Cross Examination for the New Lawyer to the Veteran Lawyer:

Checklist: Ten Standard Items to Consider in Cross-Exam of Experts

1. Show that he is less than impartial.
2. Show he has limits on his qualifications.
3. Do a peripheral cross-examination about the nature of his science and its defects.
4. Attack his opportunity for observation.
5. Show he does not have some facts.
6. Test the memory of the witness; determine his memory is faulty.
7. Make it seem that the expert is conceding some points; confirm points of our expert.
8. Modify the expert's own conclusion.
9. Discredit the expert's conclusion.
10. Develop a portion of our own case. It can be outside the direct testimony area of the expert.

The Impressive Cross Examination

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To Persuade a jury you have to do more then merely present the facts, you have to create an impression as to why you as an attorney can be trusted, why your story is correct, why your adversary is wrong, and why is for your side to win.

To effectively communicate you must understand your listeners and how they are likely to process the information presented to them.

Cross examination must focus on the witness, how the witness can reinforce the trial story you are presenting or how the witness story doesn't fit into believable storylines.

I. Witnesses

A. You may feel compelled to ask something to disrupt the bond between the witness and the jury. Your only option is to choose a safe question. There is that

listening and answer you can do no damage such as found on; #1. Facts found on a unexpected answer would be contrary to common sense.

B. Facts for the witness know that you conclusive prove.

C. Facts that maybe implied from the witness prior to statement.

D. Facts that you would have expected to have seen mentioned in a previous statement or report.

II. Persuasion

A. Sponsorship theory teaches that information and listening in cross examination is more persuasive then that presented under direct exam.

B. People subconsciously if not consciously believe that any information voluntarily presented at trial is entirely suspect. Because information enlisted on cross exam

is more believable you should use it to collaborate your trial story when ever possible.

C. The most effective cross examination focuses on the facts able to covey the necessary impressions.

D. You can use what needs to prove facts or theories favorable to case by highlighting information contained in documents, reinforcing facts, or establishing that the witness respects the opinions, qualifications, or training one or more of your

witnesses.

E. Show them the money.

Establish that the witness is basis due to the relationship with the party or

FEDERAL RULES GOVERNING CROSS-EXAMINATION AND IMPEACHMENT

A. Overview

§1:01 Scope

Unlike some state court rules which permit wide open cross-examination, cross-examination in a federal trial is controlled by Rule 611(b) which states:

> Cross-examination should be limited to the subject matter of direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Fed. R. Evid. 611(b).

§1:02 Grounds for Impeachment

The language "matters affecting the credibility of the witness" refers generally to the permissible grounds of impeachment as set forth in the Federal Rules of Evidence. Under Rule 607, the credibility of a witness may be attacked by any party. Fed. R. Evid. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness"). Rule 611(b) permits cross-examination on matters affecting the credibility of the witness. Fed. R. Evid. 611(b). Rule 611(a) permits the court to curtail cross-examination to "protect witnesses from harassment or undue embarrassment." Fed. R. Evid. 611(a). Unlike direct examination, leading questions are permitted during cross-examination. *See* Fed. R. Evid. 611(c) ("Ordinarily leading questions should be permitted on cross-examination"). The overriding requirements of Rule 403 control all cross-examination and give the court discretion to exclude evidence of slight probative value if there is a substantial risk of "unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

The Federal Rules of Evidence incorporate several traditional methods of attacking the credibility of witnesses through impeachment:

- Opinion or reputation, to attack the truthfulness of a witness (Fed. R. Evid. 608(a)).
- Specific instances of conduct probative of character (Fed. R. Evid. 404(b) and 608(b)).
- Prior convictions (Fed. R. Evid. 609).
- Prior inconsistent statements (Fed. R. Evid. 613).

Impeachment by demonstrating bias and contradiction also is permissible on cross-examination. *United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984).

B. Evidence of Character and Conduct (FRE 608)

§1:03 Character for Truthfulness (FRE 608(a))

Rule 608(a) provides that, with limitations, the credibility of a witness may be attacked or supported by evidence of the witness's character for truthfulness or untruthfulness:

> **(a) Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise

The scope of Rule 608(a) is rather narrow: the credibility of the witness may be attacked or supported in the form of opinion or reputation for truthfulness or untruthfulness. *See* Fed. R. Evid. 803(21) (reputation of a person's character among associates or in the community not hearsay). Evidence of a witness's truthful character can only be admitted after his truthfulness has been attacked; if a witness's character for truthfulness is not attacked, evidence of honesty or veracity is excluded.

§1:04 Specific Instances of Conduct (FRE 608(b))

Rule 608(b) provides that, under certain circumstances, specific instances of the witness's conduct relating to credibility may be inquired into during cross-examination.

> **(b) Specific instances of conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Several things must be considered in applying Rule 608(b). First, Rule 608(b) seeks to minimize the dangers attendant to the use of character evidence for impeachment by limiting it to evidence that is relevant to the witness's character for truthfulness. Second, Rule 608(b) is subject to the overriding protection of Fed. R. Evid. 403, that requires the

exclusion of evidence whose probative value is substantially outweighed by the danger of prejudice, confusion or waste of time. *See Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 839 (10th Cir. 1988), *cert. denied*, 490 U.S. 1021, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989) (probative value of evidence showing that one of defendant's agents embezzled $40,000 in connection with plaintiff's lease was greatly outweighed by risk of unfair prejudice). Third, Rule 611 bars harassment and undue embarrassment of witnesses. Fed. R. Evid. 611. Fourth, under both Rule 608(b) and the Federal Rules of Evidence in general, the trial court has considerable discretion to control the admission of character evidence. *See United States v. Ortiz*, 5 F.3d 288, 290-91 (7th Cir. 1993).

One other important consideration for the application of Rule 608(b) is the policy against the use of extrinsic evidence. Specific instances of a witness's conduct, other than conviction of a crime, that are offered to attack or support a witness's credibility may not be proven by extrinsic evidence. Fed. R. Evid. 608(b). Evidence is "extrinsic" if it is offered through documents or other witnesses, rather than through cross-examination of the witness himself. This means that only cross-examination may be employed to expose dishonest acts. *See Ellsworth v. Warden, New Hampshire State Prison*, 333 F.3d 1, 20-21 (1st Cir. 2003) (trial court properly excluded evidence tending to show that a witness had lied on prior occasions on the basis that it is collateral and will waste time); *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 147-148, (3d Cir. 2000) (in retaliatory firing suit, plaintiff could cross-examine witness about submission of false information to government in grant report, but could not call another witness to testify to the fact; FRE 608(b) prevents proof of such collateral matters by extrinsic evidence); *United States v. Martinez*, 76 F.3d 1145, 1150 (10th Cir. 1996) (if witness denies making particular statement on collateral matter, examiner may not introduce extrinsic evidence to prove that witness did in fact make statement).

§1:05 Related Rules of Evidence

When considering impeachment by the use of Rule 608 evidence, other federal rules should also be considered. Rule 405 establishes the methods of proving character only by reputation and opinion, and states:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Fed. R. Evid. 405.

Rule 404(b), as amended effective December 1, 2006, prohibits the admission of evidence of other bad acts offered only for the purpose of showing that the person acted in conformity with those acts. The Rule states that evidence of "a person's character or a trait of character is not admissible for the purpose of proving actions in conformity therewith on a particular occasion" in all cases except criminal actions. The Advisory Committee Notes to the new rule state: "The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait." This evidence is, however, admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, prior knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). This is not an exhaustive list. The evidence of other bad acts must be "probative of a material issue other than character." *Huddleston v. United States*, 485 U.S. 681, 686, 99 L.Ed.2d 771 (1988). The Rule does not permit specific instances of conduct except on cross-examination.

Impeachment by Evidence of Conviction of Crime (FRE 609)

§1:10 Statement of Rule

Under Rule 609, the credibility of a witness can be impeached by (1) admission of a crime that is a felony, if the probative value of admitting this evidence outweighs its prejudicial effect; and (2) evidence of a crime which involves dishonesty or false statement:

> **(a) General rule.** For the purpose of attacking the credibility of a witness,
>
> **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

§1:11 Rationale

The fundamental premise of Rule 609 is that when a jury evaluates the credibility of a witness, evidence of veracity, character and knowledge of a prior conviction will somehow be of assistance. The Rule is based on "the common sense proposition that one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath." *Cummings v. Malone,* 995 F.2d 817, 826 (8th Cir. 1993) (*citing Campbell v. Greer,* 831 F.2d 700, 707 (7th Cir. 1987)). The automatic admission provision of Rule 609(a)(2) expresses the concept that some individuals who are found to have been dishonest in other contexts are presumed to be more prone to perjury than others. *See* Conf. Rep. No. 1597, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7051, 7098, 7103.

Because there is no language in Rule 609(a)(2) that requires balancing the probative value of the evidence against its prejudicial effect to the accused, a court has no discretion, even under Rule 403, to bar impeachment of the witness by evidence of a conviction for a crime involving dishonesty or false statement, unless one of the express exceptions to the use of prior convictions applies. "The courts have now clearly held that the trial court lacks discretion pursuant to Rule 403 in this instance, and that a cross-examiner has an absolute right to introduce a conviction involving dishonesty or false statement for impeachment purposes." 4 Weinstein & Berger, *Weinstein's Federal Evidence,* §609.03 (2d ed. 1998); *United States v. Hayes,* 553 F.2d 824, 827 (2nd Cir. 1997) ("[E]vidence of conviction of a certain type of crime one involving 'dishonesty or false statement' must be admitted, with the trial court having no discretion, regardless of the seriousness of the offense or its prejudice to the defendant").

§1:12 Limits

The Rule sets forth multiple requirements as to how counsel may impeach a witness with evidence that the witness has been convicted of a crime. Rule 609(a)(2) permits impeachment of a witness by evidence of the conviction of a crime involving dishonesty or false statement, regardless of the punishment. Accordingly, even misdemeanor convictions which involve dishonesty or false statement may be admitted under the Rule. Such convictions are said to bear directly on the likelihood that the witness will testify truthfully and not merely on whether the witness has indicated a propensity to commit crimes. This type of crime must involve "some element of deceit, untruthfulness, or falsification which would tend to show that an accused would be likely to testify untruthfully." *United States v. Mejia-Alarcon,* 995 F.2d 982, 988-89 (10th Cir. 1993).

Rule 609(b) establishes a ten-year time limit from the date of conviction or release of the witness for the use of a conviction as evidence. However, the court provides that the court has discretion to admit such evidence if the probative value substantially outweighs its prejudicial effect (thereby duplicating the language of Fed. R. Evid. 403). If the crime intended to be used for impeachment is on appeal, the conviction is admissible but evidence that the appeal is in process can be introduced pursuant to Rule 609(e).

§1:13 Corporate Crime

An interesting issue under Rule 609, which may come into play in employment cases, is whether a corporation's conviction can be used to impeach corporate officers who may testify at trial. The federal courts have reached different results.

In *Walden v. Georgia-Pacific Corp.,* 126 F.3d 506 (2nd. Cir. 1997), the Third Circuit held that Rule 609 "does not permit corporate convictions to be used to impeach the credibility of employee witnesses who are not directly connected to the underlying criminal act." *Id.* at 510. The court reasoned that because "it is only the testifying witness' own convictions that will bear directly on the likelihood that he or she will testify truthfully ... it is axiomatic that it is only the testifying witness' own prior convictions that should be admissible on cross-examination to impeach his credibility." *Id.* at 524. The Third Circuit found persuasive an earlier West Virginia Supreme Court case, *CGM Contractors v. Contractors Envtl. Servs., Inc.,* 383 S.E.2d 861, 181 W. Va. 679 (1989), which held "a corporate

conviction is admissible against a witness only if the witness held a managerial position at the time the crime occurred such that it may be fairly inferred that he shared responsibility for the criminal act, or actually participated in the criminal act." *Walden*, 126 F.3d at 524 n.16.

The Eastern District of Tennessee adopted a far broader standard in *Hickson Corp. v. Norfolk S. Ry. Co.,* 227 F.Supp.2d 903 (E.D.Tenn.2002). In *Hickson*, the court decided that "because a corporation speaks through its officers, employees, and other agents ... it stands to reason that a corporation can be a vicarious witness.... [T]herefore, Rule 609 allows the use of a corporation's felony conviction to impeach the corporation's vicarious testimony." *Hickson,* 227 F.Supp.2d at 907. "Any other ruling would give the corporation an unreasonable advantage under Rule 609 as compared to a natural person." *Id.* at 906.

Prior Statements of Witnesses (FRE 613)

§1:16 Statement of Rule

Perhaps the most common and widely-used technique for discrediting the testimony of a witness is to demonstrate that the witness has made statements previously that are inconsistent with his testimony at trial. Rule 613 provides:

> **(a) Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> **(b) Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d) (2).

OTHER MEANS OF IMPEACHMENT

A. Bias

§1:20 Recognized Common Law

"Bias is a term used ... to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984). The common law permitted inquiry into a witness's bias, prejudice, or interest in a case for credibility purposes. However, the Federal Rules of Evidence omitted any rule specifically permitting examination of a witness's bias, prejudice or interest. Notwithstanding that omission, the United State Supreme Court reaffirmed the common law use of this impeachment technique in *Abel*, *supra*, 469 U.S. at 50-51, 105 S.Ct. at 468 (admitting evidence that witness was member of prison gang that required members to commit perjury). The Court stated:

> Rule 401 defines as "relevant evidence" evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, Act of Congress, or by applicable rule. A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.
>
> The correctness of the conclusion that the Rules contemplate impeachment by showing of bias is confirmed by the references to bias in the Advisory Committee Notes to Rules 608 and 610, and by the provisions allowing any party to attack credibility in Rule 607, and allowing cross-examination on "matters affecting the credibility of the witness" in Rule 611(b).

Wigmore wrote that "the range of external circumstances from which probable bias may be inferred is infinite." 3A John Henry Wigmore, *Evidence in Trials at Common Law*, §949, at 784 (Chadbourne rev. 1970). *See*, *Baker v. Kammerer*, 187 S.W.3d 292 (Ky. 2006) (in personal injury claim, trial court abused its discretion in refusing to permit evidence that investigator was employed by insurance company notwithstanding Kentucky rule excluding evidence of insurance, when evidence was used for another purpose, *i.e.*, to show bias).

§1:21 Extrinsic Evidence Allowed

One of the few exceptions to the traditional rule that extrinsic evidence is not admissible to impeach a witness on a collateral matter is extrinsic evidence of bias. *United States v. Abel*, 469 U.S. 45, 51 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984) ("The 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross examiner to 'take the answer of the witness' with respect to less favored forms of impeachment"). Generally, most courts impose few, if any, limits on the admissibility of extrinsic evidence of bias; if a witness fails to admit the facts that establish bias, other forms of proof are generally permitted to establish those facts. *See* McCormick, *Evidence*, Cleary ed. 1984 §40 ("[I]f the witness on cross-examination denies or does not fully admit the facts claimed to show bias, the attacker has the right to prove those facts by extrinsic evidence. In courtroom parlance, facts showing bias are not 'collateral,' and the cross-examiner is not required to 'take the answer' of the witnesses, but may call other witnesses to prove them."). That is, even if the witness fails to admit to the facts that establish bias, other forms of proof, such as testimony of other witnesses, are liberally permitted.

Contradiction

§1:25 Most Effective and Common Impeachment Technique

Though the Federal Rules of Evidence do not provide for impeachment by contradiction, this method is one of the most valuable and commonly used weapons of the cross-examiner to destroy the credibility of a witness.

The technique is simple. If Mr. Jones, a supervisor, testifies to a particular fact on direct or cross-examination, *e.g.*, that he never touched his employee, Ms. Smith, then the cross-examiner impeaches the witness by demonstrating that he did, in fact, touch Ms. Smith. This is done by cross-examination or, more effectively, through the use of extrinsic evidence, such as by calling a witness who will testify that on several occasions he saw Mr. Jones touch Ms. Smith. Impeachment through contradiction should lead the jury to believe that the witness has lied or has made a serious mistake as to a specific fact of importance in the case; the jury may then disbelieve other portions of the witness's testimony.

CAUTION:

Trivial contradiction may give rise to Rule 403 objection.

> Impeach by contradiction only on facts that are truly important to the case and not on collateral matters. As noted with other forms of impeachment, by impeaching a witness on a collateral or insignificant matter, the jury may believe its time is being wasted or that counsel really has nothing significant to say. Moreover, impeachment through contradiction on a trivial or collateral matter gives opposing counsel an opportunity to make a Rule 403 objection that the evidence should be excluded "by considerations of … unfair prejudice … undue delay and waste of time."

GOALS AND PRINCIPLES OF CROSS-EXAMINATION

A. Two Purposes of Cross-Examination

Cross-examination has two broad purposes: The purpose of "constructive" cross-examination is to obtain admissions of fact that prove or corroborate your client's claims or defenses and rebut evidence that is harmful; the purpose of "destructive" cross-examination is to discredit or weaken your opponent's witnesses and their testimony.

§1:30 Constructive Cross-Examination

If an adverse witness has information that supports your case or corroborates facts or information elicited from your primary witnesses, cross-examination is an effective means to have adverse witnesses ratify your position. Eliciting favorable evidence from the opposing party's witnesses adds credibility to the evidence in the eyes of the jury. Moreover, during closing argument, you can emphasize the evidence by reminding the jury that even the opposing side's witnesses supported your version of the facts.

When the goal of cross-examination is to secure admission of facts to corroborate your client's claims, approach the examination in a casual and friendly manner, with the hidden objective of securing admissions of fact, rather than browbeating the witness (which may be more appropriate for impeachment). If admissions corroborating your client's claims are obtained during cross-examination, you can then decide whether there is anything to be gained by attempting to discredit the witness. In most situations, it is good trial practice to cross-examine first on the admissions that can be elicited that support the client's case before attacking and impeaching the witness, if that is necessary.

During constructive cross-examination, frame your questions in such a manner that the witness cannot deny them without appearing ridiculous or offering an inherently improbable answer or appearing as if he is lying. The witness should be asked questions such that if he does not admit the facts or if he denies them, the jury will conclude that he is unworthy of belief and disregard his testimony due to a lack of credibility.

§1:31 Destructive Cross-Examination

When seeking to achieve the second goal of cross-examination, the cross-examiner attempts to discredit the witness through impeachment. The goal is to demonstrate that the witness is unworthy of belief as a person. With expert witnesses, the goal is to discredit the witness's opinion by demonstrating what the expert has or has not done that affects his credibility. Reveal the improbabilities and unreasonableness of his direct testimony in an effort to impeach that testimony on the basis of bias, prejudice, things the expert should have done and did not, authoritative literature or prior testimony given by the witness.

B. Preparation Is (Almost) Everything

§1:32 Know the Facts and the Law

The cardinal principle of cross-examination is painstaking, thorough and meticulous preparation. Although a cross-examiner must be able to think on his feet at trial, the only way to achieve the two goals of cross-examination is with an exhaustive and comprehensive knowledge of the facts of the case and the law that controls the case. Moreover, you must know and understand the rules and the techniques for impeachment under the appropriate rules. The foundational and predicate questions for each mode of impeachment must be understood and incorporated into the cross-examination. There is nothing worse than to have deadly ammunition for impeachment, attempt the impeachment before the jury, and then receive a warning from the court because the planned impeachment was improper for lack of foundation.

§1:33 Use Depositions to Prepare for Cross

Preparation for cross-examination at trial does not begin in the last few weeks before trial. It begins with the investigation and discovery process, culminating with the depositions of the adverse party, the key lay witnesses and the expert witnesses. The depositions taken during discovery provide the ammunition for cross-examination at trial. With thorough discovery depositions, you should be able to anticipate practically all of the testimony of the lay and expert witnesses in the case.

PRACTICE POINT:

Compare deposition v. trial examination.

The type of cross-examination done at trial is far different from the cross-examination at deposition. The goal of taking a deposition is discovery and, therefore, the questions asked will address more general areas than cross-examination at trial. Before a jury at trial, you ask questions only to elicit known and favorable responses.

At deposition, you ask open-ended, exploratory questions to discover the facts known by the lay witness; the facts supporting the plaintiff's allegations and the defendant's defenses; the opinions held by the expert witness; the bases for those opinions; and the expert's qualifications. The scope of a deposition is limited only by the broad definition of relevance. Federal Rule of Evidence 401 provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." At deposition, you have the opportunity to test the witness, to determine whether he angers easily, and to determine whether he gives long or short answers. All this information will be helpful in preparing for cross-examination at trial.

§1:34 Prepare Trial Notebook

Once you are familiar with each fact, each document, and the testimony of each witness in the case, you must identify the topics and facts where concessions can be obtained and impeachment of the witness can be achieved on cross-examination. Then, you must devise a method of organizing this information for use at trial.

Some attorneys find it helpful to prepare an outline of the cross-examination and to create a bullet point list of topics to be explored, with a very brief summary of the subject matter for each question to be asked. Although there is some disagreement on this issue, my experience has taught me to write out each and every question for cross-examination, whether for a lay or expert witness. Having these questions in a trial notebook stifles the urge to ask questions that are objectionable or not well-formulated; prevents omission of important topics during the examination; and, most importantly, helps to avoid the asking of a question when the answer is unknown.

Regardless of the method used, you must identify the potential areas where admissions can be obtained to support your client's case and areas for impeachment. A good way to do this is to use several sheets of paper or different directories on your computer—one set for "Admissions" and one for "Impeachment." On the "Admissions" sheet, list all of the subjects upon which the witness must give favorable testimony; these are the subjects and facts which tend to corroborate your theory of the case. On the "Impeachment" sheet, list the areas of cross that will be addressed for impeachment.

PRACTICE POINT:

Write out answers to "destructive" cross questions.

To insure that you are ready to achieve the second goal of cross-examination, *i.e.*, impeachment, it is good practice to prepare a list of questions *and* the answer the witness gave in deposition, with specific references to the page and line numbers. Although this may seem a bit rigid and structured, this format assures a crisp, effective cross-examination and impeachment without fumbling around for papers or depositions. There is nothing worse than setting up a lay or expert witness for impeachment with a prior deposition, knowing you can make him look foolish, and then fumbling around looking for the deposition or the exact lines of testimony while the jury waits and listens to the silence. These pregnant pauses steal the momentum from your cross-examination and give the witness time to figure out how to escape what is about to occur. They also can be extremely embarrassing and can diminish your credibility with the jury.

PRACTICE POINT:

Don't read from notebook at trial.

If you decide to prepare your questions for cross-examination in advance, do not read the questions from your notebook during trial. The best method is to look at the question in the trial notebook to refresh your recollection, then look at the witness and ask the question. Keep your eye on the witness and the jury when the question is being asked and answered. If you look down at your notebook for the next question while the witness is still answering your previous question, you may miss something important in the witness's answer and/or send a message to the jury that you really are not too interested in the answer to the question. If you are not interested, why should they be?

§1:35 In Practice: Tips for Effective Examination

Cross-examine witness only when necessary.

If the testimony on direct examination does not hurt your client's case, there may be no need for cross-examination. If there are no points to be scored and no admissions that may be helpful to your client's case, the best choice is to say, "No questions." Don't waste time impeaching on collateral, trivial or inconsequential matters.

Listen and observe.

Listen carefully to the witness's answers, both on direct examination and on cross-examination, and watch what is happening in the courtroom. Any slip of the tongue could result in a significant admission that may lead to a line of questioning that may make the difference between success and failure. Therefore, you must listen for voice changes and listen to every word the witness utters. Watch the witness closely; body language will often signal when a witness is uncomfortable with a line of questioning and when he lacks confidence in the answers he is giving. Watch the witnesses' facial expressions and his demeanor.

TECHNIQUE TIP:

Mark key testimony.

When a significant point is made, ask the court reporter to mark it; obtain the transcript and then use the point in closing argument. Asking the court reporter to mark an answer signals to the jury that the answer given was important. Alternatively, you can note the answer in your trial notebook and, during a break, approach the court reporter, identify where in the testimony you would like a partial transcript, and order it then.

Ask simple, straightforward questions.

Use simple, understandable language in the questions posed to the witness. Each question should be short, precise and limited to only one fact. Avoid legal, medical or technical language which may confuse the witness or the jury. Complex questions may permit the witness to explain or disagree with the point you are trying to make. The jury must understand every question put to the witness so that it can fully and adequately understand the answers and their effect on the issues.

Make a targeted attack.

