Practice Pointer: Deposing the Plaintiff's Expert

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John Wooden is legendary for his success as a Hall of Fame basketball coach at UCLA. In a twelve-year span (1963–1975), he led his Bruins teams to an unparalleled ten NCAA national championships.[1] His teams avoided complacency, mastered fundamentals, and dominated the competition with a consistency not seen before or since. Not surprisingly, given his on-court success, Wooden is often cited elsewhere for his inspirational ideas and motivational teaching philosophies. When defending medical malpractice cases, we like to win just as much as basketball coaches. This article suggests how you can apply some of Wooden's wisdom to succeed in deposing the plaintiff's expert witnesses in medical malpractice litigation.

It's the little details that are vital. Little things make big things happen.
—John Wooden

A medical malpractice trial is classically a battle of experts. You have yours, plaintiff has theirs, and the jury is left to choose whose view of the case to embrace. Trial success comes only with effective persuasive advocacy throughout all phases of the case—but perhaps most critically through the expert witnesses' testimony. To prevail at trial in a medical negligence case, the plaintiff needs an expert witness to establish the applicable standard of care, a breach of the standard of care, and a causal connection to the damages claimed. At trial, the jury is typically instructed that they must base their decision on the standard of care *only* on the testimony from expert witnesses on that subject. This focus on the expert testimony should be paramount in your pretrial preparation as well.

To persuade, the effective expert must demonstrate qualification, knowledge, honesty, accuracy, and credibility. To the extent that you can undermine any of these attributes of the opposing expert—you tip the scales in your direction. On occasion, this is done by "big things." For example, you may find that the expert has made a major error or omission in his review or analysis. Or you may come across a major inconsistent statement in a prior transcript that destroys the expert's credibility in one blow. Relish these rare moments, for that big victory is sweet. More commonly, it is a series of small things that you do on cross-examination at trial, set up by effective preparation and execution at the discovery deposition, which ultimately does the necessary damage to the opposing expert. Focus on the details, and you can win the close ones.

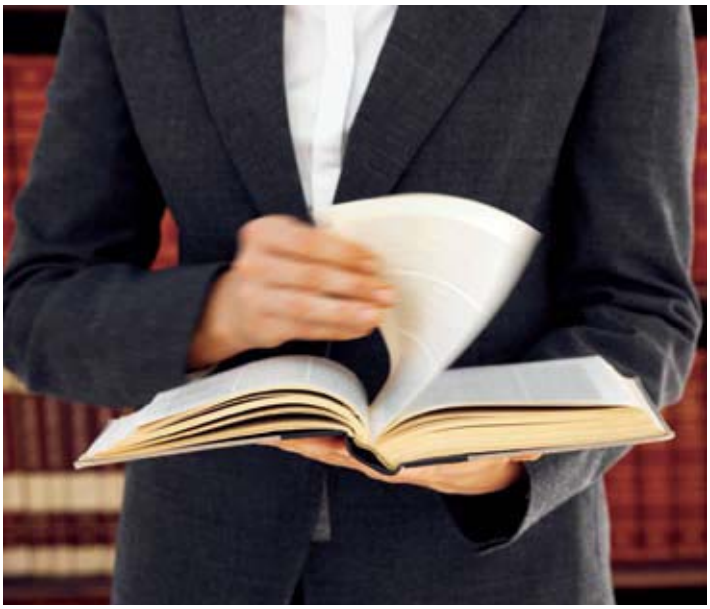
Use the discovery deposition to find (or poke) small holes that will ultimately serve to sink the plaintiff's case at trial. Explore whether the expert truly knows and understands the facts of the case. You can do so by inquiring as to whether he actually reviewed all of the relevant materials. Find out if he disregarded any of the relevant records or testimony. Challenge the expert and investigate whether he has an accurate understanding of the timeline of events, key medical facts, and your client's role. If you can establish that he has not done his homework, you can argue at trial that the expert's opinion is only as good as the facts that he relied upon and that he did not rely on the complete and accurate facts. Often when you can demonstrate several mistakes, the opposing expert will "foul out."

