agnor's Ga. Evid. (3rd ed.), § 9-6;

(4) Brannen v. Prince, 204 Ga. App. at 870 (1992), overruled on other grounds, Gillis v. City of Waycross, 247 Ga. App. 119 (2000): Witness, a neurologist, agreed that the journal Neurosurgery was "commonly read and referred to by members of the neurosurgical profession or the medical profession with interest in this area" and that it was a "useful reference and text" to which he was "not a stranger." The cross-examination was proper even though the expert had not read the article and disagreed with its conclusions; and

(5) Harris v. Tatum, 216 Ga. App. 607 (1995): Witness' acknowledgement that the text was "good for medical students" was sufficient to deem it "authoritative".

I do not use the word "authoritative" when confronting a witness simply because it connotes a higher level of certainty than is required, and witnesses routinely deny anything is an authority. I commonly question a witness as to whether a journal or text is reliable, reputable, widely read, a good source, peer review, well recognized, etc. It is very difficult for an expert to deny that any peer review journal or any text commonly used in medical schools is not reliable, widely read, etc. This has always been a foundation sufficient to permit cross-examination from that source. Out of an abundance of caution, we routinely file a pre-trial motion to educate the court in this area and request that the court exercise its discretion to determine whether the parties have established a proper foundation for the use of medical literature as opposed to requiring an opposing party or expert to use the magic words "standard" or "authoritative."

We seek to establish the authoritative nature of medical literature through our own expert witnesses on direct examination, and then use the literature to cross-examine the defendant physician or opposing expert witnesses. Although no Georgia case addresses this question, no Georgia case holds that the witness being cross-examined is the only witness who can establish the authoritative status of medical literature to be used on cross-examination. Rather, the cases simply hold that a text must be proven as authoritative before it can be used for cross-examination. See e.g. State Highway Dept. v. Willis, 106 Ga. App. 821, 824 (1962) (". . . an expert cannot be cross-examined upon a treatise which has not been proved to be a standard treatise on the subject.").

Many state and all federal jurisdictions allow the authoritative status of medical literature to be established through witnesses other than the witness under cross-examination. See Rumsey, Agnor's Ga. Evid. (3rd ed.), § 9-6 (citing cases from Minnesota, Michigan, Pennsylvania, Montana, North Dakota, Texas, and Illinois, as well as Federal Rule of Evidence 803 (18)). One important purpose of this approach is to prevent the opposing expert from blocking cross-examination by refusing to concede the proper foundation to establish that the medical literature is authoritative. Id.; See also Brannen v. Prince, 204 Ga. App. 866, 870 (1992) (Birdsong, P.J., concurring specially) (noting that witnesses on cross-examination may thwart the use of literature by refusing to label it as authoritative).

E. Effective cross-examination of other defense witnesses

In a medical malpractice case the defendants are medically trained, and there will be many other witnesses involved with the plaintiff who also have medical training. You can often use the defendants and other medically trained defense witnesses to demonstrate the significance of your client's injuries and damages. The beauty of this is that you can take a defense witness

who has the ability to undermine the liability aspect of your case and make him or her appear to be a plaintiff's witness when it comes to acknowledging the type and seriousness of your client's injuries. If you have a client who has clearly suffered significant injuries and the defense witness resists acknowledging the severity of those injuries, you will probably be able to portray that defense witness as a heartless soul.

A couple of examples of using medically trained defense witnesses to your advantage come to mind. A young girl who developed Stevens Johnson Syndrome as a result of the inappropriate prescription of a sulfur-based antibiotic has painful and disfiguring blisters on her body, the inside of her mouth and down her throat. The suffering caused by these blisters is the equivalent of someone suffering with a significant burn. In fact, the patient is placed on a burn unit for management of her condition. The patient is placed on a PCA pump to self-administer morphine for pain control. A review of the nurses' notes reveals that the patient was not administering morphine to herself, not because she was not suffering pain, but because the simple pressing of the pump with her finger caused unbearable pain in and of itself. The medical records of your client are always a potential great source for documented pain and suffering, both mental and physical.

Another example is when the defendant calls a life care planner to defend against your damages. These professionals are very ripe for demonstrating the significance of your client's injuries. Keep in mind that these professionals have seen first hand the devastation caused by catastrophic injuries such as those experienced by your client. Rather than trying to refute their testimony from direct examination that minimized the cost of your client's future care, use them to educate the jury about the lifelong hardships your client will endure on a daily basis. Have

them acknowledge that catastrophic injuries have a major impact on the entire family and not just on the one that has been physically injured.

After demonstrating the overwhelming nature of your client's injuries, ask them how much of the cost they calculated in their life care plan covers the pain and suffering of your client and the client's family. "So, if I understand correctly, if this jury did everything you have suggested in your life care plan, there would not be an award of a single penny for the frustration, embarrassment and anger my client experiences on a daily basis because his legs are paralyzed." "The same is true for the fact that this adult man has no control of his bowel and bladder." This is particularly important in cases that are not subject to the $350,000 cap on non-economic damages in medical malpractice actions. Just because the defendants call a witness to address one specific area of the defense to your case doesn't mean that you can't take that person to a better place.

F. Conclusion

Cross-examination requires meticulous preparation and a healthy dose of humility. It is essential that specific goals be established prior to any cross-examination, and it is not unusual for less to be more. As difficult as it can be, effective cross-examination is one of the greatest skills an attorney can have.