Select the areas where points can be made and keep the cross-examination concise and brief. Do not feel compelled to explore each area of testimony on direct examination; this could lead to the witness re-emphasizing the favorable aspects of his testimony during cross-examination. Proper planning will allow you to determine in advance the most important issues for cross-examination and what subjects should lead to securing admissions or impeachment. Stay focused on these subjects where the examination will advance your case. Your cross-examination should reinforce the theme of the case developed in your opening argument and lay the foundation for your closing argument.

Alert jury to new topics.

As with direct examination, during the cross-examination, it is important for the jury to understand where the examination is going. When moving to a new topic, always introduce the new topic. For example, "Now I would like to discuss the day Mr. Smith was fired." This alerts the witness and jury what the focus of the next series of questions will be and which issue will be addressed, and serves to highlight and organize the information for the jury.

Stick to your notebook of questions/topics.

Stick to the questions you have written or outlined in your trial notebook. You may decide to complete each subject in sequence or to jump from topic to topic, to keep the witness off balance. One note of caution: Jumping from topic to topic can be dangerous for the inexperienced trial lawyer and should never be attempted with a seasoned expert witness.

Avoid asking questions to which you don't know the answer.

One of the most basic and repeated principles of cross-examination is never ask a question unless you know the answer. Some very experienced trial lawyers may disregard this principle on occasion, but it is always a gamble. If you choose to take this risk, you must gently test the witness on the subject matter. Ask very short, very narrow questions and approach the examination with care. If the witness's answers, voice or body language reveal danger signals, the final question should not be asked, and the unknown answer should remain unknown.

Ask leading questions.

Cross-examination should be done by leading questions, with the preferred format: "Isn't it true …." Leading questions suggest the answer in the question; they allow you to argue the case through the witnesses by strictly controlling the information the jury will hear and emphasizing the information that is positive to your case. In essence,

leading questions allow the attorney, not the witness, to testify. The witness is placed in the unenviable position of having no choice but to agree with the examiner's statements. By using leading questions, counsel controls the witness throughout the cross-examination. Questions that begin with "Why," "How do you explain," "What is the purpose," cause trouble and can lead to a loss of control of the witness and a digression from the story the cross-examiner is telling.

Do not repeat direct examination testimony.

Do not permit the witness to simply repeat the testimony elicited during direct examination. All too often, the cross-examiner will meticulously take notes during the direct examination and then start the cross-examination by covering all the notes. This only gives the expert a golden opportunity to repeat, re-emphasize and reinforce his opinions in the minds of the jurors. It may also serve to convince the jury that the expert is actually telling the truth, especially if the cross-examination does little to discredit or impeach the opinion. Allow the expert to restate his opinions only if you are certain that you can absolutely destroy them by a contradictory statement, affidavit or prior testimony.

Know when to quit.

Leave well enough alone. The inexperienced examiner will call attention over and over to the same point in an effort to emphasize it in the jury's mind. If you made your point, do not be tempted to emphasize it again by the use of repetition. The witness may not give the same answer or may attempt to explain or lessen the impact of a prior unfavorable answer. Always quit while you are ahead.

Remain calm.

Counsel's demeanor during cross-examination is extremely important. Counsel should not get angry with a witness, except on purpose, and should remain in control at all times. The loss of one's temper in the courtroom can lead to the loss of a case. A witness should not be attacked unless there is a good reason for the attack. Jurors usually will identify with lay witnesses and sometimes with expert witnesses during cross-examination. The examiner should never attempt to intimidate or bully the witness and should not argue with the witness. If a lay or expert witness appears to be combative and argumentative, it is better practice for counsel to kill the witness with kindness. Jurors will resent a bully on cross-examination. If a witness continues to be combative and argumentative despite your efforts to remain cool and collected, the jury will observe it and then give you implicit permission to attack.

Start strong, end strong.

Finally, as with all other aspects of trial, the principles of primacy and recency should be employed. The cross-examination should always start with a strong opening, on a topic that you know will score points. Review the list of topics upon which you seek admissions and select one that the witness must admit. It is good practice to begin cross-examination on a topic that is different from the topic which ended the direct examination because the witness may be better prepared to answer, having just discussed that topic. Your last question on cross-examination should elicit a lasting impression. After the final strong point is made, sit down.

[§§1:36 – 1:39 Reserved]

IV. CROSS-EXAMINATION OF EXPERT WITNESSES

A. Basic Points

§1:40 Goal: Show that Reasonable Experts Disagree

The popularized concept of the skillful cross-examiner destroying an expert witness on the stand is a rare occurrence outside of fictionalized television dramas. In reality, the true goal of expert witness cross-examination should be to demonstrate that there is disagreement between the experts and to convince the jury that there are legitimate reasons to distrust the opposing expert. If you provide the jury with a basis for disregarding, disbelieving and minimizing the impact of the adverse expert's testimony, cross-examination has been successful. This section of the chapter will offer techniques to help you achieve that goal.

§1:41 Become an Expert on the Expert and His Field of Study

Before cross-examining any expert witness, at deposition or at trial, you must thoroughly investigate the expert's background, credentials and qualifications. Meticulous preparation is the key to success. There are several ways to accomplish this:

Review prior testimony.

In the report required under Fed. R. Civ. P. 26(a)(2)(B), the expert must disclose the cases in which he has testified during the preceding four years. It is good practice to contact the attorneys who were involved in those prior cases and try to obtain copies of the expert's testimony. If prior reports, depositions or trial testimony can be obtained, this type of information can be invaluable. Sometimes an adverse expert has given testimony on behalf of other plaintiffs, and the testimony may be inconsistent with the position he has taken in the case you are handling. This is especially true if the expert witness is a "hired gun" who testifies often. On the other hand, if the expert witness usually testifies only for one side, this can effectively be used to impeach the witness for bias.

Study expert's area of expertise.

The expert qualifies as such under Fed. R. Evid. 702 because he has scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or a fact in issue. In order to have any hope of effectively cross-examining the expert and neutralizing or discrediting his opinion, you must also have a thorough knowledge of the expert's area of expertise. If you lack this knowledge, the expert will make you look foolish. Research and study the field so that you become an expert also.

Become familiar with the authoritative and respected literature, articles or texts in the witness's area of expertise. If the expert's testimony is outside the authoritative literature, he can be impeached with the literature and be shown to be outside the accepted norms of his profession.

Review every professional publication authored or co-authored by the expert that conceivably may be relevant to the issue in your case. There is nothing more powerful than to impeach an expert with a prior article he has written that is inconsistent with his present opinion.

PRACTICE POINT:

Knowledge is power.

Meticulous preparation, such that your knowledge is comparable to that of the expert, helps to level the playing field. Knowledge equals power, and that power can be used to destroy an expert witness. By knowing as much, if not more, than the expert, you can ask specific questions and pointed follow-up questions. You may even be able to knock out the expert's testimony entirely. For example, consider the following deposition testimony; following this exchange, the expert withdrew from the case.

Q. You have no opinion?
A. I want to know what you mean by "doubling in size." What is your definition, before I answer the question. What is—what do you mean by "doubling in size"?
Q. Okay. So as to make sure that I am, hopefully, understood, I am meaning double in size to the extent that the lesion by radiographic examination has its diameter doubled.
A. That would be about a hundred times change in size, by the way.
Q. On a scale of doubling diameter equals size of a hundred?
A. I would have to figure it out, but it's a very large number.
Q. Doctor, are you saying that if a lesion, by mammography, has its diameter doubled, for instance, from one centimeter to two centimeters, that that would mean that the volume of the lesion has increased one hundred times?
A. No, I didn't say that.
Q. Why don't you explain what you mean when you said, "one hundred times" in that last answer?
A. I retract "a hundred times." I just said it would be a tremendous difference in size, because, Mr. Jones, you're forgetting something. You're talking about two dimensions and tumors are three-dimensional objects.
Q. What do you mean, sir?
A. I meant a three-dimensional object, Mr. Jones, you know exactly what I mean. You are trying to browbeat me and I don't like it.
Q. Well, my only question—
A. Because you're too smart and you know I have answered "four-thirds pi R cubed" over and over and over again. And you know damn well, that that's what the formula is. Now stop it, Okay?
Q. Only question is, doctor, what you meant—

A. We don't—no, we don't stand for that kind of browbeating here.
Q. I have treated you with respect.
A. No you haven't. You keep asking the same stupid question.
Q. Why is it stupid?
A. If you don't understand that that's a three dimensional object, then you ought to back to school and take some mathematics with your kids.
Q. Why do you call me stupid?
A. Now, please leave. Please leave. I don't want you in here anymore.
Q. Okay. Deposition is terminated.

§1:42 Know Case Facts Cold

Although the expert will know his field, quite frequently he will not be as familiar with the facts of the case as he should be. This lack of knowledge of the facts of the case provides a golden opportunity for cross-examination. All you need to do is to catch the expert in one significant mistake to cast doubt on all his opinions. If you have a full knowledge of the facts of the case, this can be a significant advantage when cross-examining a busy expert.

[§§1:43 – 1:44 Reserved]

B. Challenge Expert's Testimony

1. *Daubert* Provides Analytical Framework for Expert Testimony

§1:45 Trial Courts as Gatekeepers

The Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993), provides the analytical framework for determining whether expert testimony is admissible under Rule 702 of the Federal Rules of Evidence. Rule 702 specifically governs the admission of expert testimony, and provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

As interpreted by the Supreme Court in *Daubert*, Rule 702 charges trial courts to act as "gate-keepers," making a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." In short, expert testimony is admissible only if it is both relevant and reliable. This gate-keeping obligation applies to all types of expert testimony, not just scientific testimony. Gatekeeping is a critical judicial function because of the inherent power and danger of expert testimony. *Daubert*, 509 U.S. at 595. It requires the trial judge to conduct a preliminary assessment of reliability, including whether the expert's "methodology properly can be applied to the facts in issue." *Id*. at 592-93.

§1:46 Assessing Reliability of Expert Testimony

Many factors bear upon the inquiry into the reliability of scientific and other expert testimony. In *Daubert*, the Supreme Court offered an illustrative, but not an exhaustive, list of factors the district courts may use in evaluating the reliability of expert testimony. These factors include whether the expert's theory or technique: (1) can be or has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error or standards controlling its operation; and (4) is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593.

In the case of *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L.Ed.2d 294 (1999), the Supreme Court ruled that the reliability factors set forth in *Daubert* for the admissibility of scientific expert testimony also apply to non-scientific experts. *Kumho Tire* described the "importance of *Daubert*'s gatekeeping requirement ... to make certain that an expert ... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id*. at 152. More specifically, the trial judge must ensure that "junk science" plays no part in the decision. The court noted that the factors of *Daubert* do not always "fit nicely" and must be applied in light of the facts of the particular case. *Id*. at 150. In other words, the standard is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts in every case, depending on the nature of the

issue, the expert's particular expertise, and the subject of his testimony. *Id*. Some additional factors that have been considered are:

(1) Whether the expert's opinion was developed expressly for the purpose of testifying or as a result of independent research (s*ee Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 841 (9th Cir. 2001); *Nelson v. Tennessee Gas Pipeline Co*., 243 F.3d 244, 252 (6th Cir. 2001)); and

(2) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *Kumho*, 526 U.S. at 151.

§1:47 Trial Court Has Wide Discretion to Admit or Exclude Expert Testimony

Trial courts are given wide discretion to determine the admissibility of expert testimony. *Wilson v. Woods*, 163 F.3d 935 (5th Cir. 1999). The Court's "gatekeeper" role is not intended to supplant the adversary system or the role of the jury. The Supreme Court stated that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert* at 596. "[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *U.S. v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996).

The trial court's decision to admit expert testimony is reviewed for abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). In *Joiner*, the Supreme Court instructed that the abuse of discretion standard is the proper standard and re-emphasized the gatekeeping role of the trial court judge: "while the Federal Rules of Evidence allow District Courts to admit a somewhat broader range of scientific testimony than previous decisions, they leave in place the 'gatekeeper' role of the trial judge in screening such evidence."

This standard does not grant the court "discretion to abandon the gatekeeping function" or "to perform the function inadequately." *Kumho Tire*, 526 U.S. at 158 (Scalia, J., concurring). Where objections are made to the admissibility of expert testimony, the court must make an express determination of reliability based on a "reliability inquiry." *United States v. Charley*, 189 F.3d 1251, 1266-67 (10th Cir. 1999); *Elcock v. Kmart Corp*., 233 F.3d 734, 745-50 (3rd Cir. 2000); *City of Tuscaloosa v. Harcros Chems*., 158 F.3d 548, 565 & n.21 (11th Cir. 1998). The court need not hold a formal hearing, but where reliability is called into question, it must make a reliability determination on the record. *United States v. Velarde*, 214 F.3d 1204, 1208-09 (10th Cir. 2000); *see United States v. Alatorre*, 222 F.3d 1098, 1104 (9th Cir. 2000) (trial court conducted sufficient inquiry because it ruled on the record to admit testimony only after conducting extensive voir dire). Failure to make such an express, on-the-record determination, giving the court's ruling and the reasons for it, is an abuse of discretion. *Velarde*, 214 F.3d at 1208; *Goebel v. Denver & Rio Grande Western R.R*., 215 F.3d 1083, 1087-88 (10th Cir. 2000); *United States v. Shay*, 57 F.3d 126, 134 (1st Cir. 1995).

PRACTICE POINT:

Preliminary assessment under FRE 104.

Federal Rule of Evidence 104 provides that, "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." This Rule can be used to urge the court to conduct a "gatekeeping" preliminary assessment as to whether the human resources expert's testimony is admissible under *Daubert*. After receiving the expert's report and taking his deposition, the opposing party should consider whether an attack under *Daubert* is possible.

Note, however, that the Supreme Court emphasized the broad discretion granted to trial courts in assessing the relevance and reliability of expert testimony. Nowhere in *Daubert*, *Joiner* or *Kumho Tire* does the Supreme Court mandate the form that the inquiry into relevance and reliability must take. Presumably, although the Court stated that the inquiry is a preliminary one, this does not mean that it must be made in a separate, pretrial hearing, outside the presence of the jury, and there is an absence of authority mandating such a hearing. *See United States v. Nichols*, 169 F.3d 1255, 1262-63 (10th Cir. 1999) (rejecting claim that defendant was entitled to a preliminary hearing on admissibility and concluding trial court did not abuse its discretion in refusing such a hearing); *Kirsteinv v. Parks Corp*., 159 F.3d 1065, 1067 (7th Cir. 1998) (same); *Hopkins v. Dow Corning Corp*., 33 F.3d 1116, 1124 (9th Cir. 1994) (trial court is not required to hold a Rule 104(a) hearing in order to discharge duty under rule "but rather must merely make a determination as to the proposed expert's qualifications").

Thus, one of the strategic decisions to be made is whether to raise the *Daubert* issue before trial. Certainly, a pretrial assessment will educate the judge as to the weaknesses of the expert's opinions, but it also will educate opposing counsel. If the expert witness is not excluded on *Daubert* grounds, opposing counsel will know the bases for cross-examination at trial and prepare the expert to be ready for that attack. However, depending upon the court's ruling on the *Daubert* issue, a resolution of the case before trial might be possible, if the expert's

testimony is excluded. There are no hard or fast rules; each case and each expert witness must be evaluated individually.

[§§1:48 – 1:49 Reserved]

2. Specific Grounds to Challenge Expert's Testimony

§1:50 Challenge Expert's Qualifications

Expert evidence can be attacked by demonstrating that the expert does not possess the expertise to provide an opinion on a particular subject or that he has exceeded the boundaries of his expertise. Simply because a court determines that a witness is qualified as an expert under Fed. R. Evid. 702 does not mean that the expert witness is immune from having his qualifications attacked during cross-examination. Carefully scrutinize the expert's *curriculum vitae*. Experts frequently exaggerate their credentials; sometimes, for example, an expert witness did not actually write a published article or only served as an editor. Any flaws or discrepancies in the *curriculum vitae* can be used to impeach the expert. Obtain and review all written materials prepared by the expert witness, looking for statements or conclusions that may contradict the expert's opinions or support the opinion of your own expert witness.

If appropriate, attempt to limit the scope of the witness's expertise; emphasize missing credentials, such as licenses, degrees or certifications. If your expert's credentials clearly outshine those of the adverse expert witness, this discrepancy can provide another means to diminish the credentials of the expert witness before the jury.

For an example of how to challenge an expert witness's qualifications on cross-examination, *see* §§1:58.2 and 1:58.6, below.

§1:51 Impeach by Demonstrating Bias

Bias—the inclination to favor the party by whom the witness is employed—is one of the most frequent criticisms leveled against expert witnesses and one of the most fertile grounds for cross-examination. If you can demonstrate that the expert witness only works for one side of the bar, or repeatedly has worked with a particular attorney or law firm, his credibility will be called into question, as this consistency certainly suggests bias. The expert's fee may also suggest bias; whether or not the money leads the expert to a certain conclusion, the jury might infer bias.

The foundation for impeachment of an expert witness on the grounds of bias normally is established during discovery and at deposition. Explore the expert's background, including the jobs he has held and for whom he has worked. Then, at trial, use the information you learned at deposition to ask specific, leading questions to reveal the witness's bias. Sample deposition questions revealing bias include:

- How did you get involved in this case?
- Who was the person who initially contacted you?
- What were you told during that initial contact?
- What is your relationship to the attorney who retained you?
- On how many prior occasions have you been retained by this attorney or members of his firm?
- What is your relationship with the defendant [or plaintiff]?
- Have you testified for the defendant [plaintiff] previously? [If so, explore those prior retentions.]
- What is your relationship with the defendant's industry?
- Do you consult with other companies in that industry?
- Do you testify exclusively for plaintiffs or defendants?
- What percentage of the time do you testify on behalf of plaintiffs? On behalf of defendants?
- Have you ever testified for the plaintiff [defendant]?
- Have you ever concluded that [*e.g.*, sexual harassment or race discrimination] did in fact occur?
- Looking at your report setting forth your testimonial experience, please identify the case in which you testified that [*e.g.*, sexual harassment or race discrimination] did in fact occur.

PRACTICE POINT:

Always check the expert's documents.

Is it good practice to check the documents, rather than take the expert's word on this issue. The expert may say that he testifies for both parties equally, but a review of the documents and some quick math may reveal that he testifies for the defense 90% of the time. *See* §1:22, above (sample cross-examination).

- On what date were you retained in this case?
- What are your compensation arrangements with your client?
- What is your compensation arrangement concerning your testimony and preparation for your deposition? And at trial?
- What are your customary witness fees for this particular type of case?
- Is this in the range paid to you for your usual, non-litigation work?
- What percentage of your income is derived from litigation activities?
- What is the total income derived from litigation activities?
- Is your fee somehow contingent on substance of your testimony or outcome of case?
- Do you have an economic interest in the outcome of this case?

§1:52 Challenge Bases for Opinion

Cross-examination of the expert should probe the validity of the underlying bases for his opinion—the data, facts, observations or truths generally accepted in the expert's field upon which the expert relied. When the underlying facts upon which the expert bases his opinion are incomplete or simply wrong, significant headway can be made to impeach the expert's opinion. The goal of this type of impeachment is to demonstrate that there is insufficient, incorrect or unreliable evidence to establish the foundation for the expert's opinion—garbage in, garbage out. The purpose is not to destroy the witness, but to raise doubt as to the manner in which the expert formulated his opinion.

The ultimate opinions of an expert witness are usually predicated on several premises. If the underlying premises are based upon improper, incomplete or fallacious information, the entire opinion may fall. Therefore, it is imperative to explore thoroughly the complete bases for the expert's opinion. This will set the stage for the introduction of subsequent evidence to rebut the facts and premises that form the bases of the expert's opinion. Inquire about information or materials which were not provided to the expert or which were not considered, and other data that was not reviewed and impeach the opinion based upon the implication of failing to consider the information.

In many employment cases, the opinion of an expert witness often depends upon facts to be established by other witnesses. It is possible, therefore, to impeach the expert's opinions by challenging the factual bases of the opinion during cross-examination of lay fact witnesses. A simple technique to set up this method of impeachment is to ask the expert in deposition to list the specific facts upon which he has based his conclusions. The next step is to have the expert agree that if the underlying facts change, then a different conclusion could be reached. Even the most seasoned expert witness will have to agree with this proposition. If there are facts which the expert was not provided or if the facts provided are wrong, the final step is to substitute those facts and attempt to gain the admission that with the additional facts, the expert's opinion might change.

See generally §§1:58.3-1:58.5.

§1:53 Impeach by Use of Learned Treatises

Another method of impeachment, which is unique to expert witnesses, is to cross-examine with learned treatises. Federal Rule of Evidence 803(18), concerning the hearsay exception for learned treatises, states, in pertinent part, as follows:

> The following are not excluded by the hearsay rule .... To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits**.**

In *Rossell v. Volkswagen of America*, 709 P.2d 517, 530 (Ariz. 1985), the court explained learned treatises:

> The learned treatise exception to the hearsay rule stems from three independent guarantees of trustworthiness of such works. Treatises admissible under Rule 803(18) are written impartially in favor of truth as the authors see it; they are subject to careful professional scrutiny for inaccuracies by the author's colleagues; and the author has an interest in its accuracy because his or her reputation is at stake. 6 J. Wigmore, Evidence §1692 (Chadbourn rev. 1976). The purpose served by limiting the jury's exposure to an oral reading at the time the expert is being examined is to avoid the jurors' possible misunderstanding and misuse of the technical treatise when it is later examined in the jury room with no one present to explain or be cross-examined. 4 J. Weinstein & M. Berger, Weinstein's Evidence §803(18) [01].

See also Johnson v. William C. Ellis & Sons Iron Works, Inc., 604 F.2d 950 (5th Cir. 1979) (policy's underlying rule prohibiting learned treatises from being admitted as substantive evidence is to prevent jurors from overvaluing written

word and from forming conclusions not subjected to expert explanation and assistance), *rehearing denied in part*, opinion amended 609 F.2d 820 (1980).

The federal rule significantly alters the common law rule under which learned treatises were used only for impeachment and could be used only if the expert to be impeached recognized the learned treatise as authoritative. This led to significant battles during cross-examination, in which the cross-examiner would try to get the expert witness to admit that an article or text was authoritative; a seasoned expert witness was usually well-prepared to fight this battle. Under the federal rule, if a learned treatise is established as relied authority by the testimony of a witness expert in the profession, art or trade of the author, then the foundational requirement is met, and the learned treatise can be used to impeach another expert witness. Therefore, counsel can lay the foundation for the use of the learned treatise through his own expert and demonstrate to the jury that his expert's opinions are supported by the authorities in the field before opposing counsel even has the opportunity to attack the expert's opinions.

[§1:54 Reserved]

Expert's Opinion Is Based on Incomplete Work and Lack of Knowledge of Fundamental Facts About Plaintiff

PRACTICE POINT:

Attack based on missing information.

Now that you have exposed the shaky foundation of the opinion, move in for the attack. The plan is to impeach Ms. Squire by the omissions in her report and the unfavorable facts she failed to elicit from the plaintiff, Ms. Prescott. This is a common technique for impeachment of expert witnesses, *i.e.*, showing that there was information available that was either not provided to, or elicited by, the expert witness. This angle also subtly attacks the credibility of the plaintiff, Ms. Prescott, because she failed to tell her counselor important facts.

Q. Looking at the first page of your report, you describe Ms. Prescott's marriage to Joe Prescott, correct?
A. Yes, I did.
Q. And you mention Joe Prescott's drinking and inability to stay in a job, correct?
A. That is correct.
Q. And then you mention that Mr. and Mrs. Prescott separated, correct?
A. Yes, that is part of the history I was told.
Q. But your report makes no mention whatsoever as to how the separation from her husband affected Ms. Prescott mentally or psychologically, does it?
A. No, the report does not mention that, but I did mention that after the separation Ms. Prescott was able to maintain her standard of living.
Q. Yes, I see that, but your report does not describe her mental or psychological condition while she was dealing with her husband's drinking, does it?

TECHNIQUE TIP:

Ignore expert's attempt to sidestep your attack.

Here, the witness attempts to sidestep the omission in her report by clinging to the facts she did consider. Counsel briefly acknowledges the answer given and then immediately goes on the attack to demonstrate another omission in her report. In doing so, counsel reestablishes control over the witness. Stay on point. Don't let the witness's attempt to save face divert you from your attack.

A. No, it does not.
Q. And isn't it true that the report does not describe how the end of her marriage affected her mental or psychological condition, correct?
A. No, it does not.