The plaintiff's attorney will undoubtedly highlight various professional accomplishments when establishing the qualifications of their expert at trial. But do not be intimidated by an impressive CV. A mismatch on paper does not always translate to victory on (or in) the court. Ask questions to determine whether the expert is truly familiar, by virtue of his education, training, and experience, with the precise medical question in the case. Find out whether he has a basis to know the standard of care in the specific community at issue. Often, the plaintiff will chose an expert who, while experienced as an expert and impressive in his presentation, is not ideally qualified to discuss the medical issue that forms the basis for the liability argument. If you can establish at trial that, while impressive and charming, the witness is the wrong expert for the case at hand—you gain advantage over your adversary. It is the little things that add up to score that point convincingly.

If you don't have time to do it right, when will you have time to do it over?
—John Wooden

Ideally, we would devote hours of detailed preparation to every expert deposition. With the limitations imposed by a busy workload and the desire to deliver good economic value to our clients and insurance carriers, deposition preparation can sometimes be relegated to the day (or hours) before the deposition. When you do that, you risk that other competing priorities will pop up and steal the time you had reserved. Too often I have witnessed counsel conduct the opposing expert deposition as simply a series of open-ended questions asking the expert to discuss his resume and then expound upon his opinions as set forth in his report. While this is an efficient approach because it can be accomplished with little or no preparation, it is ineffective and a missed opportunity.

Taking the time to prepare for the deposition with a specific game plan in mind sets the stage for an effective cross examination at trial. This requires prioritizing the task and starting well before game day. Some of the materials you will want to gather, including prior transcripts or articles authored by the expert, can take significant time to obtain. Analysis of these documents will often lead you to other documents—again taking time to gather and review. If you can carve out the time for in-depth early preparation, it will pay dividends. Remember to start early so that you can finish strong.



The worst thing about new books is that they keep us from reading the old ones.
—John Wooden

Even in the electronic document era, I suspect that your files, like mine, can quickly become a mountain of paper and a deluge of digital documents. Records, transcripts, research, and correspondence can overwhelm. It is tempting to focus just on what is in your immediate inbox and lose touch with the broader file history as a case proceeds. Documents that might exist in the file but that were received long ago can be forgotten or overlooked. As you prepare for the opposing expert deposition, you are well served to know every document in the file—both old and new.

Do not let what you cannot do interfere with what you can do.
—John Wooden

In a magnificently successful expert deposition you would so destroy the plaintiff's theory of the case such that the expert would not or could not testify. Blowout—game over. In many cases, you cannot do that because you have a credible expert with a reasonable theory on the other side. Even in that circumstance, you can use the deposition to point out the theory's weaknesses, the counter arguments' strengths, and to establish helpful points for cross examination at trial. To do that, you must master the available information in the case—facts, medicine, and law.

Know the Facts

For starters, you must know the pertinent details of the relevant medical records in your case inside and out. In the crunch for time, it is all too appealing to shortcut the task of learning the records and rely upon a summary or chronology prepared for you by others. Nurse paralegal-drafted chronologies have become a common staple in the defense office. While those tools can provide helpful efficiencies, you have to know the records themselves in order to effectively prepare the case. Mastery of the material facts is indispensible. This starts with knowledge of the medical records and close familiarity with the witnesses' supplemental testimony—the patient, family, and other fact witnesses, the treating healthcare providers, and of course, your client.

Know the Medicine

From the case's outset, you should be familiarizing yourself with the area of medicine at issue. Orient yourself with general overview articles online. Ask your client to help you identify the leading texts/treatise. Read them. As you begin to refine your understanding of the precise medical issues in the case—you can focus your research on those publications that provide authoritative discussion and guidance on the critical medical issues.

Often, your client and the opposing expert are members of the leading professional society in their specialty. The publications of that society, particularly peer-reviewed consensus statements and guidelines, are helpful tools for expert cross examination. Knowing the medicine well requires the humility to admit the limits of your knowledge—and willingness to get up to speed with the help of your clients and experts. If you want to battle a board certified expert with years of experience in the area at issue—your knowledge of the medicine must go far beyond the superficial.