§1:58.5 Expert Did Not Obtain or Review Important Document That Was a Matter of Public Record and Easily Available to Her

PRACTICE POINT:

Admissions lay foundation for impeachment.

Having obtained these admissions, the basic foundation has been laid for impeachment. The following questions discredit the expert's opinion by demonstrating that there was important information available to the expert that she did not obtain. This technique is similar to impeaching an expert witness by demonstrating that there are processes or procedures that experts in the particular field would use which were not used prior to formulating expert opinions.

Q. Ms. Squire, isn't it true that Ms. Prescott showed signs of depression well before she lost her job at Star Corporation in April 2003?
A. I am not aware of that.
Q. Well, Ms. Squire, you are aware that Ms. Prescott filed for divorce in February 1992?
A. I am aware that she is divorced, but I do not know when she filed.
Q. Isn't it true that when there is an issue of child custody, the Family Court will refer the parties to a psychologist who will make a report and recommendation as to which parent should have custody of the child?
A. Based upon my counseling women with marital problems who file for divorce, it is my understanding that such reports and recommendations are made to the Family Court.
Q. Your honor may I approach the witness and give her Exhibits 6 and 7, previously admitted into evidence, which are the resume and report of Dr. Ronald R. Wood, a board certified psychologist who saw Ms. Prescott on December 9, 1992?
Ms. Squire, before you prepared your report in this case, had you seen Dr. Wood's report?
A. No, I can't say that I had.
Q. This report is a public record as part of the Prescott divorce proceedings, correct?
A. I really don't know if that is true or not.
Q. Isn't it true that the parties to a divorce are provided with a copy of the report of the doctor who makes recommendations to the Family Court?
A. I believe that is correct.
Q. And you knew that Ms. Prescott had gone through a divorce and that custody was contested, correct?
A. Yes, I knew that.
Q. But you never asked her whether she had a copy of any report by a physician concerning custody, did you?
A. No, I did not.
Q. As a public record, Dr. Wood's report was available to you while you were counseling Ms. Prescott in 2003 and before you wrote your expert report in late 2004, correct?
A. It may have been available but I did not know of its existence.

§1:58.6 Expert's Credentials Pale in Comparison to Opposing Expert's Credentials

PRACTICE NOTE:

The greater the disparity in credentials, the greater the impact of the testimony.

Dr. Wood's experience will be compared to that of Ms. Squire. Comparing the qualifications of expert witnesses is another method of impeachment which can be very effective when the disparity of qualifications is significant. The clear implication is that the jury should give greater credence to the opinion of the expert with the superior credentials.

Q Dr. Wood is a Board Certified psychologist, correct?
A. I don't know that personally, but that is what the report says.
Q. As a Board Certified psychologist, Dr. Wood first had to get his Ph.D. in psychology, correct?
A. Yes, I believe that is true.

Q. And then to become Board Certified, Dr. Wood had to pass various tests administered by the American Psychological Association, correct?
A. Yes, I believe that is the process.
Q. You are not Board Certified, correct?
A. No, I am not. I just got my Masters and wanted to help patients.
Q. And you do not have your doctorate, correct?
A. No, I do not.

§1:58.7 Opposing Expert's Report Is Accurate and Reliable

TECHNIQUE TIP:

Have opposing expert read and condone to the jury your expert's report.

Now that you have undermined the witness's credibility and revealed her to be far less qualified than your expert, the next step is to have the expert concede the points to be made by your expert. For the greatest impact, have the witness read the salient points of your expert's report to the jury, so the jury hears your side of the case before your expert even testifies. Here, counsel attempts to get the expert to admit that the plaintiff, Ms. Prescott, had pre-existing symptoms of depression.

Q. You would have no reason to doubt what Dr. Wood reported to the County Family Court, correct?
A. I don't know Dr. Wood, so I really can't answer that question.
Q. Please look at his report. Dr. Wood saw Ms. Prescott on December 9, 2002, correct?
A. That is what he wrote.
Q. That was some 4 months before she lost her job at Star Corporation?
A. That is true.
Q. I want to direct you to the third sentence of the third paragraph of the report. Would you please read that to the jury?
A. "She is currently exhibiting a great deal of anxiety in connection with the divorce. She is exhibiting signs of depression, such as sleeplessness and lack of appetite. However, she continues to maintain steady employment and she has provided a stable home for the child."
Q. Isn't it true that just four months before the loss of her job, Ms. Prescott was already experiencing sleeplessness?
A. I have no way to either agree or disagree, because I was not seeing her then.
Q. Isn't it also true that just four months before her loss of her job, Ms. Prescott was already experiencing signs of depression?
A. Again, I have no way to either agree or disagree, because I was not seeing her then.

TECHNIQUE TIP:

Questioning an evasive witness.

Getting an expert to concede the accuracy of an opposing expert's report is not an easy task. Here, the witness is doing her best to avoid admitting that the plaintiff showed signs of depression before she was fired by responding "I don't know him," "I wasn't seeing her at the time," and, in the following question, "It never came up." The witness may not concede the accuracy of the opposing expert's report, but the jury will credit the report if you stay focused on the document and the far superior credentials of your expert witness.

Q. Okay. Before preparing your report, did you ask Ms. Prescott if she had ever experienced sleeplessness or signs of depression?
A. No. It never came up.
Q. It never came up because you took an incomplete history from Ms. Prescott, isn't that right?
A. I think my history was complete.
Q. When you take a patient's history, it is important to find out about any pre-existing symptoms the patient has experienced, correct?
A. That is true.
Q. But you did not ask Ms. Prescott about sleeplessness or signs of depression?

A. No.
Q. But Dr. Wood, a Board Certified psychologist, diagnosed Ms. Prescott with depression four months before she left her job at Star Corporation, correct?
A. That is what he wrote.
Q. And he was appointed by the Court to make an accurate report to the Court on the very important issue of child custody, correct?
A. Yes, that is true.
Q. You have no reason to question the truthfulness of his report as you sit here today, correct?
A. Again, since I do not know him, I cannot answer that.
Q. Four months before the loss of her job, Ms. Prescott was exhibiting a great deal of anxiety in connection with her divorce, correct?
A. I have no way to either agree or disagree with that statement.
Q. In all of those counseling sessions you had with Ms. Prescott from June-Sept 2003, she never told you that she was experiencing those symptoms even before she lost her job, correct?
A. She never reported that to me.

TECHNIQUE TIP:

Undermine plaintiff's credibility through her own witness.

The preceding question and answer serve to undermine credibility of both the expert and the plaintiff. What kind of relationship did they have if the plaintiff omitted this critical information? What kind of expert is she if she didn't ask? The board certified psychologist asked. If plaintiff was not forthcoming with her counselor, can she be trusted?

Q. Before preparing your expert report of November 14, 2004, you knew that Ms. Prescott was going through a divorce in which child custody was an issue, correct?
A. Yes, I knew that.
Q. You knew about her divorce and the child custody issue, but you didn't bother to review the public records in connection with Ms. Prescott's divorce, correct?
A. As I said, I did not know of the existence of that report.
I have no further questions of this witness.

§ 1:53 Preparation for cross-examination and impeachment of opposing expert

Depositions serve as an integral part of counsel's preparation for cross-examination and impeachment at trial. As a general rule, any testimony that might be given properly by the witness if present at trial may also be given at deposition. Ordinarily, a deposition may be used by any party for the purpose of impeaching the testimony of the deponent as a trial witness. Therefore, whenever there are material differences between the testimony given by the witness during the deposition and at trial, the court will usually permit the deposition to be read to the jury. In light of these principles, counsel must at all times have a plan of cross-examination in mind when preparing to take the deposition of the opposing expert.

An adversary expert can be a valuable tool for the presentation of counsel's own case. As in any cross-examination of a witness, expert or not, if that witness can be made to give testimony favorable to counsel's cause, counsel may not want to proceed to discredit or impeach the witness. Thus, counsel will

want to find out in what areas there is agreement, as well as the points upon which they are at odds. Even though an opposing expert's ultimate conclusion is entirely contrary to counsel's own case, it is the rare case in which views on at least some of the subordinate issues will not coincide with those of counsel and counsel's own expert. If examining counsel inquires about the expert's opinion in great detail on every act or omission of the client, often the expert will respond favorably and uncritically regarding at least some aspects of the client's conduct. To this extent, counsel can convert the opposing expert into a favorable witness on these subordinate issues.

A typical example of this phenomenon regularly occurs in medical malpractice actions. In such a case, the plaintiff's expert may be extremely critical of the aftercare of the plaintiff-patient by the defendant doctor, but may readily agree that the plaintiff was in need of medical treatment, that the defendant took a proper history, the defendant made a proper physical examination, that the defendant used the proper operative procedures and that the defendant performed those procedures properly. By breaking down the party's conduct in great detail and then getting the opposing expert's favorable agreement at the deposition, counsel at trial can confidently obtain such favorable comments in such great detail, and in such quality, that the opposing expert will be considerably weakened and the jury will tend to think that he or she is far less critical of the entire situation than in fact the expert might be.

In preparing for cross-examination, the groundwork should also be laid for discrediting or impeaching the expert. Counsel might begin by investigating the background and qualifications of the opposing expert. In these areas, counsel should be alert for any deficiencies in the expert's education or professional experience that might be used to persuade the court to exclude his or her testimony altogether. For example, if a medical expert is "board eligible" but not "board certified," it is possible that the expert took the required residency training but then failed the oral or written examinations required by the American Board of one of the specializations before board certification will be granted. In the same vein, counsel should be alert for possible conflicts of interest or evidence of bias, such as membership in particular organizations or an unusual fee arrangement, that can be utilized to discredit the witness' trial testimony.

After laying the foundation for discrediting the expert's credentials, knowledge, opportunity for observation and other weaknesses, counsel should seek to discover and then to prepare an attack on the expert's theory. Discrediting an expert's theory should be approached from two distinct angles. First, counsel must discover the totality of the expert's knowledge of the facts of the transaction or occurrence upon which the lawsuit is based. The expert should be questioned as to when the client or the instrumentality involved in the occurrence was examined and the extent of that examination. The expert should also be questioned as to the nature and procedures involved in each and every test or inspection performed. In addition, questions should be asked about knowledge of all documents and real evidence examined in preparation for testifying. Through this type of discovery, counsel lays the groundwork for discrediting the testimony of the witness on the basis of lack of knowledge of the relevant facts of the case. However, counsel must be cautious to not overly expose the expert's weakness, but rather should depose the witness in such a fashion as to "box in" the testimony while leaving any areas of exposure for cross-examination at trial.

Second, through attacking the logic of the expert's conclusions, counsel can discredit the proposed theory. Examining counsel should seek initially to narrow the basis for the expert's ultimate conclusions by varying the elements of a hypothetical question, or by direct questioning, and thus discovering what facts or assumptions are critical to the witness' ultimate conclusions. Counsel should also attempt to identify any elements of speculation or conjecture in the expert's analysis, as well as the degree of general acceptance of the approach used in establishing a theory of the case. Finally, counsel should ascertain the degree of reliability of the data upon which the expert's opinion is based. Often the data base upon which further analysis is performed is borderline, incomplete or inappropriate to the facts presented.

A third basis of cross-examination is for counsel to demonstrate that there are alternate theories that are equally plausible to those the expert is espousing. This goal can usually be achieved through two

separate approaches. First, counsel might seek to have the expert witness admit the authoritative nature of significant authorities in the field and, in turn, to recognize de facto the validity of the theories and approaches they espouse with respect to the same or similar issues. Second, after discovering what facts and assumptions are critical to the expert's ultimate conclusions, counsel might vary those factors, to the extent reasonably warranted by the facts of the case, to determine whether the expert's opinion will change on the basis of alternate facts.. **Checklist for Cross-Examining the Expert**

1. The foregoing subsections describe general cross-examination principles that apply as well to the expert.

2. In addition, there are special considerations or techniques regarding experts.

3. Have counsel's own expert assist in preparing for this cross-examination.

4. Qualifications:

(a) cross-examine the expert to show a lack of competence, Fed. R. Evid. 702

(b) even if the expert has been recognized by the court, undermining the qualifications will undermine the opinions, especially in a contest between experts

(c) subjects to question include:

(1) anything suspicious in or absent from the curriculum vitae or resume

(2) narrow the expert's field of expertise, especially if the expert is testifying outside his or her direct experience

(3) rapid turnover in positions or unusual career path, possibly indicating abrupt termination

(4) a reprimand, suspension or some other sanction or black mark

(5) overstatement of responsibility for research or positions

(6) identification with discredited organizations or theories

(7) shortfalls in the resume, e.g., if a university faculty member, failure to reach the status of full professor or, if a doctor, failure to become board certified.

5. If not already disclosed, counsel is entitled to disclosure of the facts and data underlying the expert's direct testimony. Fed. R. Evid. 705.

6. An expert opinion may be excluded if counsel can show that the expert is relying upon facts that experts in the same field would not rely upon. Fed. R. Evid. 703.

7. Establish that the expert is being paid a fee for providing the testimony.

8. Have the expert admit:

(a) that the opinions are just that: opinions

(b) that he or she has no personal knowledge of the facts, only what was related by counsel or the party

(c) that other experts in the field might disagree

(d) that there is room for doubt in the opinion; nothing is certain

(e) that if the facts and assumptions relied upon turn out to be incorrect, the opinion is worthless.

9. Test the limits of the expert's opinions by changing, adding or deleting facts or assumptions, possibly showing that the expert's opinion is extreme and contrary to common sense

(a) to make this examination most clear, consider having the expert list all facts, assumptions and logical steps needed to reach each opinion

(b) this technique will backfire if the opinion has a solid basis

(c) ideally, counsel will be able to prove that the alternative factual situation was the actual situation

(d) if the expert is inflexible, his or her credibility will diminish with the jury.

10. A hypothetical question, stating all the facts forming the basis for the question, may also be used to test the expert's reasonableness and obtain, if counsel can prove all the underlying facts, a favorable opinion.

11. Question the expert about prior testimony to show that the expert is a hired gun

(a) a pattern of testifying a number of times, and usually for one side, will suggest the witness is not impartial

(b) testimony in those actions may also be used to show inconsistencies or obtain favorable testimony.

12. The expert can be the source of constructive cross-examination to support counsel's case or to corroborate counsel's expert

(a) for example, the expert may agree with the premises, assumptions or authorities relied upon by the opposing expert

(b) the expert may even agree that the opposing expert's conclusions are reasonable or at least possible conclusions

(c) the expert may also be a source for opinions on other issues than those addressed in the direct.

13. If the expert has published articles or books, these can also be a source for either inconsistent statements or for constructive information useful to counsel's case.

14. An expert may be impeached with a treatise

(a) consult Fed. R. Evid. 803(18)

(b) the authority must be called to the attention of the expert on cross, or relied upon by the expert in direct

(c) it must be established as a reliable authority either

(1) by the expert

(2) by another expert

(3) by judicial notice

(d) the passage from an authority may then be read into evidence, but the authority is not made an exhibit

(e) this is a common technique for impeaching experts, especially those who are testifying outside the mainstream of their field.

In preparing a trial plan, counsel must bear in mind both the offensive and defensive potential of depositions. Not only can a deposition be used for the destructive purpose of contradiction and impeachment, but constructively as an integral part of the necessary proof of the party's case. Both purposes require a thorough familiarity with the deposition rules and a sound knowledge of the laws of evidence.

FRCP Rules 32(a)(1) to (4) and court decisions have defined the use of depositions in court proceedings.

1. Any deposition of anyone may be used by any party to impeach that deponent. The most common use of depositions at trial involves comparing the deposition transcript with the trial testimony and impeaching the witness on cross-examination.

2. The deposition of a party or corporate, governmental, or other organizational party may be used by the adverse party for any reason. Depositions can be used as admissions, substantive evidence, impeachment and cross-examination, and for any other reason, even if that deponent party or agent is available to testify or has already testified. Whether or not the deposition of an agent of a party may be used for any reason depends upon the status of that agent.

3. The deposition of anyone may be used by any party for any reason if any one of five conditions is met

(a) the deponent is dead

(b) the deponent is more than 100 miles from the courthouse, unless such absence has been caused by the attorney offering the deposition

(c) the deponent cannot testify because of age, sickness, infirmity, or imprisonment

(d) the deponent cannot be subpoenaed

(e) upon a showing of exceptional circumstances (e.g., if the jury would be confused by live testimony, if you can make the judge cry)

. The availability of a witness will be determined at the time the deposition is offered at the trial.

4. A deposition from another lawsuit may be used in a common action if there was a substitution of parties or if the former action involved the same subject matter and parties. Depositions may also be used in other cases if one or more of the adversaries had the same motivation to examine or cross-examine the deponent in the prior action.

§ 1:68 Depositions used to impeach or refresh recollection

1. Besides offering all or part of a deposition in evidence in place of live testimony, deposition testimony may be used to impeach a witness or to refresh recollection.

2. Consult FRCP 32, Federal Rules of Evidence 612 (refreshing recollection), 613 (prior statements-impeachment), and 801(d) (inconsistent statements and admissions).

3. There may also be local rules or pre-trial orders governing the procedure for examining a witness using a deposition.

4. Impeaching a witness with a deposition:

(a) any witness may be impeached or contradicted with his or her own deposition testimony, FRCP 32(a)(1)

(1) there are other methods of impeachment, e.g., cross-examination

(2) the testimony of one witness may also be contradicted by other testimony or evidence, but this encompasses the fundamental purpose of a trial, to resolve factual disputes, which is much broader than impeachment of a given witness

(b) even counsel who called the witness may impeach the witness, just like any other party, Fed. R. Evid. 609

(c) before the trial, counsel must prepare for impeachment by noting critical parts of the deposition upon which the witness will be questioned

(1) counsel should anticipate testimony from the witness to be offered by all parties

(2) to facilitate quick reference during trial, it often helps to mark these portions of the deposition with slips of paper, colored inks and so forth

(3) if the witness deviates from the deposition, impeachment is in order

(4) if the deposition is long or the likely subjects for impeachment difficult to predict, counsel may wish to have an index, digest or summary of the deposition to assist in locating relevant portions in a hurry

(5) counsel may quickly search transcripts of depositions residing in computer-readable form, which some courts even permit to be available through computer terminals in the courtroom,

(d) as with any other aspect of trial, counsel should use care when deciding whether to impeach a witness:

(1) if the testimony is not clearly inconsistent, the witness or opposing counsel is likely to explain away the difference

(2) if the point is minor, the judge and jury may resent impeachment without purpose

(3) impeachment is a dramatic moment in the cross-examination, which will backfire if it seems to the jury to have failed

(4) impeachment also increases the pressure on the witness, with whom jurors often empathize, so counsel should not seem unduly hostile

(5) counsel should not feel compelled to use the deposition for impeachment just to prove that the deposition was worth taking in the first place

(6) even if it is not used at all, the deposition testimony will be on the witness' mind and discourage any change in testimony

(e) deposition testimony used to impeach a witness does not automatically become evidence itself, but merely undermines the credibility of the contrary testimony of the witness

(1) for a party-opponent witness, the deposition is an admission and is evidence, Fed. R. Evid. 801(d)(2), if offered by counsel

(2) for a witness subject to cross-examination on the statement, Fed. R. Evid. 801(d)(1), the deposition testimony is admissible for:

(aa) a prior inconsistent statement or

(bb) a prior consistent statement offered to rebut a charge, express or implied, that the witness "recent[ly] fabricat[ed]" the testimony or that the witness is subject to "improper influence or motive,"

(cc) to admit the deposition testimony, the witness must have an opportunity to explain or deny this "extrinsic evidence" and the opponent must have a chance to question the witness regarding the statement, Fed. R. Evid. 613(b)

(f) impeachment procedure:

(1) assuming the witness is hostile, these questions should be asked as leading questions

(2) confirm the witness' testimony, e.g., "do you recall testifying today that . . .."

(3) ask the witness whether he or she recalls giving a deposition, establishing for the jury what a deposition is

(4) ask the witness to confirm that the deposition was taken under oath, in the presence of a court reporter who was recording the entire deposition, with counsel for the parties present

(5) ask whether the witness reviewed the transcript, confirmed that it was accurate, and signed it [this step is optional, especially if the deponent avoided signing]

(6) ask the witness whether his or her testimony at the deposition was accurate, and whether the witness was telling the truth

(7) there are several ways to present the actual testimony:

(aa) ask the witness to read a specific question and answer (or series of them) aloud

(bb) read the passage to the witness and ask the witness to confirm that this was his or her prior testimony

(8) although it is not necessary, counsel may ask the witness to confirm that the two statements are contradictory

(9) as discussed above, if counsel has established the foundation for admission of the impeaching deposition testimony, and wishes to offer it as substantive evidence, the testimony should be offered explicitly

(10) the witness need not be shown the deposition testimony before being questioned about it, Fed. R. Evid. 613(a)

(aa) opposing counsel is, however, entitled to review the testimony

(bb) counsel may accomplish this by citing the page and line of the passage

(cc) many judges will nevertheless insist that the witness be shown the testimony, especially if the witness asks for it

(11) under the Federal Rules of Evidence, it is not necessary to allow the witness to explain the discrepancy during counsel's impeachment

(aa) this is a matter for cross-examination, re-direct and so forth

(bb) other courts, and even federal judges, insist, however, that counsel immediately allow the witness to explain the contradiction

(12) opposing counsel has the right to counter-designate portions of the deposition, particularly if they provide an explanation for the seeming inconsistency or place the statements in context, FRCP 32(a)(4).

5. Refreshing a witness' recollection with a deposition:

(a) consult Fed. R. Evid. 612

(b) actually, a witness may be refreshed with any document, including someone else's deposition

(c) counsel must remember that anything used to refresh a witness' recollection is subject to inspection by opposing counsel, Fed. R. Evid. 612:

(1) opposing counsel may cross-examine the witness on the document

(2) the opponent may also offer other portions of the document in evidence

(3) irrelevant portions of the document may be excised by the court

(4) this rule applies to documents used before trial to refresh recollection, except that the court may only require production of pre-trial materials if required "in the interests of justice"

(d) in light of these production rules, counsel should caution the witness before testifying to inform counsel of all documents to be reviewed, before they are reviewed by the witness

(1) the witness should not take documents onto the witness stand without counsel's permission

(2) any documents likely to be needed on the stand may be kept ready by counsel

(e) to refresh the witness' recollection:

(1) attempt to have the witness testify without assistance

(2) if the witness cannot recall, ask the witness whether a deposition was given before trial--this is the foundation for refreshing recollection

(aa) if the witness testifies, but is mistaken and seems to have forgotten, counsel may have to impeach the witness or offer the contrary statement under a hearsay exception

(bb) the court may permit counsel to suggest that the witness is mistaken, using the deposition to refresh recollection, and see whether the witness corrects the testimony

(3) with the judge's permission, counsel may then show a part of the deposition to the witness

(4) the witness should read this silently, then return the deposition to counsel before testifying

(5) counsel should then ask whether the deposition has refreshed the witness' recollection

(6) if so, the witness then testifies from recollection:

(aa) the testimony becomes evidence

(bb) the deposition is not evidence, having been used solely to refresh the witness' recollection

(cc) the witness is not supposed to read the deposition into evidence, but to testify from memory

(7) if the deposition is independently admissible and counsel establishes the foundation for its admission, it may be admitted, but using it to refresh recollection does not make it evidence

(8) if the witness' recollection is not refreshed by one passage of the deposition, consider whether other testimony or information might refresh the recollection

(9) a witness who cannot remember is considered unavailable and the deposition may be admissible under Fed. R. Evid. 804(a) and (b)(1):

(aa) the deposition may come from any proceeding, not just the case in question

(bb) the party against whom the deposition is offered, or its predecessor in interest, must have had an opportunity and "similar motive" to develop the deponent's testimony.

6. A deposition may also be offered as a prior consistent statement, under Fed. R. Evid. 801(d)(1)(B)

(a) but only if the witness' testimony has been challenged, expressly or implicitly, as being recently created for trial

(b) or if it has been challenged as being a result of improper influence or motive.

CHAPTER 26

Attacking and Supporting Credibility of Declarant

[Rule 806]

Contents

§26.100 RULE 806: ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

§26.200 EFFECT

- Upon admission of:
  - A hearsay statement, or an out-of-court statement by a nontestifying declarant;
  - An admission by an authorized person;
  - A statement by an agent or servant concerning a matter within the scope of agency or employment made during the existence of that relationship,

    or
  - A statement by a coconspirator;

  the party against whom the statement is admitted may attack the credibility of the declarant by any evidence that would have been admissible if the declarant had testified.
- An attack by evidence of any inconsistent conduct or statement is not subject to any requirement that the absent declarant first be afforded an opportunity to deny or explain the evidence attacking credibility.

- The proponent of the out-of-court statement can support the declarant's credibility by evidence that would be admissible for that purpose had the declarant testified.
- If the party against whom the evidence has been admitted calls the declarant as a witness, the party can examine the declarant concerning the statement as if on cross-examination.

§26.300 BASIS

It would be unfair to admit hearsay statements of nontestifying declarant and not permit the party against whom they are admitted to show that the declarant should not be believed. Rule 806 adopts the principle that in fairness the hearsay declarant should be treated as in effect a witness subject to impeachment and support as though he had in fact testified. *Advisory Committee Note to Rule 806*. To make the Rule effective, it removes the formalities of Rule 613(b), which ordinarily precludes impeaching a witness with an inconsistent statement unless the witness is afforded an opportunity to deny or explain the inconsistency. In many instances a declarant is not available to be confronted.

§26.400 DISCUSSION

§26.410 What Attacking Party May Offer

Rule 806 does not allow the opposing party to offer anything done or said by the declarant. The Rule authorizes only evidence that the party could introduce at trial to attack the declarant's credibility.

§26.410(a) Specific Instances of Conduct

An important issue under Rule 806 is whether it supersedes the restriction on evidence of specific conduct for attacking or supporting a witness' credibility. Under Rule 608, "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but ... the evidence may refer only to character for truthfulness or untruthfulness, and [s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility ... may not be proved by extrinsic evidence."

In *United States v. Saada*, 212 F3d 210, 221 (3d Cir. 2000), the court held that Rule 806 does not overcome "Rule 806's ban on extrinsic evidence of prior bad acts in the context of hearsay declarants when those declarants are unavailable to testify." *See also United States v. White*, 116 F3d 903, 920 (D.C. Cir. 1997) (Defendant's counsel "could have asked Sergeant Sutherland only if Williams had ever lied on an employment form or violated any court orders, and could not have made reference to any extrinsic proof of those acts.").

Illustration

b Defendants are charged with making false insurance claim from flooding at warehouse caused by a broken sprinkler. Defendants permitted to introduce hearsay as an excited utterance that since-deceased former state judge ran into office screaming accident had occurred and now they had a mess. Prosecution offers two state supreme court decisions ordering declarant's removal and disbarment for unethical conduct. Evidence should not be admitted, even though declarant is unavailable. *See United States v. Saada*, 212 F3d 210, 218-222 (3d Cir. 2000).

§26.410(b) Inconsistent Statements

While the Rule removes the normal formalities for using a prior inconsistent statement for impeachment [see Rule 801(d)(1)(A), Chapter 4], the statement the opposing party seeks to introduce under Rule 806 must be inconsistent with the statement the court admitted. *United States v. Graham*, 858 F2d 986, 990 (5th Cir. 1988), *cert. den.*, 489 US 1020 (1989). *Cf. United States v. Finley*, 934 F2d 837, 839 (7th Cir. 1991) ("Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed").

Illustrations

- In a prosecution for unlawful importation of heroin, an undercover agent testified that in negotiating deal with Stanley Esser, Esser said he would be getting the heroin from Hadji and that Hadji was big in the drug business. The government claimed the defendant, Abdul Wali, was Hadji. Esser's statements were admitted as coconspirator statements [see Rule 801(d)(2)(E), Chapter 6]. Defendant sought to admit a statement given by Esser to the Dutch police, in which he said that defendant was not involved in any drug transactions with him. The trial court excluded the statement on the ground that defendant had not sought to depose Esser and deprived the government of the opportunity to cross-examine him. The appellate court held that exclusion of the statement violated Rule 806. When the government admits a statement of an alleged coconspirator, the defendant can admit exculpatory statements of that alleged coconspirator for purposes of impeachment under Rule 806. *United States v. Wali*, 860 F2d 588, 591 (3d Cir. 1988).
- Defendant was charged with participating in a cocaine distribution conspiracy. An undercover drug agent testified that after defendant left a meeting with Brian Williams, the person who negotiated the cocaine sale, Williams told the agent that defendant was one of Williams's runners. Defendant, on cross-examination of the undercover agent, sought to show that when Williams pled guilty to the same charge, he stated to the court that he disagreed with the government's version of the events in that he did not tell the undercover agent that defendant was one of his runners. The trial court properly denied the cross-examination. The conspiracy statement of Williams was that defendant was his runner. His statement at sentencing, which was a denial that he made the statement that defendant was his runner, was not inconsistent with defendant having been his runner. The plea statement went only to impeachment of the undercover agent, not Williams's conspiracy statement. Rule 806 allows admission only of statements that would impeach Williams, not his subsequent hearsay statement impeaching the undercover agent. *United States v. Graham*, 858 F2d 986, 989-90 (5th Cir. 1988), *cert. den.*, 489 US 1020 (1989).

§26.420 Cross-Examination

Rule 806 recognizes that after the court admits a declarant's hearsay statement against a party, and that party calls the declarant to testify, the party did not initially present the declarant as a witness and should be permitted to cross-examine the declarant.

§26.430 Trial Practice

- Before invoking Rule 806 to introduce evidence attacking a hearsay declarant's credibility, consider what responsive out-of-court statements your opponent might use after you attack the absent declarant's statement. Your attack could prompt the admission of cumulative prior statements to support the declarant's credibility. The effect of a single statement by the declarant may be multiplied by your use of the Rule.
- Be sure that the evidence with which you propose to attack the declarant's credibility does impeach the evidence the court admitted. Impeachment evidence should be offered only to prove that the witness said both "X" and "not-X" and therefore is unreliable. You must show both an X and a not-X. *United States v. Hale*, 422 US 171, 176, 95 S Ct 2133, 45 L Ed 2d 99 (1975) (basic rule of evidence provides that prior inconsistent statements may be used to impeach credibility of witness, but as preliminary matter court must be persuaded statements are indeed inconsistent)
- This Rule applies to attacking *any hearsay* admitted at trial and is not limited to oral statements made by individuals. This includes learned treatises, business records and other written forms of evidence.

§26.500 RELEVANT CASES

§26.510 Attack on Credibility

United States v. Wali, 860 F2d 588, 591 (3d Cir. 1988). Under Rule 806, the government's introduction of statements of an alleged coconspirator implicating the defendant in unlawful drug importation made a statement by the alleged coconspirator to police denying the defendant's role in drug importation admissible.

United States v. Smith, 930 F2d 1081, 1987-88 & n7 (5th Cir. 1991). In a case in which the court admitted hearsay statements of defendant's estranged wife, the defendant was entitled to impeach her credibility by evidence of prior convictions, reputation or prior inconsistent statements. Under Rule 806, the defendant also could have called his estranged wife as a witness and cross-examined her with respect to her statements.

United States v. Moody, 903 F2d 321, 328-29 (5th Cir. 1990). The trial court erred in not permitting defendant to elicit from a witnesses' testimony that defendant's alleged coconspirators, whose statements were admitted under the coconspirator exception to the hearsay rule, had bad reputations for truthfulness. A hearsay declarant is deemed to be a witness whose credibility is subject, in fairness, to impeachment. "The scope of impeachment parallels that available if the declarant had testified in court, since rule 806 treats the physical location of the testifying declarant for impeachment purposes, as legally insignificant." The limitation also violated the defendant's rights under the Confrontation Clause.

United States v. Graham, 858 F2d 986, 990 (5th Cir. 1988), *cert. den.*, 489 US 1020 (1989). The purpose of Rule 806 is to establish a standard for attacking the credibility of a hearsay declarant. It may be attacked by any evidence which would be admissible for those purposes if the declarant had testified as a witness. The Rule, however, requires that when a supposedly inconsistent statement is proffered, the court first decide whether the statement is actually inconsistent with the hearsay statement already admitted.

United States v. Wuagneux, 683 F2d 1343, 1357-58 (11th Cir. 1982). The defendant in a tax evasion case introduced testimony that defendant's accountant told another accountant he was concerned that the income from certain leases had not been reported in defendant's tax return because the accountant was aware of it and presumably it was the accountant's fault it was not reported. The declarant/accountant was unavailable because he invoked the Fifth Amendment privilege against self-incrimination. Defendant introduced the testimony as a statement against interest [Rule 804(b)(3); see Chapter 22]. Under Rule 806, the government was entitled to call an IRS agent to testify that the accountant had told him that prior to filing defendant's tax return, defendant disavowed any interest in the leases in question.

United States v. Traska, 962 F Supp 336, 338 (E.D. N.Y. 1995). Defendant's prior inconsistent statement admissible to impeach declaration attributed to defendant by his son even though it may not have directly contracted the statement. It is enough if the proffered testimony, either by what it says or omits to say, gives some indication the facts were different from those portrayed in the declaration.

§26.520 Support for Credibility

United States v. Lechoco, 542 F2d 84, 89 n9 (D.C. Cir. 1976). Defense psychiatrists testified at a criminal trial that defendant was insane. Their testimony was based on the truthfulness of statements made to them by defendant, which the court admitted under the exception to the hearsay rule for a statement to a physician [Rule 803(4); see Chapter 9]. In response, the prosecution attacked the credibility of the defendant's statements in cross-examining the psychiatrists by suggesting that defendant deceived them. The court then improperly precluded the defense from introducing evidence of defendant's reputation for truth and honesty.

United States v. Bernal, 719 F2d 1475, 1477-79 (9th Cir. 1983). The court admitted the statement of an alleged coconspirator as a statement in furtherance of conspiracy [Rule 801(d)(2)(E); see Chapter 6]. The defendant presented evidence attacking the credibility of declarant. Under Rule 806, the court properly permitted the government to introduce another statement of the declarant to support his credibility.

§26.530 Miscellaneous

United States v. Paris, 827 F2d 395, 400 (9th Cir. 1987). The provision in Rule 806 that if the party against whom the hearsay was admitted calls the declarant as a witness, the declarant can be examined as if on cross-examination,

does not grant a defendant any independent right to call the declarant as a witness. The Rule by its terms applies only if the party is otherwise able to call the declarant as a witness.

§5.2 Checklist: Six Standard Items in Cross-Examination

1. What must the witness admit? (For example, that there was a stop sign; that it was red; that it was three feet wide; and that he started up and there was a collision.) When the witness admits a point that you want to press home as part of your theme of the case, follow it up with a question like: "No question about that, is there?"

2. What shows bias or otherwise impeaches credibility?

3. On what items can his testimony be limited? (For example, he did not hear the rest of the conversation; or he did not read all the contracts; or her viewpoint was limited by the bush between her and the cars.)

4. Where is he weak? Weak spots in the witness's testimony make the witness's other testimony lose force. ("You do not know...?")

5. Areas in which you have lots of material, and the witness has little.

6. What does the witness know that agrees with your case? Look for areas in which you can keep pressing the theme to emphasize your advantage. (Is it true that...?) (You were in court when X testified that...?)

§5.3 Checklist: Standard Questions to Use Against Adverse Witness

Every good litigation attorney needs to have some standard questions and lines to use in the situations which are common in litigation. So here are some handy phrases that you will want to have at the ready. Keep this sheet in your trial notebook and read it before each trial.

WHEN THE ADVERSE WITNESS IS SLOW IN ANSWERING, you want to rattle the witness into answering faster, and also tell the jury to suspect the witness because he is taking too long in answering to really be telling the truth. Ask in quick succession:

Are you thinking of the answer to give?

Did you hear the question?

Did you understand the question?

Are you trying to think of the best answer to give?

Don't you want to answer the question?

CROSS EXAMINATION ON DISCREPANCY FROM DEPOSITION.

Were you examined under oath on (date) at (place)?

Your attorney was present? Court reporter?

Sworn to tell the truth? Your attorney had prepared you for the depositions?

I'm going to read a question and an answer. Was this question then asked of you and did you give this answer? . . . . . ? Did I read that correctly?

Was that answer true when you gave it? Did you sign the deposition, saying it was true?

Is your memory of the accident better today than it was on (date of depositions)?

To EMPHASIZE WRITTEN MATERIAL, ask:

Did I read that correctly?

WHEN WITNESS ADDS AN ARGUMENT, point out that it was an argument, and not a fact, by quickly saying something like:

That is for the jury to decide.

Or, your attorney can do the arguing, I want facts from you. If you do not have a fact to answer with, just tell us you do not know. Here is my next fact question. "....."

TWISTING THE KNIFE: TO EMPHASIZE A POINT, you can get the same answer repeated to the jury a couple of times, by asking:

You have testified that " . . . "

Do you want to change your testimony?

Is your testimony true that " . . . "?

Or for variety, ask:

So, it is a fact that " . . . "

No question about that, is there, that " . . . "?

WHEN YOU CANNOT CROSS-EXAMINE BECAUSE IT IS A TRUTHFUL, GOOD ADVERSE WITNESS WITH ROCK HARD TESTIMONY, BUT YOU NEED A QUESTION, to give the impression that you were not overwhelmed by the witness, you almost always can ask:

Did you say that it IS a fact that " . . . X . . . ?" (X being a fact which was helpful to your case, or at least neutral in his testimony against your client.)

TO EMPHASIZE GOOD TESTIMONY say: (This works with your own witnesses, as well as with adverse witnesses.)

Will you please look to the jury, because they want to get all of this.

MIXING A WITNESS UP ON DISTANCES OR FIGURES. There is an old standby to make the jury think the witness has no real accuracy. When a witness has said "9," you almost always can get to them to say "it could have 8 or it could have been 10." Ask: "You have testified to a distance of 100 feet. Could it have been 110 feet? 118? Could it have been 82 feet? 72?"

In building your cross-examination, there are THREE SEMANTIC INVESTIGATIONS which will often help you.

1. Exactly what does the witness mean? (Pull the exact meaning out to eliminate the shades of meaning that hurt you. If the witness says, "It was a long time before he called," can you gain an advantage by insisting that the witness tell the jury it was exactly three days, not a "long time"?

2. How does the witness know what he is telling? Many times a witness really was not able to have a good vantage point to see the event.

3. Does the mere telling distort the way it happened? For example, it may help to point out that the events happened quicker than the witness is able to relate them.

§5.4 Times and Words for a Non-Cross-Examination

A brilliant cross-examination may consist of "Thank you, your Honor, but it is not necessary to cross-examine this witness."

An experienced trial lawyer recognizes those times when cross-examination is not going to do anything for her. When those times occur, the cross-examination should be waived. Most often the times to decline cross-examination occur:

- When the witness is harmless to your cause, you tell the jury that by saying it's not necessary to cross-examine. You can even use it as an example in your closing argument how the adversary was not being helpful in helping decide "the real issue in this case."
- When the witness is a dangerous witness and the direct examination by adverse counsel has not produced any significant, memorable, testimony. You should guard against giving a dangerous witness a chance to plunge the knife into you. For example, consider the friend of a family who has testified about the child in the family who was killed in the car accident. In that situation you should be on your guard that the witness under your cross-examination may launch into an emotionally appealing description of the dead child and the effect on the surviving plaintiffs.
- When your cross-examination of a previous witness was highly successful. In such cases the next witness served up to you by the adversary is likely to be a new witness who has been coached by the adverse attorney on how to turn the tables on you and afford the jury a new perspective on the situation. For example, suppose your cross-exam of the previous witness may have established that although he testified the company distributed safety rules, he actually never saw the company distribute any safety rules to employees. Your next witness may have been coached to respond to questions by stating the safety rules were "of course not 'distributed'; they were *posted* on the lunch room wall so we *saw* them every day." Often, it's better to keep the steam you have, rather than risk losing what you have by trying the same trick twice.
- When the scope of cross-examination under the rules of the jurisdiction will prevent you from going forward with the most important points you can establish with this witness.[1] In that situation, you should consider saying: "Your Honor, there are some points not covered by opposing counsel. But instead of asking part of the questions now, we will call the witness as an adverse witness during our own case."

Before the trial, think of a few phrases you can use in waiving cross-examination. Tuck them into your head or trial notebook, so that you do not lapse into a mere "no cross-examination" (a phrase which jurors may take as retreat by you). Use words that will convey to the jury that it would be a waste of time to cross-examine the witness and that the testimony was not important to the case. For example: "It is not necessary to examine the witness." Or, "Oh, I don't see that there is anything that is worth more time at this point your Honor. The witness may be excused."

Alternatively, in proper instances use words that indicate the other side is hiding something, and you will reveal it to the jury later. For example, "Your Honor, counsel, we can put the information from this witness into evidence during our rebuttal presentation. We reserve the right to call this witness as an adverse witness later. No cross-examination right now."

Sometimes you might want to do the non-examination in a slightly different way. If a witness has said one thing helpful to you, you can ask about that one thing, and leave that as the jury's final impression, by saying: "Did you say that [helpful point to your side]"; and following the witness's affirmative response, then saying "Your Honor, it's not necessary to examine this witness any further."

§5.5 Checklist: When the Witness Says "I Don't Remember"

In some depositions, there comes a time when the adverse witness says "I don't know" or "I don't remember." Beware of simply taking the answer and moving to a different question. "I don't know" or "I don't remember" allow the witness to appear at trial with a refreshed memory and a new answer that surprises you at the trial.

Moreover, some insurers and attorneys have been known to engage in the shady practice of educating a witness to say "I don't know" to any questions of present location or occurrences. (The drill is: "Mary, don't you understand that even if you parked your car in the parking lot when you came in here, your car may have been stolen. Say 'I don't know' if they ask where your car is.")

Finally, even if this witness does not know, she may know how to get the information you want.

Therefore — every time a witness says, "I don't know" or "I don't remember," there is a series of questions to ask. Print this list out and put in your trial notebook where you can find it quickly during the deposition of any witness.

❑ [If "I don't know"]

Did you once know [the answer]?

If you once knew, who did you tell?

Why don't you know?

What could you do to find out [the answer]?

❑ [If "I don't remember"]

Why don't you remember?

What might bring back your memory, that is, refresh your recollection?

❑ [For either "I don't know" or "I don't remember," also add the questions]

Who does know?

Who might know?

What have you heard about [content inquired about]?

What documents have the information?

Were any records or memoranda made?

If so: Who made them? Who has them?

What could you do to find out where the information might be?

Who might know where to find the answer to the question?

§5.6 Form: Witness Summary for _____

Trial Appearance Scheduled for Date: _____ Time: _____

Phone: Home _____ Mobile _____ Work _____

Address_____

Subpoena issued? _____ Employer _____

Deposition to be read? _____ Job Title _____

Purpose of Testimony: ____ Liability ____ Damages ____ Expert
Does witness answer questions directly? Yes ( ) No ( ) Average ( )
Will witness make a good impression on a jury? Yes ( ) No ( ) Average ( )
This witness is: Friendly ( ) Hostile ( ) Neutral ( ) to our client.
Special Remarks about Witness

THE TWO MOST FAVORABLE (TO US) POINTS THIS WITNESS CAN CONTRIBUTE
1.

2.

THE TWO WORST (TO US) POINTS
1.

2.

Testimony Summary & Other Items Witness Can Prove

Additional Notes

Footnotes:

1 Fed. R. Evid., Rule 611 provides: "(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

TASK 110
Prepare Cross-Examination Plans

I. WHAT AND WHY

A. Cross-examination is, in most cases, when an attorney questions a witness that the opposing attorney called to the stand.

B. The fundamental difference between direct and cross-examination is the type of questions that may be asked. Cross-examination usually is conducted with leading questions (those that contain information not in evidence and tend to elicit yes and no answers from the witness). *See* FRE 61 l(c).

C. The scope of cross-examination is limited to the subject matter of the direct examination (*see* task 109) and matters affecting the witness's credibility. FRE 61 l(b); *U.S. v. McLaughlin*, 957 F.2d 12, 17-18 (1st Cir. 1992).

II. WHEN

A. Begin thinking about cross-examination early in the litigation, especially when you depose the witness before trial. *See* Task 42.

B. Prepare final cross-examination questions no later than 24 hours before the witness will testify.

III. HOW

A. Before preparing your cross-examination for a particular witness, make sure you know what opposing counsel is trying to prove with the witness's testimony. Review:

1. Your proof outline and the proof outline you prepared for the opposition case. *See* Task 4.
2. Your trial plan. *See* Task 80.
3. The witness's deposition. *See* Tasks 42-44.
4. The jury instructions. *See* Task 103.
5. Any exhibits you anticipate the witness will introduce.*See* Tasks 87-90.
6. Any demonstrative evidence the witness may use to illustrate his or her testimony. *See* Task 87.

B. Prepare cross-examination on the key issues.

1. Consult your trial plan, and begin with the first witness opposing counsel will call.
2. List all of the facts and exhibits that rebut the witness's testimony.
3. Review any depositions or statements made by the witness, and list those statements that support the crossexamination.
4. Organize the facts and exhibits into a coherent sequence. One simple method is to:
    a. List all the points you want to make in your cross-examination, from the strongest (those most certain to help your case or weaken the opposition's case) to the weakest (those you feel the witness may be able to explain or neutralize).
    b. Begin with the safe questions for which you know the answers, with which the witness must agree and which do not go to the core of the case. This will help you ease into the cross-examination. For example, begin by asking questions regarding:
        i. The witness's background
        ii. The tests or examinations the witness performed
        iii. Statements the witness made during deposition
    c. Then ask questions that are a bit riskier, those to which you are not certain of the answers but that are important enough to ask.

d. Finish with leading questions that are material to your case, to which you know the answers, and from which the witness cannot escape.

5. Do not ask questions that allow the witness to reemphasize opinions or facts that harm your case.

IV. PRACTICE NOTE

A. Listen to the direct examination carefully. Do not assume that the witness will testify the same way he or she did during deposition.

B. Object to leading questions. Most attorneys cannot, or will not, avoid leading questions during direct examination. Federal judges tend to be less tolerant of poorly framed questions than state judges are. However, even federal judges will become irritated if your objections, while valid, go to unimportant matters. Accordingly, do not object until the attorney gets close to a crucial issue. Then object and keep objecting to prevent the attorney from testifying instead of the witness.

C. Cross-examination is an excellent opportunity to reestablish your version of the case. Ask fact witnesses about facts with which they are familiar and which help your case. If the witness is an expert, ask leading questions like: "Did plaintiff tell you about these facts?" Then state facts that are helpful to your case and that the expert cannot dispute.

D. Planning cross-examination before trial is valuable in highlighting what you may wish to say in your opening statement.

E. One valuable reason to prepare cross-examination before trial is to locate and incorporate into the questions the best impeachment documents.

F. Planning cross-examination often reveals evidence you should bring out during your d

Chapter 19

Attacking Defendant's Case: Cross-Examination

NOTE

A trial transcript from an actual case tried by the author is included to demonstrate the principles discussed in the chapter. For more information about this case, see *Chapter 16, Pretrial Motions and Jury Selection, and §16:02.*

I. The Law of Cross-Examination

A. Lay Witnesses

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A. Lay Witnesses

§19:01 Definition of Cross-Examination

Cross-examination is defined as the questioning of a witness by a party other than the party who called the witness to testify, on matters within the scope of the witness's testimony on direct examination. [Cal. Evid. Code §761. *See also Fost v. Superior Court*, 80 Cal. App. 4th 724, 733, 95 Cal. Rptr. 620, 626 n.4 (2000).] The object of cross-examination is to test the truth of witnesses' statements and thereby prove your case or disprove a defense contention.

§19:02 Right to Cross-Examine Opposing Party's Witnesses

Cross-examination is not only an important part of a civil case, it is a right that belongs to a party in such a case. [*See Goldberg v. Kelly*, 397 U.S. 254, 269-270, 90 S. Ct. 1011, 1021 (1970).]

Each party has the right to cross-examine every witness in the action called by another party.

AUTHORITIES

California: Cal. Evid. Code §§761, 773, 776.
Fost v. Superior Court, 80 Cal. App. 4th 724, 733, 95 Cal. Rptr. 620, 626 n.4 (2000).
Florida: *Coco v. State*, 62 So. 2d 892, 894-895 (Fla. 1953). "It is too well settled to need citation of authority that a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called."
New York: *People v. Stanard*, 396 N.Y.S.2d 825, 831 (1977)
Gottfried v. Gottfried, 95 N.Y.S.2d 561, 566 (1950).

Because the right of cross-examination is said to be "fundamental," the court may be committing reversible error by denying or unduly restricting the right of a party to cross-examine a witness.