Know the Law

If you are setting up the case for a motion to strike the expert or for summary judgment, decide what testimony you need to make that motion succeed and go after it in the opposing expert deposition. Craft questions using the precise language from the cases that you are relying upon. Do not accept evasive or equivocal answers to these key questions during the deposition. Stay after it until you get it.

Similarly, where you can, use the expert deposition to eliminate issues from the case that might have been raised in the initial pleadings or discovery responses. Look back at the complaint and evaluate the specific legal theories pled—breaches of the standard of care, causation arguments, and damages. Look also at any discovery responses that state positions on the arguments in the case. Use these to guide the expert deposition. For example, are there a series of negligence theories or damages claimed in the complaint that are not supported by the evidence that has come to light in pretrial discovery? If so, use the opposing expert's testimony to take these issues out of the case before trial and avoid surprise. Go beyond the expert report to the other legal documents in the case and use them to guide the deposition inquiry.

I'd rather have a lot of talent and a little experience than a lot of experience and a little talent.
—John Wooden

As medical malpractice defense attorneys, we typically know just enough medicine to be dangerous. We generally have no experience performing the medical procedure or care at issue. However, with each new case, we absorb the details of the medicine—taught to us by our clients or experts, the relevant medical

records of the case, and careful study of the pertinent medical literature. Healthcare lawyers will never know as much gastroenterology, pediatric neurology, or cardiology, etc., as the trained physician—but when it comes to that little slice of medicine that forms the basis of our case, healthcare lawyers can and must know it as well or better than the opposing expert.

Just like Wooden would scout the opposition, healthcare lawyers also must know the opposing expert very well before we first shake his hand in the deposition room. There is a wealth of information available about most any expert witness if you research thoroughly and in the right places. It is too common and in the author's opinion inexcusable to come to an expert deposition prepared by having reviewed only the expert's CV provided by opposing counsel, and the expert report or summary disclosed in discovery. That is not scouting; that is merely scratching the surface.

Dig deeper. As you examine the expert's CV, consider it an index to possible sources of information. Look at where the expert was trained—those who trained the plaintiff's expert might make for persuasive defense experts. Determine what societies and professional organizations the expert belongs to because their publications might prove helpful to rebut the expert's opinions. Of course, identify and obtain anything that the expert has published that might relate to the issue at hand. Get it and read it. If the expert takes an inconsistent position, his credibility is damaged. At a minimum, when you quote the expert to himself in the deposition, you have sent a message that he is being examined by an attorney who has done his homework. This has a tendency to keep the opposing expert honest.

For the expert witness who is not putting on the plaintiff's uniform for the first time, consult the usual sources to find prior transcripts. The best practice is to acquire and read all of them. When time or resources call for you to be more selective—look for recent cases to get the demographics, expert fees, and income, and other general background information. Look to cases with similar medical legal issues to hopefully find that golden nugget of a substantive statement that is inconsistent with a position being taken in your case, or that is otherwise on point and helpful to the defense.

When you intend to set up an impeachment for trial by using prior deposition testimony, do not overreach. Do not unfairly take testimony out of context. Ask the same question in your deposition that was asked previously. Let the expert give a different answer. Then you are prepared to impeach them at trial, and you have not left the door open for the "but that's a different question" escape hatch. Juries can spot the slippery expert when you confront the witness at trial with his own inconsistent statements that he must then disavow or attempt to explain away.

Success is never final, failure is never fatal. It's courage that counts.
—John Wooden

Even with smart and diligent preparation, not every expert deposition and ensuing expert cross examination will go as planned. And not every case can be won at trial, despite our best efforts. If the trial is a battle of experts—we are the ones who present those experts to the jury. It is our task to present the picture of qualification, knowledge, honesty, accuracy, and credibility that governs juror perception of each expert.

Attorneys probably get too much credit for trial victories and too much blame for defeats. Remembering that in some eyes, you are only as good as your last trial result will keep you humble, even after you have found trial success. Approaching expert deposition preparation with humility and hunger to win, as well as a diligent commitment to do the detailed work it takes to prepare for that success is a proven strategy for victory.

May you enjoy your wins, learn from your losses, and bravely move forward to the next game!

1 *See* example online biography at http://enwickipeida.org/wiki/John_Wooden.

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