AUTHORITIES

California: *McCarthy v. Mobile Cranes, Inc.*, 199 Cal. App. 2d 500, 509, 18 Cal. Rptr. 750, 756 (1962).
Florida: *Mendez v. State*, 412 So. 2d 965, 1966 (Fla. 1982). "The right of full cross-examination is absolute, and the denial of that right may easily constitute reversible error."
Illinois: *People v. Crosser*, 452 N.E.2d 857, 863 (Ill. Ct. App. 1983).

However, the court is entitled to place reasonable limits on the time and scope of cross-examination.

AUTHORITIES

California: Cal. Evid. Code §765

People v. Ducu, 226 Cal. App. 3d 1412, 1415, 277 Cal. Rptr. 464, 466 (1991).

Florida: *Miller v. State*, 780 So. 2d 277, 279-280 (Fla. 2001). "As a general rule, trial courts have wide discretion in imposing limits on the scope of cross-examination."

Texas: *McGowan v. State* (2006) 188 S.W.3d 239, 242. "Reasonable restrictions, such as those concerning relevance, may be placed on cross-examination."

§19:03 Court Retains Discretion in Timing

Cross-examination normally follows the direct examination of each witness. [Cal. Evid. Code §772 (a) & (b).] For good cause, the court may permit a party to postpone cross-examination until a later point in the trial.

AUTHORITIES

California: Cal. Evid. Code §§772(b), 776.

New York: *Vitiello v. Mayrich Constr. Corp.*, 680 N.Y.S.2d 482, 487 (1998). It was not error for the court to allow cross-examination of an expert witness until after other witnesses and photographs had been introduced into evidence.

Normally this is done as a result of scheduling difficulties, particularly of professionals and expert witnesses.

§19:04 Scope Normally Limited to Matters Raised on Direct

The general rule is that the scope of cross-examination is limited to matters raised on direct examination, which includes the witness's credibility.

AUHORITIES

California: Cal. Evid. Code §§761, 773(a), 785.

Florida: *D.W.G. v. Dept. of Children and Families*, 833 So. 2d 238, 242 (Fla. 2002).

Illinois: *People v. Blue*, 792 N.E.2d 1149, 1155 (Ill. 2001).

New York: *People v. Blackwell* (1985) 128 Misc.2d 599, 600. "In civil matters, although it is within the trial judge's sound discretion to enlarge the allowable areas of cross-examination, such questioning is generally limited to matters testified to on direct examination."

Pennsylvania: *Commonwealth v. Ogrod*, 839 A.2d 294, 322 (Pa. 2003).

A minority of jurisdictions do not follow this rule, and permit cross-examination to cover any issue within the discretion of the court. [*CPS Intern., Inc. v. Harris & Westmoreland* (1990) 784 S.W.2d 538, 543.] "Limits on the cross-examination of a witness lack support in Texas law. This State has long followed the so-called English rule which permits cross-examination of a witness to extend to every issue in the case, regardless of the scope of direct examination. One may cross-examine as to all phases of the case and is not limited to matters raised on direct examination."

However, the scope of cross-examination may be limited by the discretion of the trial court.

AUTHORITIES

California: *Garcia v. Hoffman*, 212 Cal. App. 2d. 530, 536, 28 Cal. Rptr. 98, 102 (1963).

Florida: *D.W.G. v. Dept. of Children and Families*, 833 So. 2d 238, 242 (Fla. 2002).

Illinois: *People v. Blue*, 792 N.E.2d 1149, 1155 (Ill. 2001).

Pennsylvania: *Commonwealth v. Mickens*, 191 A.2d 719, 723 (Pa. 1963).

Texas: *Hilliard v. State*, 881 S.W.2d 917, 921 (Tex. 1994). "The scope of cross-examination is within the control of the trial judge in the exercise of his sound discretion."

An attack on a witness's credibility is almost always within the proper scope of cross-examination.

AUTHORITIES

California: *People v. Humiston*, 20 Cal. App. 4th 460, 479, 24 Cal. Rptr. 2d 515, 526 (1993).

Florida: *D.W.G. v. Dept. of Children and Families*, 833 So. 2d 238, 242 (Fla. 2002).

Illinois: *People v. Barr*, 280 N.E.2d 708, 710 (Ill. 1972). "Though the scope of cross-examination is generally within the trial court's discretion, the widest latitude should generally be allowed defendant in cross-examination for the purpose of establishing bias."
Pennsylvania: *Commonwealth v. Ogrod*, 839 A.2d 294, 322 (Pa. 2003).

A party's cross-examination is not necessarily strictly limited to matters covered by direct examination.

Courts have held that direct examination on any aspect of an event or transaction "opens a door" to cross-examination on "all relevant and material matters proceeding, concurring with or following" matters that were testified to on direct examination.

AUTHORITIES

California: *Gallaher v. Superior Court*, 103 Cal. App. 3d 666, 672, 162 Cal. Rptr. 389, 392 (1980) (overruled on other grounds. This holding was confirmed in *In re Victor F.* (1980) 112 Cal.App.3d 673, 682).
Colorado: *People v. Jones*, 675 P.2d 9, 15 (Colo. 1984).
Florida: *Stotler v. State*, 834 So. 2d 940, 942 (Fla. 2003).
Illinois: *People v. Thomas*, 556 N.E.2d 1246, 1259 (Ill. 1990).
Texas: *Dempsey v. Shell Oil Co.*, 589 So. 2d 373, 378 (Tex. 1991). "When the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination."

In California, a witness can be cross-examined on reasonable inferences that were capable of being drawn from the witness's direct testimony. [*People v. Wrigley*, 69 Cal. 2d 149, 162, 70 Cal. Rptr. 116, 124 (1968).]

§19:05 Can Be Based on Other Parts of the Same Act or Writing

Not infrequently, a witness will testify on direct examination to part of an "act, declaration, conversation or writing." It is generally thought that this opens the door to cross-examination on any other part of the same act, declaration, conversation or writing.

AUTHORITIES

California: Cal. Evid. Code §356.
Florida: Fla. Stat. Ann. §90.108.
New York: *People v. Wortherly*, 416 N.Y.S.2d 594, 596 (1979).
Texas: Tex. R. Evid. 107.

§19:06 Can Be Expanded to Include Separate Writings or Acts

A witness may be cross-examined as to acts, conversations or writings that are separate from any acts, conversations or writings testified to on direct examination if these are "necessary to make...understood" the original direct examination testimony.

AUTHORITIES

California: Cal. Evid. Code §356.
Florida: Fla. Stat. Ann. §90.108.
Texas: Tex. R. Evid. 107.

For example, if a witness testifies to a letter on direct examination, that witness maybe able to be cross-examined on the response to that letter. [Cal. Evid. Code §356.]

§19:07 Court Retains Right to Expand Beyond the Scope of Direct

The court always maintains the discretion to expand the scope of permissible cross-examination to areas "not within the scope of the previous examination of the witness."

AUTHORITIES

California: Cal. Evid. Code §772(c).
Florida: *Roberts v. State*, 510 So. 2d 885, 890 (Fla. 1987).
Illinois: *Kurrack v. Amer. Dist. Telegraph Co.*, 625 N.E.2d 675, 686-687 (Ill. 1993).

New York: *People v. Acklin*, 424 N.Y.S.2d 633, 640 (1980).

In California, when cross-examination is expanded beyond the scope of the direct examination, the cross-examiner may no longer use leading questions on that subject matter. [Cal. Evid. Code §760], Comment. However, the cross-examiner maintains the right to impeach the witness if the witness gives incredible answers. [Cal. Evid. Code §785.]

§19:08 Cross-Examination of Character Witness

If a witness testifies on direct examination to a party's good character or reputation in the community, that witness may be cross-examined about specific acts of misconduct by the party inconsistent with the character trait testified to on direct.

AUTHORITIES

Federal Rule: *U.S. v. Bynum*, 566 F.2d 914, 919 (5th Cir. 1978).
California: *People v. Buchanan* (1932) 6 P.2d 538, 539.
Florida: *Butler v. State*, 376 So. 2d 937, 939-940 (Fla. 1979).
Illinois: *People v. Lewis*, 185 N.E.2d 254, 256 (Ill. 1962).
New York: *People v. Jones*, 717 N.Y.S.2d 270, 272 (2000).
Texas: *Brown v. State*, 477 S.W.2d 617, 619-620 (Tex. 1972).

§19:09 Leading Questions Generally Permitted

Leading questions are generally permissible on cross-examination.

AUTHORITIES

California: Cal. Evid. Code §767(a).
Florida: *Kembro v. State*, 346 So. 2d 1083, 1084 (Fla. 1977).
New York: *Cusumano v. Pitzer Trucking Co.*, 209 N.Y.S. 2d 715, 721(1961).
Texas: *Day v. Hunnicutt*, 160 S.W. 134, 136 (Tex. 1913).

However, leading questions are only permissible where the examiner represents a party whose interests are adverse to the party calling the witness.

AUTHORITIES

California: Cal. Evid. Code §773(b).
Florida: *Shere v. State*, 579 So. 2d 86, 91 (Fla. 1991).
New York: *Cusumano v. Pitzer Trucking Co.*, 209 N.Y.S. 2d 715, 720(1961).
Texas: *Cruse v. Daniels*, 293 S.W.2d 616, 621 (Tex. 1956).

§19:10 Typical Objections

A party whose witness is being cross-examined, does not have to simply sit back and let the cross-examiner have his or her way. There are objections which are allowed and will be sustained if appropriate under the circumstances. These include:

- Argumentative.
- Assumes facts not in evidence.
- Misstates evidence.
- Conclusionary.
- Cumulative.
- Compound.
- Prejudicial.
- Harassing.

[§§19:11-19:19 Reserved]

B. Expert Witnesses

§19:20 Attacking Hypothetical Questions

Although attorneys are entitled to ask expert witnesses hypothetical questions, those questions can be attacked on a number of grounds.

An objection to a hypothetical question may be granted if each fact that an expert is asked to assume is not supported by the evidence.

AUTHORITIES

California: *Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 339, 145 Cal. Rptr. 47, 55 (1978).
Florida: *Nat Harrison Assoc., Inc. v. Byrd*, 256 So. 2d 50, 53 (Fla. 1971).
Illinois: *Grabner v. Amer. Airlines, Inc.*, 401 N.E.2d 1196, 1200 (Ill. 1980).
New York: *Bergman v. Mergenthaler Linotype Co.*, 85 N.Y.S.2d 124, 127 (1948).
Texas: *Aetna Casualty & Surety Co. v. Scruggs*, 413 S.W.2d 416, 423 (Tex. 1967). "Provided the facts assumed are properly supported by evidence, and sufficient to call for an intelligent answer, and we have so held as to this question, such hypothetical question was not subject to the objections, and the court did not err in overruling them."

However, this does not mean that the assumed fact must be entirely undisputed.

AUTHORITIES

California: *People v. Becker*, 94 Cal. App. 2d 434, 444, 210 P.2d 871, 876-877 (1949).
Florida: *Chiles v. Beaudoin*, 384 So. 2d 175, 178 (Fla. 1980).
Illinois: *Granberry by Granberry v. Carbondale Clinic, S.C.*, 672 N.E.2d 1296, 1300 (Ill. 1996). "The facts suggested in hypothetical questions need not be undisputed but need only be supported by the record."

However, hypothetical questions that assume facts contrary to the proof in the case are improper. *Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 338, 145 Cal. Rptr. 47, 55 (1978).

Further, hypothetical questions may be objectionable if they omit undisputed material facts.

AUTHORITIES

California: *Coe v. State Farm Mutual Ins. Co.*, 66 Cal. App. 3d 981, 994-995, 136 Cal. Rptr. 331, 338-339 (1977).
Florida: *Nat Harrison Assoc., Inc. v. Byrd*, 256 So. 2d 50, 53 (Fla. 1971). "Where, however, the factual predicate submitted to the expert witness in the hypothetical question omits a fact which is so obviously necessary to the formation of an opinion that the trial judge may take note of the omission on the basis of his common knowledge, an objection founded on the inadequacy of the predicate may be sustained."

If an attorney fails to object to an improper hypothetical question, he or she waives the right to claim error on appeal.

AUTHORITIES

California: Cal. Evid. Code §353(a); *In re Jacobson's Guardianship*, 30 Cal. 2d 312, 324, 182 P.2d 537, 544 (1947).
Florida: *Keech v. Yousef*, 815 So. 2d 718, 719 (Fla. 2002). "The failure to preserve any issue for appellate review constitutes a waiver of the right to seek reversal on that error."
New York: *Miano v. Westchester Gulf Service Station*, 455 N.Y.S.2d 269, 270 (1982).
Texas: Tx. R. App. Rule 33.11. Generally, failure to object on the record to any question or submitted evidence waives any error on the admissibility of that evidence.

§19:21 Limiting or Excluding Testimony by a Motion in Limine

A motion in limine may be granted where a party can establish before the trial that the opinion of a particular witness, including an expert witness, is inadmissible as a matter of law.

AUTHORITIES

California: *Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 337-338, 145 Cal. Rptr. 47, 54 (1978). It was not improper for Court to exclude defendant's expert witness because "there was no legally admissible evidence upon which he could base any opinion as to plaintiff's speed since there was no foundational evidence upon which to base a hypothetical question to elicit such a conclusion" and Defendant offered insufficient proof as to the matter upon which the expert could base his opinion.

Further, the entire testimony of an expert witness may be excluded if the expert witness was not properly designated pursuant to the rules of a given jurisdiction.

AUTHORITIES

California: *Richaud v. Jennings*, 16 Cal. App. 4th 81, 90-91, 19 Cal. Rptr. 2d 790, 795-796 (1993).

Florida: *Luis v. State*, 851 So. 2d 773, 777 (Fla. 2003). Despite the prosecution listing a testifying officer on its general witness list, its failure to designate the officer as an expert violated Florida's criminal expert designation rules and failure to exclude this witness was reversible error.

Illinois: *Betts v. Manville Personal Injury Settlement Trust*, 588 N.E. 2d 1193, 1217 (Ill. 1992).

New York: *Olden v. Bolton*, 524 N.Y.S.2d 562, 564 (1988).

Texas: *Mother Frances Hosp. v. Coats*, 796 S.W.2d 566, 571 (Tex. 1990). There was no abuse of discretion where party did not designate its expert until one year after making the decision to use the expert, violating Texas' rule mandating experts be designated "as soon as practical."

In the alternative a motion in limine could be brought to exclude portions of the expert's testimony if the other party failed to appropriately designate the scope of the testimony or the expert witness failed to cover such testimony during the witness's deposition, if the witness was asked appropriate questions.

AUTHORITIES

California: *Jones v. Moore*, 80 Cal. App. 4th 557, 564-565, 95 Cal. Rptr. 2d 216, 220-221 (2000).

§19:22 Motion for Leave to Voir Dire to Challenge Qualifications

Counsel may seek leave to interrupt the direct examination of an expert witness to "take the witness on voir dire." This is normally done when an attorney wants to challenge the qualifications of an expert witness to testify at all or testify on a certain subject matter.

AUTHORITIES

California: Cal. Evid. Code §802. The court may require that a witness be examined concerning the matter on which he is going to base his opinion prior to direct examination.

Cal. Evid. Code §402(b). The Court may direct the voir dire examination to be conducting outside of the jury's presence.

Florida: *J.A.D. v. State*, 695 So. 2d 445 (Fla. 1997).

Illinois: *Flynn v. Edmonds*, 602 N.E.2d 880, 893 (Ill. 1992). "If an opposing party believes that the witness lacks sufficient qualifications for an anticipated opinion, the court may permit a preliminary cross-examination into the question of qualification. The decision to allow this preliminary cross- examination rests in the court's discretion and does not exist as a matter of right."

New York: *People v. Kelly*, 732 N.Y.S.2d 484, 486 (2001). Any arguments concerning the qualification of an expert witness may be fully explored on either voir dire or cross-examination."

PRACTICE TIP

An attorney who challenges the qualifications of an expert witness and loses may lose credibility in front of the jury. Therefore a voir dire to challenge qualifications of an expert should be done outside the jury's presence. Otherwise, such a challenge should only be done when the challenging attorney has complete confidence that the expert can be shown to be unqualified.

§19:23 Challenging Expert Witness as Non-Qualified

A valid ground for challenging the expert witness as non-qualified is that the witness lacks "special knowledge, skill or experience on the particular subject on which he or she is being called upon to express an opinion."

AUTHORITIES

California: Cal. Evid. Code §720(a); *Putensen v. Clay Adams, Inc.*, 12 Cal. App. 3d 1062, 1080-1081, 91 Cal. Rptr. 319, 331 (1970).

Florida: *Seaboard Airline Railroad Co. v. Lake Region Packing Ass'n*, 211 So. 2d 25, 30-31 (Fla. 1968).

Illinois: *People v. Novak*, 643 N.E.2d 762, 768 (Ill. 1994) (disagreed with on other grounds).

New York: *People v. LeGrand*, 747 N.Y.S.2d 733, 740 (2002). Because an expert must be competent in the field of expertise upon which he or she is going to testify; a lack of skill, knowledge, or education could disqualify the expert.

Texas: *Perez v. State*, 113 S.W.3d 819, 832 (Tex. 2003). The proponent of the expert's testimony has the burden of establishing the expert's competency, which the opponent may challenge.

§19:24 Scope of Permissible Cross-Examination

Expert witnesses may be cross-examined to the same extent as any other witness. They can be cross-examined on their qualifications, the subject matter of their expert testimony, the matters in which the expert opinion is based and the reasons for the expert opinion.

AUTHORITIES

California: *People v. Stoll*, 49 Cal. 3d 1136, 1159, 265 Cal. Rptr. 111, 125 (1989). Challenging the basis and reasons for expert's opinions.

Florida: *Anderson v. State*, 863 So. 2d 169, 179 (Fla. 2003). Challenging the expert's qualifications.

Illinois: *Trower v. Jones*, 520 N.E.2d 297, 300 (Ill. 1988). Court held there was no impropriety in inquiring into the annual income of the expert stemming from services relating to rendering expert testimony during the two years prior to the trial.

New York: *Rodolitz v. Boston-Old Colony Ins. Co.*, 425 N.Y.S.2d 353, 354 (1980). An expert's lack of direct knowledge on the subject matter upon which he or she is testifying is not a bar to his or her testimony, but is the appropriate subject of cross-examination.

Attorneys are normally allowed wide latitude when cross-examining experts on their qualifications and the reasons given for their opinions.

AUTHORITIES

California: *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 796, 174 Cal. Rptr. 348, 373 (1981).

Florida: *Music v. Hebb* (1999) 744 So.2d 1169, 1171.

Illinois: *Montefelice v. Terminal Railroad Ass'n of St. Louis*, 427 N.E. 2d 370, 372-373 (Ill. 1981).

Texas: *Davidson v. Harris County*, 454 S.W.2d 830, 832 (Tex. 1970).

§19:25 Limitations Based on Scientific or Technical Publications

Expert witnesses may not be cross-examined about the "content or tenor of any specific, technical or professional text, treatise, journal or similar publication" unless one of the following has occurred:

- The publication has been admitted into evidence.
- The witness referred to, considered or relied upon such publication in arriving at or forming his or her opinion.
- The publication has been established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

AUTHORITIES

California: Cal. Evid. Code §721(b).

Florida: Fla. Stat. Ann. §90.706.

Illinois: *Brown v. Arco Petroleum Products Co.*, 552 N.E.2d 1003, 1009 (Ill. 1990). It was error for the court to permit Plaintiff to question whether Defendant's expert agreed with a portion of a medical text where the materials were never identified, the witness was not questioned about the author's competence, judicial notice was not taken of the author's competence, and Plaintiff did not call any of her own witnesses to establish that the materials were authoritative.

Texas: Tex. R. Evid. 803(18).

Further, cross-examination is generally allowed based upon articles or publications that the expert witness authored himself or herself.

Also note that expert witnesses can be cross-examined on publications established as "reliable authority."

AUTHORITIES

Federal Rule: F.R.E. 803(18).

California: Cal. Evid. Code §721(b)(3).
Florida: Fla. Stat. §90.706.
Texas: Tex. R. Evid. 8013(18).

The parties seeking to introduce the "reliable authority" may be required to show either the recognition of the writer's authoritative stature or that the views expressed in the publication are generally accepted in the profession as a whole.

AUTHORITIES

Federal Rule: *Meschino v. North Amer. Drager, Inc.*, 841 F.2d 429, 434 (1st Cir. 1988).
Illinois: *People v. Behnke*, 353 N.E.2d 684, 689 (Ill. 1976).

In any event, the publication itself does not come into evidence.

AUTHORITIES

Federal Rule: F.R.E. 803(18). The treatise may only be read into evidence.
California: Cal. Evid. Code §721(b)(3).
Florida: *Green v. Goldberg*, 630 So. 2d 606, 609 (Fla. 1993). The Court held that a treatise permitted to be used in the cross-examination of an expert witness under Fla. Stat. §90.706 may not be used as substantive evidence.
Texas: Tex. R. Evid. 803(18).

§19:26 Challenging Scientific Basis for Expert Opinions

A party may base an objection to expert witness testimony on the theory that the expert's testimony is based upon an invalid or unproven scientific theory or technique.

The leading case on this subject matter is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Daubert suggests five factors that could appropriately be considered when determining whether testimony meets minimum standards:

- Whether the theory or technique is generally accepted.
- Whether it has been published and subjected to peer review.
- Whether it is testable and has been tested.
- Whether standards and controls are maintained.
- The error rate of the technique.

[*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-595, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).]

§19:27 Impeaching Expert Witnesses With Prior Inconsistent Testimony

Experts often have a history of previous testimony in other cases involving similar issues. Prior testimony should be retrieved, reviewed for inconsistencies, and used for cross-examination of experts based on prior inconsistent testimony, a well-known exception to the hearsay rule.

[§§19:28-19:39 Reserved]

II. Sample Cross-Examinations

A. Cross-Examination of Defendant Liability Expert

§19:40 Value of Sample Cross-Examination of Defense Liability Expert

Doe v. Roe is an unusual case in that defendant decided to take the Fifth Amendment and not testify at the trial. In his place, the defense called Dr. Ross (not his real name), a psychiatrist who evaluated Dr. Roe, his conduct and his treatment of plaintiff.

Defendant's strategy in putting on the testimony of Dr. Ross was to present the position of Dr. Roe, who would make a terrible witness, through the testimony of Dr. Ross, who had the appearance of a middle-aged choirboy. The plan was for Dr. Ross to be critical of the conduct of Dr. Roe in his treatment of plaintiff, while characterizing that treatment as negligent and not intentional. Dr. Ross would take the position that Dr. Roe's misconduct in the treatment

of plaintiff arose out of Dr. Roe's untreated serious depression which severely clouded Dr. Roe's judgment. Because of the depression, Dr. Roe was unable to form the intent to harm plaintiff.

Thus, the defense would admit liability on a negligence theory, but deny liability on plaintiff's theories of intentional infliction of emotional distress, battery and sexual battery. Because Dr. Ross' testimony would help on the issue of insurance coverage, plaintiff did not object to the testimony of Dr. Ross. Plaintiff attorney felt confident that through cross-examination of Dr. Ross he would be able to elicit testimony that would indicate that Dr. Roe's conduct was reckless and outrageous, while leaving relatively undisturbed the portion of Dr. Ross' testimony that would help on insurance coverage issues.

It was important for plaintiff attorney to establish that Dr. Roe was guilty of intentional misconduct, because under California law there are important limitations on damages in medical negligence cases. Of particular concern was a two hundred fifty thousand dollar cap on any recovery for general damages. In California, courts have held that the cap does not apply to the intentional misconduct of a physician. [*Waters v. Bourhis*, 40 Cal. 3d 424, 437, 220 Cal. Rptr. 666, 675 (1985).]

§19:41 Excerpts From Direct Examination

The following excerpts from Dr. Ross' direct testimony are provided to help understand the cross-examination:

Q. Why was it that you felt it necessary to personally examine, evaluate and speak with Dr. Roe in this case?

A. Well, it's difficult to make an assessment with what's going on with somebody if you don't have a chance to either sit down with them or observe them and listen to how it is they respond to questions about what's been going on with him now or at various times in the past and try to compare that to other sources of information that you've got. I don't think it was any more complicated than that. That's usually what we do and that's how we do it.

Q. Doctor, when you saw Dr. Roe in your office, he was 70 years old?

A. Yes.

Q. Right now, I'd like to have you tell the jury, if you could, what you learned from those sources relative to his background from childhood to the time he first started medical school that's of significance to your opinion in this case.

A. Well, he was born in St. Louis in 1923. I think the significance of that, to me, was at the time I was seeing him, he was 70 years old. He'd grown up in St. Louis. His father was a doctor who he, both early on and still, apparently very much admires, but also a doctor who was never home, so that there is this kind of distant admiration. And there's also a sense of a lack — or a sense of a lack of closeness to the fellow. The fellow was somebody who was apparently very good at what he did, but also not somebody to whom Dr. Roe could feel that close because the man was never there. He was always out with his patients.

He was a man who was very active in the community, the father. He was also a man who used to like to write and to make speeches — things that became important, because in terms of Dr. Roe's later practice, those were unusual features of his practice.

In contrast to the father, Dr. Roe's mother apparently had some kind of psychiatric problem. Dr. Roe described her as a woman who was very suspicious, who was very withdrawn, with whom he found it hard to get along. She eventually died in 1955, and he was somewhat surprised about the extent to which — this is in 1955, so he's 32 or 33 years old, he was depressed, or felt depressed at her death, despite the difficulties that he's experienced with her earlier on.

In Cleveland, he had a very active practice. He started publishing articles at the rate of about two a year in 1955, and he continued that when he got to Cleveland with a number of articles that he was publishing a year, increasing to about 15 a year in the mid 1960's and continuing up to 1974, where he had 20 articles published. And in 1974, he suffers what for him is the greatest adversity he had in his life up to that time. He expected to be made head of the Mayo Clinic in Cleveland. He wasn't. He left Cleveland and came to California.

The amount of publishing that he was doing every year dropped from the average of 15 articles down to an average of one or two in the years after that.

He had, when he got to California, a job that he thought was going to be running an outpatient clinic and doing research. He lost those jobs in part because of proposition 13 and in part because of problems he had with the man who ran the overall program at West Coast Medical Center. And in 1978, he was working for a county hospital in Orange County which for him represented an enormous fall from where he had been in Cleveland. So, over a matter of four years, he'd gone from being the most pre-eminent psychiatrist, or one of the most pre-eminent ones in Cleveland, to having amongst the more menial jobs available to psychiatrists in Southern

California. He was doing — he was seeing patients in private practice at that time, and by the early 1980's, he was almost exclusively in private practice, doing some outside hospital work.

Q. Let me ask you some questions. Doctor, first of all, what's the significance in your work in this case, evaluation of this case, of this prior history — the writing you've told us about, the research projects, the activities that Dr. Roe engaged in this period of time up to, let's say, the mid '70's? Why was that important?

A. Well, this was — there was clearly an enormous change in his life when he came to California, and the question was, does that change have anything to do with the behavior he exhibited with Ms. Doe over the last 10 or 12 years or so. And I felt there were indications in terms of seeing him that he was depressed as of the time I was seeing him, but I felt also that it's possible that this depression is related maybe just to his divorce, maybe it's related to the other kinds of losses that he's had.

Indications from his history were that he'd been depressed for a very long period of time, and that depression went back into the 1970's, and that in the early 1980's, at the time he became involved in seeing Ms. Doe, he'd already been significantly depressed for a number of years. He was at that time entering his 60's. There was a question of whether some of his depression was related to aging, whether it's related to his having an ability or potential to be depressed anyway.

He had this earlier depressed episode at the time of the death of his mother in 1955, which may not mean anything. It's not unusual for someone to get depressed when one or another of their parents die. But he also lost a lot in the six or seven years prior to the time he started seeing Ms. Doe, and the question was, did those losses result in his being depressed to such an extent that he was not exercising in some way over his behavior the kind of control and direction you'd otherwise expect him to exercise.

Q. When you examined Dr. Roe and looked at his records, you arrived at certain conclusion about his mental state in the early '80's. What opinion do you hold relative to depression and other states of mind that he might have had, problems that he might have had in the early '80's here in California?

A. That he was depressed enough by the late 1970's and the early 1980's that he would have benefited from and was in need of either a psychiatrist or anti-depressant medication, and that for probably as long as 15 years prior the time I'd seen him, so back until 1978 or so, the indications were that his behavior in almost all areas of his life was significantly affected by this depression, and that he was, for a good deal of this time, unaware of the extent to which it was affected, even though he could describe the results of that effect.

He could talk about his having a lower level of energy, thinking poorly about himself, feeling that his life was essentially down the tubes, that everything was going wrong in every area of his life. But the one word he did not use when he was with me was "depressed," even though all the terms he used to describe himself are the terms that are used by depressed individuals to describe themselves.

Q. You and Dr. Roe talked about his conduct with the plaintiff in this case?

A. Yes.

Q. Did he offer you any kind of excuse at any time for his behavior, his conduct?

A. No. He gave no excuse for it.

Q. And he did acknowledge his conduct, that is, the sex with the patient repeatedly?

A. He did, yes.

Q. He acknowledged the — to you, the fact that on occasion there was another patient besides the plaintiff in the room when there were sexual activities going on?

A. Yes.

Q. He acknowledged the fact to you of giving the Didrex, or the medication prescription slips as well as the pills, to the plaintiff?

A. He acknowledged giving prescriptions of medications, yes.

Q. And he offered no excuse in any of that for his behavior during the years in the '80's and the early 1990's?

A. No, he did not.

Q. Doctor, have you formed an opinion as to his mental status at the time that he first had contact with the plaintiff? We're now in the early '80's. There's a formal diagnosis that you believe can be ascribed to his behavior at that time?

A. Yes.

Q. What is that, doctor?

A. He was suffering then as he was at the time of my evaluation of him, and there were indications at least a year or two prior to the time I saw him of a major depression that gave indications of having started in the mid 1970's and having continued — sometimes a little bit better, sometimes a little bit worse, up to the time I saw him.

There was still, as to the time I saw him, the question as to whether this represented an underlying organic deterioration; in other words, that it was related to the fact he was getting older, at least in its initiation, not just the fact that he'd had some reversals in life, but he had the reversals in life at a time that his brain wasn't functioning as well as it was earlier, and that he was experiencing a not uncommon phenomenon, which was that in his mid-50's, he was starting — early 50's and mid-50's, he was starting to get more and more depressed.

This was substantiated to some extent by indications from a psychological test that he'd had two years earlier that he's had the kind of interference in his thinking that you would expect from somebody who had a long-term depression; trouble in concentrating, trouble in focusing, trouble in paying attention, trouble in thinking in a logical manner for anymore than a shorter period of time, problems with being able to judge the probable consequences of his behavior, either for himself or other people, problems in making judgments about ordinary, everyday things in life, particularly with respect to what you could expect the outcome was going to be.

The word for that is called sequencing. In other words, you just put things in their sequence, just like we could tell if we walked out in the hallway that there's going to be two ways we could go; then we can sort of think our way down stairs. We're sequencing ourselves through every stop. The indications were that he has trouble with that.

The indications were for this — mostly from the tests in the 1990's, my belief from his statements and the other indications of the fall-off in his — his personal, his professional life, was that this went back at least 15 years before that and was either organic or was largely tied in with the reversals he had in his life, and I don't know which — or it was some combination of those two.

Q. You made reference earlier to a psychological evaluation that Dr. Roe had a couple of years ago.
A. Yes.
Q. You're referring to Dr. Olson's evaluation?
A. Yes, the psychologist he was seeing. He was a therapist after everything sort of blew up on him and — who had also arranged for him to have a battery of psychological tests.
Q. And you've taken that report — we had testimony about it earlier in the trial, but you've taken that into consideration in your opinions in the case?
A. Yes.
Q. Did Dr. Roe have — see a psychiatrist, see a psychotherapist at any time in the '80's or early '90's until he got to Dr. Olson?
A. No.
Q. Was he taking any medication for this depression that you described?
A. Not that there were any indications of that, no.
Q. How would you characterize that? Was he aware of the depression? Was he aware of the need for therapy, medication?
A. All the indications were that he wasn't — he was not aware. And that's not uncommon, that basically what happened was that his behavior was influenced by it, his relationships were influenced by it. His thinking was influenced by it, but his thinking and emotions were influenced enough by it that he was not aware of the extent to which he was disabled.

And that is the most common finding you have with people who are disabled. It's that either they can't and don't recognize it or they deny to themselves the extent to which they're losing the abilities they used to have before. And while that's not uncommon with all of us as we get older, to some extent, and we lose some of the attributes we have earlier, if you're clinically depressed or you've got a mental problem, which I believe he did have, it's worse than for those of us who are not afflicted as much.

Q. The problem was that he couldn't conform his conduct — the writing of the prescriptions, the sex, all the other aspects of his misconduct with the plaintiff, he couldn't conform that with reason. Is that a fair statement?
A. That's a conclusion. I think the fairer statement is that the depression that he had was intense enough and affected so many areas of his life. There was no area of his life that was not affected by this. There was absolutely nothing that he did and nobody that he related to where his depression didn't cause him to be more isolated, to feel more discouraged, hopeless, helpless to do anything about it, to be uncertain as to why things were continuing to go wrong with him, and that it — all it did was continue on, and it influenced everything he did, every bit of behavior, and everything — it did this because it influenced his entire emotional life and thinking life.

It's just like when any of us get depressed; we look at the world, ourselves and everybody else, in a different way. And his problem was it went on for a long enough period of time that he was looking at himself and

everybody else in a different way, and he was behaving towards, again, everybody in his life — family, spouse, other doctors, everybody, including Ms. Doe, in a different way than he had earlier. This was — I'm saying prior from the onset of this in 1974 or 1976, something similar in that area, and that it was severe enough and intense enough that the indications were that he was unable to propose to himself reasons for acting differently, and he was, as a result of that, unable to conform his conduct to the requirements of reasoning: what would a reasonable person do?

A. He's far more depressed now than he was before, in large part because of the enormous losses he's had in every area of his life —

Mr. Winer: Excuse me. Your Honor, this is irrelevant as to his state today.

The Court: Sustained.

By Mr. Jones: Q. Doctor, the last time he had contact with the plaintiff was in late 1991, two years before you saw Dr. Roe, are you able to form a diagnosis as to his mental state at that time?

A. Yes.

Q. Could you tell the jury what that is?

A. The indications are he had and was suffering then from a major depression with an underlying organic brain disorder, most likely of a mild to moderate nature, and that it was accompanied by a beginning cardiac condition that may or may not have influenced some of the organic problems. If you've got trouble with how well your heart functions and you're getting older, one of the things that happens is you don't get the same amount of oxygen to your brain. You don't think as clearly as you do otherwise.

It's clear he had that problem in a major way later. It's not clear that he was having that in the late 1980's.

Q. Did he acknowledge, when you talked with him —

Mr. Winer: Excuse me, your Honor. I'd ask that the end of that answer be stricken as irrelevant.

The Court: I think it's by way of explaining his opinion. Denied.

By Mr. Jones: Q. Doctor, did Dr. Roe acknowledge to you that the injury that he caused to the plaintiff was of his own making?

A. Yes.

Q. Did he acknowledge to you that he, during the time he had contact with the plaintiff, was exercising monumentally poor judgment in what he was doing?

A. Yes.

Q. Did he acknowledge to you that, during that time, he lacked control of his impulses? Or was he able to form that —

A. That's not what he said.

Q. Is this part of the denial that you talked about earlier?

A. The part about impulses is my opinion. It was not his statement to me. I was basing the opinion that I gave you on comparing him and his — his presentation to me and his description and Ms. Doe's description of him and other people's description of him over the previous ten years with other doctors and the evaluations that I've made of them or what they've said of themselves.

He did not use the word about himself that he was unable to control himself. Rather, what he said was that beginning in the late 1970's or early 1980's, he'd noticed that he'd started to experience a decreased amount of control over every area or his life. That was his relationships, his practice, how things went with everybody else, how thing were going for him, his ability to pull himself out of things when they went wrong.

He did not specifically use that to say, "that's why I was in the trouble with Ms. Doe," or "that's why I did what I did with Ms. Doe." Rather, he said more it was just a feature of his life, and it was probably the thing that he remained most aware of, was that he was far less in control of himself as things went on, but he was not talking there about the thing with Miss Doe. He was really talking in a much larger context.

Q. Doctor, your role in this case has been not to reach conclusions that excuse in any way his behavior. Rather, it's true, isn't it, that your role has been to explain why Dr. Roe entered into the misconduct that he did over that period of time. Is that a fair statement?

A. Well, I think initially it was to try and understand what might have been going on with him, and really didn't go any further than that, with the realization that what he might understand could be all the way from absolute, total control over everything in his life to problems.

I think when I found indications of a substantial amount of mental and emotional problems in his life, then I told you about it. At that point, it became explaining it, but up until then, it was just a question of understanding it from his own reports and from the descriptions given him — of him by other people.

Q. And there is no excuse for his misconduct in this case, correct?

A. I don't think there's any excuse for the conduct, no.

Mr. Jones: That's all I have. Thank you.

§19:42 Cross-Examination of Defense Expert on Defendant's State of Mind

By Mr. Winer: Q. Dr. Ross, this deep depression that Dr. Roe allegedly was in, did you contact anybody to see if they noticed it?
A. No, I did not. I wouldn't ordinarily have done that anyway, but I did not.
Q. Did you have an opportunity to read the depositions of the people who worked with Dr. Roe?
A. I don't think so. I don't remember offhand.
Q. Well, you don't remember them noticing anything depressed about Dr. Roe?
A. I do not remember other people stating that they saw him as depressed in the way he behaved. But again, that would not be uncommon, because most of us, when we are depressed, are not wearing it on our sleeves.
Q. I'm sorry. I thought you said that everybody noticed this decrease in his functioning.
A. I don't think I said that. If I did, that would have been incorrect. He certainly talked about it.

COMMENT 1

Since defendant has put his mental state at issue, this is a rare situation in which the roles are somewhat reversed for plaintiff attorney and he is the one attempting to establish the fact that defendant is making up, exaggerating or overstating defendant's claim that he himself is suffering from the mental disorder of depression.

The cross-examination begins with questions meant to impress upon the jury the question that they should be asking, which is "If defendant's depression was so bad, how come nobody noticed it?"

The defense would certainly be making this argument if plaintiff was making a claim of depression. The defense is getting a taste of its own medicine.

Q. Well, let's talk about Dr. Roe, but first yourself. You testify frequently in criminal cases, don't you?
A. Approximately once a month or so.
Q. How many times have you testified in criminal cases in your career?
A. Probably about 800 times or so.

COMMENT 2

Jurors are generally biased against psychiatrists who testify in criminal cases. Although one of plaintiff's experts, Dr. Burnstein, also testifies in criminal cases, Dr. Ross has testified in an astounding 800 cases. This is important to point out to jurors, a few of whom will be turned off by this fact.

Q. And frequently, you're called upon by the defense or the court to state an opinion about somebody's sanity or their mental competency; is that right?
A. Well, sanity would be criminal cases, competency would be criminal and civil.
Q. Well, the criminal case that is most on people's minds now is the O.J. Simpson case. If O.J.'s lawyers were going to shift their strategy and try to prove that he couldn't form the intent to commit the crime, his lawyers would call on somebody like you or maybe call on you to testify; is that correct?
A. They might.
Q. And you've been involved, have you not, in famous criminal cases in this area; is that true?
A. Some.

COMMENT 3

Plaintiff attorney is attempting to accomplish "guilt by association."

The criminal verdict in the O.J. Simpson case had just come down and people were, amongst other things, believing that O.J. got off because of clever defense attorneys and expert witnesses. Even though Dr. Ross had nothing to do with the O.J. Simpson case, plaintiff attorney is attempting to make the point that if he could have helped O.J. get off, he would have.

Q. And it's true, is it not, that Dr. Roe in his work in the medical-legal arena would have also been involved in criminal cases where he would be testifying that defendants could not form the capacity to commit certain conduct?
A. He might have been, particularly depending on the time that you're talking about.
Q. Let's talk about — I'm just referring to — you reviewed his resume, right?

A. Yes.

COMMENT 4

Plaintiff attorney is not only attempting to establish the guilt by association of Dr. Ross with the O.J. Simpson case, he is now attempting to establish the guilt by association of Dr. Roe, who also testifies in criminal cases like the O.J. Simpson case.

Q. I'm noticing that he's a psychiatric consultant to the public defender's office of the City of Los Angeles from 1983 to the date of the resume. Now, in that work, he would have actually been consulting with people who represent criminal defendants, trying to help them plan strategies to help the lawyers get their criminal defendants off on an insanity defense; is that right?
A. That's not usually what's done, but could I say absolutely that he never did that? No, I can't say that.
Q. Whatever work he did in the criminal arena in consulting with the public defender's office, that work would be part of his knowledge when he comes to your office in late December of last year; is that correct?
A. Yes, I would expect it was.

COMMENT 5

In addition to the "guilt by association" argument, plaintiff attorney is attempting to point out to the jurors that one of the defenses that Dr. Roe is subtly relying upon in this case is the fact that he was not able to form the capacity to commit certain conduct. The defense attorney, Mr. Jones, set this up at the beginning of Dr. Ross' testimony when he had him go through the definition of legal capacity. Now, plaintiff is attempting to point out that Dr. Roe in his past probably had consulted with criminal attorneys and defendants "trying to help them plan strategies to help the lawyers get their criminal defendants off on an insanity defense." Thus, attempting to create the impression that defendant knows very well how to fake a "lack of capacity" defense. Thus, he could be faking such a defense in this case.

Q. You mentioned that Dr. Roe admitted to all of the misconduct alleged by Ms. Doe in this case; is that correct?
A. No, I didn't say that. I was asked about specific things.
Q. Well, did he agree with her version of what happened?
A. Not in its totality.
Q. Did he agree to all the sexual allegations?
A. He agreed that there were many acts of sexual activity between the two of them.
Q. And you'd agree that there was no inconsistencies between Dr. Roe's version of what happened and Ms. Doe's; Is that correct?
A. I didn't find any in the time that I was with him.
Q. And he generally did agree with Ms. Doe's version of the sexual activity?
A. Well, insofar as I was able to tell, but I didn't at that time have Ms. Doe's deposition to go through with him line by line, so it was basically a general question having to do with that.
Q. And he generally agreed with all that she said about the drug prescriptions; is that correct?
A. He agreed that there had been drug prescriptions. Again, the issue of what exactly it was that she said, and his agreeing with all of it, that wasn't part of this — at least part of the exam or part of the thing I went over with him because I didn't have access to everything that she said.
Q. Well, you stated in your deposition, did you not, that when you talked to Dr. Roe, you actually went through her deposition with him?
A. I went through the papers I had. I don't remember going through that deposition with — with him at that time. I may have said that in the — in your deposition. I just don't remember doing it right now.

COMMENT 6

Plaintiff attorney in the cross-examination of Dr. Ross is attempting to take advantage of the fact that the defense has decided to accept "accountability" for everything that Dr. Roe did to Ms. Doe by having Dr. Ross testify that Dr. Roe admitted all of his misconduct to Dr. Ross.

This line of questioning represented a no lose situation for plaintiff. Either Dr. Ross admits that Dr. Roe conceded that everything that plaintiff testified to is accurate, at which point, plaintiff's credibility will grow enormously and her testimony will be accepted on one of the truly contested issues in this case which is the extent of the prescriptions of Didrex, or, Dr. Ross will waffle, and testify that Dr. Roe, does not in fact admit to all of the misconduct alleged, therefore, he is not accepting full accountability for his own abhorrent actions.

As it turns out in the testimony above Dr. Ross appears to attempt to waffle. However, he eventually holds the "party line" that Dr. Roe "may" agree with all of plaintiff's allegations, he just simply cannot remember at this point whether or not he went through every allegation of Dr. Roe's misconduct, contained in plaintiff's three-day deposition.

Q. When you met with Dr. Roe, you were surprised about what he was like, correct?
A. I was.
Q. You were expecting somebody to be — looked depressed, right?
A. To appear more morose, yes, Hang-dog. He did not.
Q. In fact, he was garrulous, correct?
A. He was garrulous. He had a tendency to run on in terms of what he talked about and get into irrelevancies, yes, he did.
Q. What's garrulous mean?
A. A tendency to be far more talkative than you expect under the circumstances, and to go off into irrelevancies, things that really don't have to do with the topic that you're talking about, a tendency to talk an awful lot about things that aren't part of what it was you started talking about.
Q. Well, doctor, he was actually in the interview quite proud of himself and proud of his manlihood; is that correct?
A. With various things in terms of his life, that's true, yes. Depends on what you're talking about in terms of pride, but there were a number of things about which he was very proud.

COMMENT 7

Once again, plaintiff attorney is attacking the idea that Dr. Roe is depressed, when he didn't look depressed. Further, somewhere in Dr. Ross' file plaintiff attorney found notes with a statement that defendant was "proud of his manlihood." Plaintiff attorney is pointing this fact out to the jury to indicate that not only is it unlikely that Dr. Roe was as depressed as he claims when he treated plaintiff, but, he was proud of the amount of sexual abuse that he was able to commit at the age of 70. This point will be hammered home even harder in later testimony.

Q. Dr. Ross, Dr. Roe was a clinical professor at a medical school, correct?
A. Yes.
Q. He was the director of psychiatric residency training at the Los Angeles Mental Health Service; is that correct?
A. Yes.
Q. Faculty and Medical Director of the Heath Institute; is that correct?
A. Yes, for a while.
Q. Medical Director of another institution?
A. For a while, yes.
Q. He was well-trained, correct?
A. As far as I could tell, he was. He was certainly adequately trained, and he had enough experience.
Q. Don't you think somewhere along the line somebody would have told him, "You're not supposed to have sex with your patients"?
A. I don't think there was any question that he knew that.
Q. He was also aware that it wasn't right to have sex with a patient, correct?
A. Yes, if you were to ask him that in a straight way, that's what he would have told you, I believe.
Q. And he was trained, was he not, in this powerful transference process where a patient transfers feeling that she has for a parent onto her therapist, so the therapist becomes the parent in the patient's mind; Dr. Roe was trained in that, correct?
A. He at least had classes and experience with it.
Q. And he wrote papers on it, correct?
A. Yes, he did, about transference; not exactly what you're saying, but he did write a paper on transference.
Q. And he was trained that you don't abuse this transference, correct?
A. Yes.
Q. And when he saw you, he told you that he had sex with Ms. Doe because he wanted to, correct? He didn't talk about any defects or impulse control problems?
A. He talked about defects, but not with respect to Ms. Doe. He talked about them with other areas of his life, and he said there was an aspect of his involvement with Ms. Doe that involved his doing what he wanted.

COMMENT 8

All of the above testimony goes to the issue of "intentionality." By reading Dr. Ross' interview with Dr. Roe, plaintiff attorney was able to determine that Dr. Roe was well-trained, generally. Well-trained specifically in the field of transference and refused to admit that he had any problems with impulse control, and knew exactly what he was doing when he became sexually involved with plaintiff. It was Dr. Ross, as a psychiatrist, who was attempting to soften all of this information about Dr. Roe. It is true that a patient may be the last person to have any true insight about themselves, however, it is a different situation when that patient is a trained psychiatrist.

On the other hand, plaintiff attorney did not want to hit too hard on the intentionality point because it could affect insurance coverage. It was plaintiff attorney's goal on this part of the cross-examination to put Dr. Ross' testimony into doubt, without destroying it.

Q. And doctor, you received a history that Dr. Roe was taking — at least according to Ms. Doe, that Dr. Roe was taking amphetamines, correct? Speed?
A. Yes.
Q. And you know that speed can cause brain damage, organicity, correct?
A. It can, depending on the amount that's taken and the circumstances, yes, and it could also be an anti-depressant.

COMMENT 9

At this point, plaintiff attorney extracts an admission from Dr. Ross that speed or amphetamine use can cause brain damage. In the scheme of things, this is actually an important admission since even though Dr. Ross did not interview Ms. Doe and was not commenting on Ms. Doe's mental or neuropsychological condition, he was conceding that plaintiff's claim, that is that amphetamines can cause brain damage could, at least in theory, be an accurate claim. Since there was very little literature on this subject, the testimony of Dr. Ross added credibility to plaintiff's claim.

Q. I see that. I understand Dr. Roe was actually tested in '92 by a psychologist, a Dr. Olsen; is that correct?
A. Well, the actual test was administered by a — another fellow, but the interpretation was made by Dr. Olsen.
Q. Dr. Olsen a psychologist in Los Angeles?
A. Yes.
Q. And he tested Dr. Roe, correct?
A. Yes.
Q. And he tested him for this organic brain dysfunction which you think that Dr. Roe has, correct?
A. Yes, or gave him a screening test for that.
Q. And on the psychological testing, specifically, the Bender-Gestalt test, the finding was no organic brain dysfunction, correct?
A. On that test, that's true.
Q. And during the test-taking and interview, Dr. Olsen concluded, "He did not exhibit any marked impairment of his ability to attend and concentrate." Is that correct? Top of page three.
A. That's true. That's in terms of his behavior during the course of the testing, rather than the test results themselves.
Q. I understand.
A. Yeah.
Q. But Dr. Olsen was specifically testing to attempt to rule out the possibility of a neuropsychological impairment, correct?
A. That was one of the things he was looking for, yes.
Q. And in his report, Dr. Olsen concludes, "There are no signs of organic dysfunction." And that would be brain damage, correct?
A. It depends on where — which part you're looking at.
Q. Page 6.
A. He does have that, and he has other statements which would be consistent with brain damage, but he does have that.

COMMENT 10

Once again, plaintiff attorney is attempting to establish that Dr. Ross' opinions have been made up strictly for the litigation and are inconsistent with the opinions of other people who knew Dr. Roe, and in the case of Dr. Olsen, a psychologist who tested Dr. Roe. In his testimony, Dr. Ross has attempted to make a big deal out of the fact that he believed that Dr. Roe likely had organic brain damage that caused him to act out with plaintiff. Here, plaintiff establishes that a doctor who actually tested Dr. Roe for neuropsychological impairment, tests that Dr. Ross never

performed himself or ordered to be performed, felt that Dr. Roe was not suffering from organic dysfunction or brain damage. Thus, Dr. Ross is contradicted by a psychologist whose opinion he relies on in this case.

Q. And, in fact, Dr. Olsen concluded, based on the test results, that Dr. Roe is a self-centered individual, correct?
A. He did.
Q. And he also concluded that Dr. Ross is a controlling individual, correct?
A. Yes, he did.
Q. And he also concluded that Dr. Ross is greatly attracted to sensual experience, did he not?
A. Yes, he did.
Q. Doctor, what's empathy?
A. Empathy's an ability to put yourself in another person's place and experience what's going on the same way they would.
Q. So it's the ability to understand somebody else, right? Have some feeling for them?
A. It's even a little bit more than that. It's the ability to sort of experience the thing or a situation the way somebody else would, so it's going even beyond understanding. It's more than that.
Q. And Dr. Olsen's testing showed Dr. Roe showed a lack of deep empathy; is that correct?
A. Yes, he did.
Q. The testing also showed that he fails to accept responsibility for the consequences of — the testing also showed that Dr. Roe fails to accept responsibility for the consequences of his impulsive — impulsive and potential harmful behavior despite a verbal admission of fault; is that correct?
A. That's what he said, yes.

COMMENT 11

The testimony above is a perfect example of the "tunnel vision" of the defense in many mental and emotional injury cases. The defense decided to bolster Dr. Ross' testimony by providing him with a report written by Dr. Olsen for the Medical Board as part of the licensing action. This report had one or two points in it which helped defendant in the civil case, however, it also had all of the above testimony regarding what a horrible person Dr. Roe was which was far more damaging to defendant's civil case defense than the one or two small points that helped his defense. Plaintiff attorney easily points this out to the jury by having Dr. Ross admit that Dr. Olsen concluded that Dr. Roe was self-centered, controlling, greatly attracted to sensual experience, lacked empathy and failed to accept responsibility for the consequence of his impulsive and potentially harmful behavior despite a verbal admission of fault. What could be better testimony for plaintiff? And the beauty of it was that the testimony came from the defense's own expert witness.

Further, plaintiff attorney is able to achieve this result without really taking on the defense expert directly, always a risky strategy. Plaintiff attorney was simply reading statements from a report which the defense expert cannot contradict. A no lose strategy.

Q. And isn't it true that Dr. Roe feels bad for what he did, but not because of what it did to Nancy but only because of what it did to him and his family; is that correct?
A. More so because of what it's cost him than what it cost Ms. Doe.

COMMENT 12

Just when it seems it cannot get any better for plaintiff, it does. The above testimony represents information in the Olsen report. However, one would never know it from the question and answer. It appears to be the conclusion of Dr. Ross himself that defendant only feels bad for what he did because of the personal cost to his own career as opposed to any harm that he caused Ms. Doe.

Q. And you'd agree that he can't even today appreciate the enormity of the harm that he caused to Ms. Doe; is that correct?
A. That is my opinion.
Q. Doctor, a therapist is trained that when he gets depressed or impaired in any way, that what he's got to do is go get help and to not treat patients that are at risk; is that correct?
A. Well, its certainly good judgment. It's not part of any training I know because usually the impairments are picked up by other people and not the person who's impaired. That's what it means to be impaired, that is,

most of the time you don't realize the extent of it. But, I think in terms of it being the kind of thing one ought to do if one recognizes one is impaired, absolutely.

Q. Psychotherapy takes place behind closed doors, doesn't it, doctor?

A. Yes, most of the time.

Q. What are we supposed to do to protect ourselves or our loved ones against somebody like this who you say is so impaired he can't realize it, and yet may be treating very vulnerable people? What can we do?

A. Well —

Q. Don't we have to rely on the physician to get help for himself?

A. I think — the problem is if you — the kind of answer that your question calls for is the kind of answer that I don't think you want me asking the question.

Q. Well, when Dr. Roe talked to you, what he told you at the time was he thought he was always treating Nancy in a caring, helpful way; is that correct?

A. Yes, Dr. Roe, if anything, was clear that in terms of his attitude towards Ms. Doe, that he saw himself then and saw himself as of the time I was with him, as approaching Ms. Doe and attempting to treat her in what he saw as a caring way.

COMMENT 13

Now that plaintiff attorney has the defense expert pinned down on what an awful person Dr. Roe is, he is free to move on to what will be one of the major themes of his closing argument, that is, that it is important that the jury make a very large compensatory damage award against Dr. Roe because it is the only way that we as a society can police what happens behind the closed door of a therapy room.

Here is a situation where according to Dr. Ross, Dr. Roe had lost his judgment. Even though Dr. Roe should have been trained to get help if he was impaired, he either was too arrogant to get such help or didn't recognize his impairment. Either way, we as a society were in danger. This line of questioning which seemed like it was only aimed at whether or not defendant's judgment was impaired, is in fact aimed at giving the jury a reason to bring in a multi-million dollar verdict for plaintiff against defendant.

At the end of the above testimony, plaintiff attorney allows Dr. Ross to attempt to make the point that despite what Dr. Olsen said in his report, it was Dr. Ross' opinion based on information supplied to him by Dr. Roe, the only real "testimony" that we were going to get in the case from Dr. Roe, that Dr. Roe saw himself as treating plaintiff in a caring way. This set up the testimony that will follow which will indicate that either Dr. Roe or Dr. Ross is trying to pull the wool over the jurors' eyes if they really believe that Dr. Roe was treating plaintiff in a "caring" manner.

Q. Was he acting in a caring and helpful way when he was suckling her breast and asking her to pretend he was her son?

A. Clearly, the act was not a caring act. Clearly, the act was unacceptable by any standard that you apply to it.

Q. Was he acting in a caring and helpful way when he was having intercourse with her on the floor while her son was there crying?

A. Clearly, by any standard you're going to apply to that conduct, it was totally unacceptable. The difference is what he was saying of his perspective of himself acting in a caring way, and the question as to whether, first of all — whether it's believable, and secondly, whether it makes sense in terms of the impairments that he did exhibit.

Q. Was he acting in a caring and helpful way when he was having sex with her in front of another patient, or another patient —

A. Absolutely not. The conduct itself is indefensible, and there was never a question of that. The question was: what was it that was going on with this man at the time he was engaging in the conduct? At least for me, it was. I know there's broader questions.

Mr. Winer: That's all I have.

COMMENT 14

By this point, there was no way that the jury would be listening to Dr. Ross when he stated that his quest was to find out "what was going on with this man at the time he was engaging in the conduct." It has been made clear in the cross-examination that Dr. Ross was attempting to find excuses for inexcusable conduct and that the "only thing that was going on at the time" with Dr. Roe, was that he was engaging in outrageous intentional and negligent misconduct.

[§§19:43-19:49 Reserved]

B. Cross-Examination of the Defense Psychological Expert on Causation and Damages

§19:50 Report of Defense Psychological Expert

The following is the actual psychiatric report from the female defense psychiatrist in *Doe v. Roe*. The name of the psychiatrist as well as the name of some other participants in the case have been changed as well as certain locations

Mr. Jones

Re: Doe v. Roe

As you requested I have conducted an independent medical examination of Nancy Doe. I interviewed her for three hours and ten minutes on December 22, 1993. Prior to the IME, I explained that I was a psychiatrist doing an evaluation at your request and that, therefore, the information she reported to me would not be kept confidential, I also reviewed the following records:

[Dr. Defense lists 22 different sets of records and depositions she reviewed.]

Identification

Ms. Nancy Doe is a 42-year-old divorced, unemployed white female who lives with her five-year-old son in a Los Angeles apartment where they have lived since he was approximately three months old.

Description of Events

Ms. Nancy Doe first saw Dr. Roe for an SSI evaluation in 1980. She had been referred to him by the Social Security Administration after she initiated an SSI application. Approximately two years later in 1982, she began treatment with him and saw him every other week until November, 1991. Ms. Doe described having sex with Dr. Roe regularly throughout the course of treatment, and also described working for him as a research associate, becoming a "colleague" of his, and taking numerous medications prescribed by him, including Valium, Klonopin, Adipex, Didrex, Tenuate, Prozac, Wellbutrin and Tylenol with codeine. In April, 1991, Ms. Doe began seeing Dr. Goldstein and told the therapist about the nature of her relationship with Dr. Roe. In May, 1991, she was given a pamphlet by this therapist regarding sexual contact between therapists and patients. In November, 1991, Ms. Doe stopped seeing Dr. Roe and initiated a report regarding the nature of their relationship to the Attorney General's Office.

Ms. Doe's Psychiatric Symptoms when She First Began Treatment with Dr. Roe

In the IME, Ms. Doe told me that she had been told by a friend that Dr. Roe was "wonderful." She said she went to see him because she was determined to become a teacher and was anticipating having problems with this dream. She had failed at numerous other jobs and job training experiences prior to that time. She also mentioned that she was in "a bad marriage" at the time and wanted some help with that. When asked specifically in the IME about psychiatric symptoms at the time, including mood difficulties, poor self-esteem, any change in her sleep or in her concentration, she stated for each question, "I don't remember." When asked about medications at the time, she also said, "I don't remember."

In her deposition, she reported that when she first began treatment with Dr. Roe, she was taking Navane (an antipsychotic) and Valium, felt "love-starved" and "emotionally disturbed." She also reported symptoms of fatigue, of being slow, and of wanting to be happier, to function better, to be more autonomous and less dependent. She stated that she needed love and needed someone to talk to. In the deposition, she admitted that she had failed many careers, that her whole life had been a failure, with her marriages, jobs and job training, and that she didn't trust any professionals.

Ms. Doe's Psychiatric History Before Dr. Roe

Ms. Doe reported experiencing nightmares as a child up until she was approximately five to eight years of age. When she was eleven years old, while at summer camp, she "didn't adjust well" and began seeing therapists. In the sixth grade, she made a suicide attempt by overdosing on aspirin. She threw up the pills and was not formally treated for that episode. When in junior high, she reported that she was "acting out." She had self-mutilating behavior, fell on the floor at times and curled up into a fetal position, acted bizarre and was very depressed. Twice while in junior high and high school, she was placed on home instruction because of acting out behavior at school. She saw psychologists, but was not treated with medication during this period.

For the ages of sixteen and seventeen, she was placed at the Jonestown School, a school for children with psychiatric difficulties. While there, she was treated with either Mellaril or Triavil three times a day. She could not remember the name of the medication. She reported having symptoms at the time of low self-esteem, feeling very "bad," being awkward and clumsy. At the age of sixteen, in 1967, she was extremely depressed and slashed her wrist in a suicide attempt. She was admitted to State Hospital, where she stayed for a few months. In the IME, she was unable to recall what the nature of the treatment was while at the hospital.

At the age of 22, in 1973, she made a second suicide attempt by overdosing on Elavil. She had been, prior to that time, in outpatient treatment while she was in the process of training to become a technician. She became more depressed, overdosed on the Elavil, went to the building where her therapist was, and, by her best recollection, passed out while in that building. She was incubated, hospitalized for approximately two weeks, and does not, at this time, remember what medications, if any, were prescribed during that hospitalization. She stated, during the IME, that she was later readmitted for a second time at that same hospital, but did not remember the details of that hospitalization either.

While in the hospital apparently she was told of a medical school in China and she then made the decision to go to China to begin medical school. While in China, she had an episode in which she was "sleeping with dead bodies, smashing my head through the window, running through the hospital naked; I felt mixed up and I had no insight." She was apparently told by the dean of the medical school, "Nobody wants you," and she left the school and returned to the United States. She did not receive any formal psychiatric treatment for this episode in China, however, she did say that, at the time, she has been using some Dexedrine.

She then moved to California and, while living there, was in psychotherapy with an individual therapist and also attended a group psychotherapy for women. While in treatment with the psychologist for approximately one to two years, she reported intentionally cutting herself in a self-mutilating way. The therapy was begun due to difficulties with her marriage at the time, and, in describing the course of therapy, Ms. Doe related that the therapist told her that she must be "a victim of incest" and told her that she was "too sick for [her] to handle." According to Ms. Doe, the therapist gave her a hug and said goodbye. In the IME, Ms. Doe denied having any significant problems with depression at the time nor with her concentration. She did mention that her husband at the time had spoken quite frequently and openly to her of wanting to see other women and, when asked in the IME how that made her feel, she responded, "I don't remember."

Ms. Doe then moved to Minnesota in approximately 1977 or 1978. While there, she was very upset over her divorce from her first husband and reported feeling alone, frightened, rejected and depressed. She saw a psychologist. She saw him approximately ten times and told me that she said to him once in a session that she would jump out of a window in his office. He stopped her from doing this and then later the therapy was terminated. She described having a psychiatric hospitalization in Minnesota. The admission was precipitated after she became extremely depressed following the receipt of a letter from her ex-husband. She was voluntarily admitted, however, she doesn't remember for how long she stayed. It was either for "a few days or a few weeks." While in the hospital, she did take medications, however, she was unable to recall what program and she saw a doctor approximately once a month as an outpatient at that time. Medication was prescribed for "sadness about my divorce," however, in the IME, she did not remember "anything" about the treatment. She did mention that, at one point, she took her clothes off while in the doctor's office, however, he told her immediately to put them back on.

Ms. Doe reported having auditory hallucinations intermittently prior to 1980 and, also prior to 1980, she had an SSI evaluation while in Minnesota, however, she told the evaluating doctor not to "put [her] on SSI" because she wanted to be a pilot, and subsequently her SSI application was rejected. In approximately 1980, she moved to Los Angeles. All of her belongings were shortly thereafter stolen from her car. She was on General Assistance. She decided to apply for SSI and was referred to Dr. Roe for an SSI evaluation.

Overall, she has made in her life a total of four to five suicide gestures or attempts, the most severe being the overdose on Elavil. She also has been prescribed numerous psychiatric medication, including either Mellaril or Triavil while in the Jonestown School, Valium since she was in college, Dexedrine while in China, and Navane in the late 1970's and early 1980's. She reported that she has been given the following diagnoses: anxiety, neurotic, simple schizophrenic, paranoid schizophrenic, reactive depression, hysteria and borderline personality disorder.

Ms. Doe's Course During Treatment with Dr. Roe

As noted above, Dr. Roe prescribed the following medications during the course of ten years of treatment: Valium, Klonopin, Adipex, Didrex Tenuate, Prozac, Wellbutrin and Tylenol with codeine. Ms. Doe had married her second husband in approximately January, 1982, and subsequently became divorced in approximately December, 1982. She had a relationship with Stanley James which lasted from 1984 to 1986 and a subsequent relationship with Don Walters from 1986 to 1991. In the early 1980's she completed a teaching credential and also took other courses (as described below) at community college. After getting her teaching credential, she taught from 1984 to approximately 1988. She had a child (the father of the baby was Don Walters) in 1988. Ms. Doe described becoming significantly and seriously more depressed after the birth of her baby. She had left her teaching job and taken the maximum leave of absence (one and a half years) due to the birth of her baby and need for child care. Upon her return to work, she returned for only one day and then resigned. She stated that she was "nonfunctional; I couldn't take attendance; the class was going wild." She had been having a hard time with her baby. She reported that she had been having decreased sleep, had felt exhausted, had had intermittent hallucinations and had even, at one point, thought of bringing her baby to the police

because she was fearful that she couldn't take care of him. She stated in the IME that she had not planned adequately for managing child care while working. She stated that, ever since she attempted to return to work that one day, she has been depressed since except "on sunny days." Dr. Roe did prescribe medications to attempt to help her with this depression, however, Ms. Doe stated that "they didn't help."

Over the course of the latter 1980's and early into 1990 and 1991, she stated that she felt "increasingly robotic." She began feeling increasingly dysfunctional and felt overwhelmed with activities of daily living. She stated that she felt increasingly dependent on Dr. Roe and characterized their every-other-weekly sessions as the main thing she looked forward to in her life. In the late 1980's and early 1990's, she began to work as an associate of his doing library research and xeroxing, and also saw a client of his to whom he introduced Ms. Doe as "an associate." She also, at his request, allegedly referred other clients to him. The "robotic" feeling persisted throughout the summer of 1991. She continued in treatment with Dr. Roe until November, 1991, when she terminated treatment after a session in which he allegedly asked for sex at the very beginning of the session unlike the more typical pattern in which allegedly the two would do "talk therapy" for half of the session and then engage in sex for the latter half of the session. She stated that she slammed the door at the last session in November, 1991, and did not return for any future treatment.

There were also times during the course of the ten years in which she was seeing Dr. Roe that the two met in places outside of his office. These included one episode at her own apartment, one time that they met at the UCSF library and allegedly engaged in sex in a library corral, one time at a hotel, and several times at various hot tub clubs throughout Los Angeles.

Ms. Doe's Course Since Treatment with Dr. Roe Was Ended

Ms. Doe had begun treatment with Dr. Goldstein on April 17, 1991. She was seen four times between April 17 and June 4, 1991. She presented with symptoms of depression, mood swings, and getting into many fights. As noted above, in a session on May 20, 1991, she was given a pamphlet by her therapist on client-therapist sex. Ms. Doe had no contact with Dr. Goldstein from June 4, 1991 through December 26, 1991, however, she thereafter was seen regularly through August, 1992. The progress notes of Dr. Goldstein reflect mostly the patient working on issues related to her living situation, her relationship with Don Walters, and the lawsuit regarding Dr. Roe. Dr. Goldstein encouraged Ms. Doe to attend Narcotic Anonymous, which she did, according to the notes, it appears fairly sporadically.

Ms. Doe has seen several other therapists since. She saw Dr. Rose in September, 1992. At the time of presentation, she was depressed and suicidal with some "post-traumatic stress syndrome" symptoms. Dr. Rose diagnosed her with recurrent depression and borderline personality disorder, and referred her to a new physician after he received threats from the father of Ms. Doe's baby. Ms. Doe saw Dr. Seppo in November, 1992. I am not sure how many times she saw him, however, that therapy did not continue. She also saw Dr. Springs two times, Dr. Rutter two times in 1992, Dr. Sugar two times in 1992, Dr. Lept for an uncertain length of time, and she has been seeing Dr. Rosen since at least March, 1993. At the time of my IME, she was still seeing Dr. Rosen every other week. There was also a time in the spring of 1993 when Ms. Doe wanted to use one of her attorneys (an attorney representing her in Doe v. Roe), a Mr. Rockwell, as her therapist.

At the time of the IME, she was taking Prozac 40 mg a day and had been taking that dose for at least a year: chloral hydrate (dose unknown) as needed for sleep, and Valium which she reported having been on intermittently since her days in college. She did report a history of going off of Prozac for approximately three weeks on two separate occasions, however, each time she reported experiencing a significant increase in crying spells. She reported that on Prozac she felt a "spurt of energy" and did not have crying spells.

Her symptoms at the time of the IME included depression which she reported having since the birth of her baby with the following symptoms: light sleep with frequent awakening which she related as being due to both nightmares and also bladder problems, feeling slowed down, feeling easily overwhelmed, suicidal thoughts, low energy, decreased concentration, not feeling hopeful about the future, feeling incapable of close relationships, not being able to trust people in her life and feeling fatigued and exhausted by the end of the day. Her weight was stable. She denied any change in her appetite. She denied anhedonia, in fact, she reported enjoying going to the movies, spending time with her child and going to the park. She also denied any crying. In addition, she reported symptoms of anxiety with feeling "jumpy" all the time, feeling easily frightened with a "bad startle." She reported occasional nausea, experiencing flashbacks of Dr. Roe whenever she saw a white-haired elderly man on the street, experiencing dreams regarding Dr. Roe several times a week, and feeling more withdrawn, not wanting to think about what happened. Of note, she said that the "bad startle" had been experienced ever since the birth of her baby.

Current Functioning

When asked about a typical day, Ms. Doe reported that in the morning she feeds her son breakfast, has some coffee herself, walks him to his preschool after making him some lunch, and then after dropping him off at school walks back to her apartment. She sometimes goes to the store on the way back, but then once she is back in her house she

spends her time reading or staying in bed and dozing. She sets her alarm and goes and picks her son up again in the middle of the day and takes him to the gym. She then returns home where she spends her time straightening up, doing dishes and sometimes going to various appointments that she has. At the end of the day, she then goes and gets her son and brings him home and feeds him dinner, either an omelet or they buy barbecued chicken on the way home. She did state that it is at times difficult for her to prepare meals for him and that he sometimes has to ask her repeatedly to do so. She reported feeling overwhelmed by simple tasks and related as an example gift wrapping a gift for Christmas which took her several hours to do because she kept forgetting what she was doing and losing the scotch tape or the scissors. She does at times go out to movies which she enjoys, and also goes to the park with her son. She has a friend, Margaret, with whom she speaks on a regular basis.

Past Medical History

Surgeries: Ms. Doe had an eye operation as a child for strabismus. In July, 1986, she had a myomectomy and in March, 1988, she gave birth to her baby by Cesarean section. Medical diagnosis include: (1) paroxysmal atrial tachycardia; and (2) she has been told she has a "cervical tumor." She has no known drug allergies. Regarding use of illicit substances, Ms. Doe denied any use except for marijuana two to three times. She also reported using alcohol "only as part of Jewish rituals." As noted above, she has taken numerous medications, including various diet pills and antianxiety agents, prescribed reportedly by Dr. Roe and by subsequent treating psychiatrists.

Family and Developmental History

Ms. Doe reported that she grew up in a "crazy family." Her father was allegedly a heavy drinker and was abusive to her. She stated that he "slapped" her around and that he told her that she was stupid and that no one would ever marry her. He worked for an insurance company his entire career. The patient described her mother as "always very depressed." Her mother apparently didn't work initially, but later worked various jobs, including as a teacher and social worker. Ms. Doe is currently estranged from her parents. She last saw them when her baby was two months old. She rarely has contact with her sister.

Educational History

As noted above, Ms. Doe received home instruction during her junior high years due to behavioral difficulties. She ultimately went to the Jonestown School from which she graduated. She then took college courses, and ultimately received a B.A. in biology in 1974. In 1978, she took courses in pipefitting, and she also took a course in immunology. In 1979, she took various industrial arts courses in Minnesota. Beginning in the spring of 1981, she took various industrial arts courses at a college. She also took one welding course at college in the fall of 1981. In these industrial arts courses, she earned A's, B's, and an occasional C, and also withdrew from some courses. Beginning in the summer of 1983, she took mathematics courses at college, obtaining grades of A's or withdrawals. She continued in courses at college through the summer of 1985. Beginning in the fall of 1981, she took metal tech classes at a college. Metal tech continued through the spring of 1982, and then, beginning in the spring of 1983, she began taking classes towards a teaching credential, including secondary school health, secondary education and student teaching. She continued to attend college through the fall of 1984, at which point she received her credential as a teacher. In the fall of 1991 and spring of 1992, she attended two additional courses at college, which were medical microbiology and hematology respectively.

Vocational History

After college, Ms. Doe attended classes to become a medical technician, however, she did not work in this field. She then went to China, where she attended medical school, but that education was truncated by her bizarre behavior. She returned to the United States, and went to California where she worked many different jobs. She reported in the IME that she never held any job in California for more than two months. She then moved up to Minnesota, where she also worked several jobs, but none for any significant length of time. In Los Angeles, she volunteered as a teacher from September, 1983 through June 1984, and then worked as a student teacher at a high school in Los Angeles from September, 1984 through December 1984. She then was employed by the Lincoln High School from February 4, 1985 through August, 1985, and then worked through the Los Angeles School District from September, 1985 through 1988, at which point she was on a leave of absence for one and a half years. She returned in September, 1989, but resigned after one day. In the Los Angeles School District, she taught eighth grade mathematics. She has had no regular work since. She was, in addition, employed by Dr. Roe. On a form which she completed for college on August 10, 1991, she wrote that she was employed by him from "1990 until the present."

Mental Status Examination

In general, Ms. Doe was on time for the evaluation. She was neatly groomed and dressed, and cooperative, however, she made very little eye contact throughout the first approximately one third of the independent medical examination. She sat in her chair with her feet up on the chair, and held her legs tightly. There were no abnormal movements. Her speech was soft and fairly monotonous, with no pressure. When asked her mood, she said she was "miserable,

depressed and fearful" before, but then felt relaxed and comfortable at the end of the session. Her affect was fairly flat. Thought process was well-organized, fairly goal-directed, with some mild tangentiality and some perseveration on themes pertaining to her lawsuit. Thought content was significant for suicidal ideation with thoughts of jumping off of the bridge, jumping at a mall, obtaining Elavil and overdosing on that. She also reported that she had sent away for literature from the Hemlock Society. She stated that she thinks about suicide "a lot" and calls the suicide hotline. She does not plan to act on these feelings because of her love for her son. She denied any homicidal ideation. She admitted to vague auditory hallucinations when feeling extremely stressed or frightened, and also admitted to vague thought broadcasting when stressed. She gave as an example the sensation that she thought Dr. Roe could read her mind. There were no other overt examples of psychotic thought content.

Cognitive exam: she was alert, oriented to person, place and date. Her immediate recall was intact, as evidenced by her ability to repeat three nouns immediately. Attention was mildly impaired. She could state the months of the year backwards except that she left out May. She was able to calculate serial sevens without difficulty, but did it very slowly. Her intermediate memory was somewhat impaired. She was able to remember one out of three words in five minutes without a prompt, remembered a second of the three words with a list prompt and remembered the third with a category prompt. Her remote memory appeared intact. She was able to remember the current president and vice president and also the past few presidents. Calculations were intact as tested by asking her how many nickels were in a dollar and how many nickels were in $1.35. Proverb interpretation revealed intact abstract thinking, as did her ability to interpret similarities. Her judgment and her insight were fair.

Current Diagnosis

At this time, Ms. Doe meets the diagnostic criteria for the following diagnoses: major depressive episode, chronic, recurrent, in partial remission; and, borderline personality disorder. The criteria she meets for the diagnosis of depression include depressed mood, difficulty sleeping, psychomotor retardation, decreased energy, decreased concentration and chronic suicidal thoughts. The criteria she meets for borderline personality disorder include a history of unstable relationships, impulsiveness, affective abandonment, and chronic feelings of emptiness. Ms. Doe also meets some symptoms of post-traumatic stress disorder, including persistent re-experiencing with recurrent dreams and recollections, numbing of general responsiveness with decreased interest in activities, feelings of detachment from others, a decrease in her range of affect, and symptoms of hyper arousal with decreased sleep, decreased concentration and increased startle.

My Opinion

In reviewing Ms. Doe's medical records and the depositions pertaining to this case, as well as in completing the independent medical examination, I found the following inconsistencies in her presentation:

1. She denied any significant drug use except for the medications prescribed by Dr. Roe. However, in a letter dated December 23, 1985 from Dr. Lott to Dr. Bert, Dr. Lott mentions that the patient had a history of cocaine and amphetamine abuse and also using diet pills through a "physician friend." In the letter, it appears that the history of drug abuse was mentioned to Dr. Lott by Ms. Doe.
2. Ms. Doe reported that she initially began treatment with Dr. Roe in 1982 because of fears about how she would deal with beginning to train to become a teacher. However, in fact, she didn't begin classes towards getting a teaching credential until the spring of 1983. The classes that she was taking at the time were all in the industrial arts.
3. When asked about specific past psychiatric symptoms which led her to seek treatment, she stated repeatedly, "I don't remember."
4. She described her relationship with Dr. Roe as her primary love interest however, during the time that she was involved with him, she also had relationships with Stanley James and Don Walters, and it is unclear how many additional relationships she had as well.
5. In her deposition, Ms. Doe reported that she thought the sex was part of the therapy with Dr. Roe, however, in her history, she had been hospitalized after taking her clothes off in an emergency room in Minnesota, and also reported having taken her clothes off in a therapist's office, and that the therapist told her immediately to get dressed. In other words, in those other two episodes, no sexual contact occurred, and it was clear that her becoming naked was not part of the treatment, and, in fact, led to interventions on the part of the therapists.
6. Ms. Doe described severe anxiety to the degree that she frequently picked at her cuticles until they bled, however, during the IME, there was no evidence of such behavior on her hands.
7. Her current functioning she described as fairly difficult, with easily becoming overwhelmed by small tasks, however, I feel it is significant that she has been able to keep multiple appointments for independent medical exam psychiatric evaluations, neuropsychological evaluation, depositions and various other evaluations pertaining to the lawsuit.

In sum, Ms. Doe was a very impaired person with severe psychiatric pathology before ever meeting Dr. Roe and beginning a course of treatment with him. She had a long history of depression, with severe and potentially lethal suicide attempts, and intermittent suicidal ideation. She was unstable, had anxiety, had repeated failures with employment and with relationships. After beginning treatment with Dr. Roe in 1982, she began to have a period of what seems to be the greatest stability of her adult life. She was able to attend to school regularly and obtain her teaching credential and subsequently worked as a teacher. She received excellent evaluations and achieved tenure in her teaching job. Then, after having her child in March, 1988, she developed a significant depression and a severe decrease in her ability to function. This depression and decreased functioning has persisted ever since. She also reported developing a severe "startle reaction" ever since her child's birth. At this time, she remains significantly depressed, however, she has some partial remission brought on by the treatment with Prozac. In addition, she has some symptoms of post-traumatic stress disorder.

The inconsistencies mentioned above suggest that Ms. Doe has attempted to minimize her psychopathology prior to meeting Dr. Roe and to emphasize what her psychopathology is at the current time. In sum, she was severely impaired with respect to her emotional condition at the start of the treatment and she remains severely impaired in her emotional condition to this day.

Recommendations

Ms. Doe has been in psychotherapy fairly regularly since the age of eleven, and would clearly benefit from continuing to be in supportive psychotherapy. In addition, psychopharmacology is indicated to attempt to manage her depression and symptoms of anxiety. With the combination of psychotherapy and psychopharmacologic intervention, I feel that her prognosis is fair.

Sincerely,
Dr. Defense

§19:51 Defense Expert's Opinion Regarding Plaintiff's Brain Damage

Because Dr. Defense does not directly address the brain damage issue in her report in the *Doe v. Roe* case, her testimony from her direct examination in that case is included below:

Q. Doctor, is it your opinion that the plaintiff's suffering presently from an organic brain syndrome?
A. No. It's my opinion she has difficulty with attention, but in my opinion, that's a symptom of depression.
Q. So symptoms such as attention, concentration, can be evidence of both organic brain syndrome as well as major depression?
A. Yes.
Q. And in this case, it's your opinion, based on your work with her, that those symptoms that she has are reflective of major depression?
A. Yes, and until her major depression is completely in remission, you can't call it otherwise.

§19:52 Direct Examination on Plaintiff's Future Psychotherapy Needs

Because Dr. Defense in her report does not really deal with the issue of plaintiff's future psychotherapy needs, and because it is such a critical issue in the case, the portion of Dr. Defense's actual testimony on the issue is included below:

Q. And did you form an opinion as to her — that you estimated to be her treatment needs back in the early 1980's when she first started seeing Dr. Roe, given that diagnosis?
A. Yes, the appropriate treatment for those two diagnoses together would be medicine, psychiatric medicine to treat the depression, any existing — currently existing with that anxiety, so she might need two medicines, and also therapy in a supportive way, typically once a week, possibly twice a week at that time. But what she really would need — would have needed back in the '80's — would have been an ability to form a good alliance with somebody. She failed previous personal treatment and had not improved from that.
Q. I believe you said medical science — medicine is not an exact science. Is that a fair statement?
A. Absolutely.
Q. And within medicine, is psychiatry any more exact than the general body of knowledge referred to as medicine, or is it less exact?
A. In some ways, it's less exact. We can't for example, send off a blood test and have it come back, "yes, that person's borderline," or "this one's depressed, this one has neurocognitive difficulties." We don't have that level of sophistication yet with our tests.
Q. So there's an element of estimation, approximation, particularly when you're looking back 14 years to 1980 to determine —

A. Yes.
Q. — to determine what the treatment needs were?
A. Absolutely.
Q. What about forecasting in the future? Can you, with any degree of certainty, say in five years or in ten years, the probability of what exactly she's going to need, or any patient's going to need for that matter?
A. I don't think so. I mean, you can come up with opinions, but there's no way of knowing for sure. What really matters the most in trying to come up with a prognosis is looking at the past, what's helped, what hasn't helped, what's the course of the person's illness been?
Some of the illnesses we treat, and borderline's one of them, are not particularly amenable to treatment.
Q. What do you mean by that?
A. Well, that it's a life-long condition. That's the nature of a personality disorder. It doesn't just go away, but what treatment helps is to help the person manage it.
Q. Doctor, do you have an opinion as to the current and future treatment needs of this particular patient?
A. Yes, I do.
Q. Would you tell the jury what that opinion is?
A. Yes, I think that Ms. Doe needs ongoing, supportive psychotherapy, at best on a weekly basis, seeing a therapist once a week, where she will get support in acknowledging all she's been through and helping her to better cope with it.
I think, in addition to that supportive psychotherapy, she needs medication. I believe, at least at the time I saw her in December, she was on Prozac and Valium. There are other antidepressants that could be considered if she is not responding any better to the Prozac now than she was in December. So antidepressant treatment is certainly indicated. And anti-anxiety medication is something she's been on since college, the Valium, and she probably will need chronic anti-anxiety treatment.
Lastly, she might need a mood stabilizer medicine. She has rapid shifts up and down. That's a symptom of borderline. And mood stabilizers, like Lithium, Tegretol, can be very effective.
Q. Why, in your opinion, at least initially, not more than once a week for supportive psychotherapy?
A. I think a more intense therapy with more frequency of sessions would be just too intense for her to handle, and as a result, she would potentially be compensating even more, where she would cry hysterically or become more suicidal, and just not be able to handle all the emotions that the therapy would churn up.
In my unit, it's not uncommon for us to see people who are in such a therapy, people with borderline being seen three times a week or so, and get more suicidal, have an acute emergency and need to be hospitalized for a period of time, and then kind of shore them up and send them back out.
Q. And the need for those thoughts and the hospitalization with that intense psychotherapy is because of the reaction to that? It's too intense, too frequent, too much?
A. Too hot is the way that we talk about it — psychotherapy's getting too hot. And often the reaction of the patient is self-mutilation, cutting on themselves, or actual suicide.
Q. What about in four — three, four, five years, just randomly picking a number, what are your thoughts about — and your opinions about needs at that point?
A. First, I think it's hard to know exactly how she'll be in two, three or four years, but if she's able to form an alliance with a therapist whom she trusts and with whom she feels comfortable, and is able to gain some better strength through that relationship, it's possible that over time, it might be in a year — it might be two, it might be three — she'd be able to do a little bit deeper work, which we are now switching from supportive psychotherapy to a more insight-oriented psychotherapy.
Deeper work means looking more into your past, your parents, childhood episodes, and how they contributed to who you are now. That's the nature of the insight area of psychotherapy, but I think right now she'd be too fragile to handle that type of work.
Q. And supportive psychotherapy is — if I can be real sophomoric about it, basically hand-holding by a professional, supporting — "I want to help you," and just being there as a willing ear?
A. And acknowledging the validity of her feelings.
Q. So, after a period of supportive therapy once a week and evaluation of it, then there's a good likelihood that it might be best for her to get into insight therapy, which is going into the past, understanding those issues, dealing with that maybe on a more frequent basis?
A. There's a possibility, yeah, that she'd be able to improve from that work.
Q. It is your opinion that she's going to need psychotherapy the rest of her life?
A. Yes, I think so.

Q. Is it your opinion that the psychotherapy she would have needed back in 1980 would have continued for the rest of her life?
A. I think she would have benefited if she'd had it throughout the rest of her life, yes.
Q. And would she in 1980 have required, as best you can estimate, medication for the rest of her life for her mental problems?
A. Yes, just as she had been on it, what, since her pre-teen years?
Q. Now, you've formed an opinion about the pros and cons of hospitalization for this patient, correct?
A. Yes.
Q. What is that opinion, doctor?
A. What's good about hospitalization is that she would be prevented from any suicidal acts, and what I think is bad about a hospitalization and something we see very commonly in psychiatric hospitals is regression. What I mean by regression is in a hospital, your needs are all met, taken care of, and what we often see is that people become even more primitive, more childlike in a hospital setting, and actually worsen than get better.
Q. That's based upon your experience over ten years, plus working in a psychiatric hospital, etc.
A. Yes.
Q. So, you don't — because of that, you don't think it would be, in your opinion, best for this patient, given her present make-up and your expertise?
A. Yes, I agree.

§19:53 Cross-Examination of Defense Psychiatric Expert

By Mr. Winer: Q. Dr. Defense, you would agree that when Nancy began treatment with Dr. Roe, she was in a fragile psychiatric condition?
A. Yes.
Q. And with the borderline personality that she had at that time, you'd agree that she would have been needed — she would have needed to be treated with great consistency by a therapist; is that true?
A. Yes.
Q. Did Dr. Roe treat her with great consistency?
A. I don't think he treated her appropriately, no.

COMMENT 1

Right out of the box plaintiff attorney is attempting to emphasize defendant's misconduct with the defense causation and damage expert. If there was a correct way to treat plaintiff and defendant treated her in the exact wrong way, how can the jury take seriously Dr. Defense's opinion that plaintiff was essentially not damaged by defendant's misconduct? It defies logic that poor treatment would not have led to damage.

Q. Would you agree there was no consistency? No consistency of the kind that a borderline should be treated with?
A. Correct.
Q. You would agree that somebody like Nancy, fragile psychiatric condition, borderline, should have been treated with limit setting; is that true?
A. Yes.
Q. What's limit setting mean?
A. It's kind of related to consistency, but it means that if the patient is acting inappropriately, limits are placed on that inappropriate behavior.
Q. Did Dr. Roe treat Nancy with limit setting?
A. No.
Q. A patient like Nancy, after there's a therapeutic alliance, they should be — you should help them understand how they got to be where they are, is that true? Give them insight into their past?
A. If there is a possibility that would establish that alliance, then that would be the next task.
Q. Did Dr. Roe provide Nancy with any insight?
A. I don't think so.
Q. And a therapist should help a patient like Nancy affect change in the way that they relate to others in their life, correct?
A. Ultimately.
Q. Did Dr. Roe do that?
A. Not that I can tell.

Q. And Dr. Roe, on whose behalf you're testifying, should have formed strict boundaries with somebody like Nancy; is that correct?
A. Yes.
Q. Did he do that?
A. No.
Q. Dr. Roe, with somebody like Nancy, should have helped her with her self-esteem. Did Dr. Roe do that?
A. No, but also, to add, all these things, these are true with any patient, not just someone like Nancy.
Q. He didn't do it with Nancy, though.
A. No.
Q. And a therapist treating Nancy should have — should not have created an unhealthy dependence; is that correct?
A. Yes.
Q. Did Dr. Roe create an unhealthy dependence in Nancy?
A. Yes, I think so.
Q. And a doctor treating Nancy should not have entered into a dual relationship with her; is that correct?

COMMENT 2

Before attempting to take the defense psychiatrist on, on the points of her testimony which will differ with plaintiff's experts, plaintiff attorney felt it was important to get her to concede that she agrees with plaintiff's experts on all of the points that they have raised as to the standard of care violations and all of the actions by defendant which plaintiff's experts believe caused plaintiff great harm.

It is simply impossible for the jury to believe that defendant could commit all of these wrongful acts and not harm plaintiff.

Now plaintiff attorney has set the defense psychiatrist up to ask questions about whether she believes Dr. Roe injured plaintiff, an opinion that she has not really conceded up until this point. After going through the litany of Dr. Roe's misconduct toward plaintiff Dr. Defense realizes that she will look foolish if she does not concede that Dr. Roe caused plaintiff harm. Plaintiff attorney is in a position to move in and ask the question about whether Dr. Roe injured plaintiff.

Q. And you believe, do you not, that Dr. Roe injured Nancy; is that correct?
A. Yes, I do.
Q. And he injured her by all of these things that we've listed that he did wrong; is that correct?
A. Yes.
Q. And those things that we listed that he did wrong are below the standard of care; is that correct?
A. Absolutely.

COMMENT 3

Now that plaintiff attorney has secured the defense psychiatric expert's concession that Dr. Roe has harmed plaintiff, he is going to ask Dr. Defense how she believes he caused that harm. Thus, helping plaintiff's causation case by essentially providing her own version of the psychodynamic mechanism of injury. She has to answer this question. If she says she doesn't know, she looks foolish. Thus, this question cannot help but end up with an answer that will help plaintiff's case.

Q. Can you explain to me the mechanism by which Dr. Roe injured his patient?
A. Well, I'd need you to be a bit more specific about that.
Q. I mean the psychodynamic mechanism by which he exploited her fragility, her vulnerability.
A. There's many ways. It's a very long list. I guess the best way to explain it is that she is someone who had a personality disorder that made her vulnerable, and the boundary violation, the sexual acts, the inappropriate prescription of medications all worsened her personality disorder and also made her depression worse.
The third part is that it left her with some post-traumatic stress disorder symptoms that she didn't have before.
Q. How did it happen? I understand what he did wrong, I understand what you're saying that he damaged her, but how? What's the mechanism? Do you know that?
A. Well, in part she developed a dependency on the relationship, thought of herself as being quite special, and then as time went on and she later received that pamphlet from a different therapist and learned that in fact many things happened that were indeed inappropriate, that specialness disappeared, and then she felt quite taken advantage of and betrayed.

COMMENT 4

Although Dr. Defense is not as thorough in her answer to the question of the psychodynamic mechanism of plaintiff's injury as were plaintiff's experts, she does essentially agree with the basic mechanism of injury described by plaintiff's experts. One could imagine that Dr. Defense was testifying on behalf of plaintiff, not defendant, in the answers above. Also, because of the way this testimony has been set up, Dr. Defense has moved a long way from the opinions in her report.

Q. What held Nancy to this relationship for these years?
A. Uh-hum.
Q. — What do you believe held her in so long?
A. I think it was a mixture of different things.
Q. What do you think?
A. One thing was the sense of being special that she spoke of, another was being told that he would testify that she was a fit mother if there was any sort of case that she was not a fit mother. Another was the SSI; that kept her having income. He maintained her on SSI. A fourth is the medication.

COMMENT 5

Plaintiff attorney still has some concern at this point that some of the jurors may blame plaintiff for staying in the relationship for such a long period of time when Dr. Roe's conduct was so obviously outrageous and harmful. In the questioning above, plaintiff attorney attempts to have the defense expert, join plaintiff's experts in an explanation for why plaintiff stayed in the relationship with Dr. Roe for such a long period of time. Dr. Defense gives an answer which is very satisfactory to plaintiff's case on this issue.

Q. Do you agree it's the professional's responsibility for what happened in this relationship, or do you blame Nancy?
A. I wouldn't use the word "blame" towards her. I think that her — her contribution was her symptoms, her illness, pre-existing personality disorder and depression. But I would couple that with her wish to have an income, and that — that's a — separating out the SSI is a conscious thing that she wants. And that kept her seeing this man who was giving her approval for SSI.
In that sense, that's her contribution, that she participated in that part of it quite consciously, which is different from a personality disorder.
Q. So it's your opinion that she contributed to this relationship because she wanted to be on SSI and she didn't want any kind of a career or anything like that. Is that your opinion?
A. Well, I think the SSI is a part of it. Clearly, she wanted a career, but also, in the beginning of the relationship, she wanted SSI.
Q. Not before the sexual relationship started; is that correct?
A. Before the sexual relationship she wanted the SSI. That was my understanding of why she first saw him.
Q. Yes, I understand that, but by the time she saw him for treatment, she had this goal of being a teacher; is that right?
A. That's right, yes.
Q. So she was trying to get off SSI.
A. She was trying to be a teacher, yeah. Actually, you know, I don't remember at what point the SSI stopped or if it stopped.

COMMENT 6

Plaintiff attorney is attempting to bate Dr. Defense into blaming plaintiff for her own injuries. Although it is very useful to have the defense expert agree with plaintiff's experts on all the major points, plaintiff attorney also wanted the jury to get mad at Dr. Defense. If Dr. Defense blames the victim and then plaintiff attorney can convince the jury that the victim does not deserve blame, this should make a significant impact on the jurors' opinion of how far Dr. Defense will go to try to help the side which hired her.

Q. Okay. And, doctor, you'd agree that Nancy was damaged by Dr. Roe, is that correct?
A. Yes.
Q. Okay. Let's talk about post-traumatic stress disorder. I think Dr. Burstein told us about some of the symptoms, and I'll just put out, you know — You believe that she does have a sleep disorder; is that correct?

A. She told me she wakes up at night sometimes to urinate, sometimes without that.
Q. She does have anxiety; is that correct?
A. Yes, even going back in time to when she was in college, in high school.
Q. Does she have anxieties as a result of Dr. Roe?
A. I think it's worse, yeah.
Q. Does she have depression as a result of Dr. Roe?
A. I think she clearly has depression. It is because of what happened in the nature of the relationship, and a component is pre-existing.
Q. Does she have rage reactions now?
A. She didn't tell me about rage reactions.
Q. You didn't see that anywhere in the records, or the depositions?
A. Actually, I remember seeing it in the records of Dr. Goldstein.
Q. Would that be as a result of Dr. Roe?
A. It could be.
Q. She has problems with concentration and attention now; is that correct?
A. That's correct.
Q. She has flashbacks of Dr. Roe?
A. Yes.
Q. She has nightmares of Dr. Roe?
A. Yes.
Q. She has shame and self-blame as a result of her feelings about Dr. Roe.
A. Yes, she does.
Q. She has intrusive ruminations?
A. Uh-huh, yes.

COMMENT 7

Dr. Defense has already conceded in her report and on direct examination that plaintiff has some of the symptoms of post-traumatic stress disorder; however, she does not give plaintiff the diagnosis of post-traumatic stress disorder. In the line of questioning above, plaintiff attorney is attempting to have Dr. Defense concede that plaintiff, in fact has all of the symptoms of post-traumatic stress disorder found by all of plaintiff's experts. Dr. Burstein in particular, made a chart of plaintiff's symptoms of post-traumatic stress disorder and plaintiff attorney is going through that chart with Dr. Defense. He obtains Dr. Defense' concession that plaintiff is suffering from all of the symptoms of post-traumatic stress disorder listed by Dr. Burstein. Things are going so well at this point, that plaintiff attorney attempts to take on Dr. Defense on the issue of whether Dr. Roe's conduct constituted a sufficient stressor to qualify plaintiff for the DSM-III (at the time) diagnosis of post-traumatic stress disorder. This is not a battle that plaintiff attorney would necessarily want to fight with a more bullheaded defense expert.

Q. So she would fulfill all of the criteria of a post-traumatic stress disorder other than you believe this wasn't a sufficient stressor; is that correct?
A. I wouldn't say it wasn't a sufficient stressor, it's just different from how the diagnosis is laid out in our manual.
Q. Was this seven-year sexual relationship with all these things happening, including the breast feeding and sex in front of her son when he was crying, are those competent in your mind, all these acts of Dr. Roe's to cause a post-traumatic stress disorder?
A. Yes.
Q. So then we would agree, for all practical purposes, just setting semantics aside, Nancy Doe is suffering from a post-traumatic stress disorder as a result of Dr. Roe's conduct?
A. Yes.

COMMENT 8

By cornering Dr. Defense, plaintiff attorney has forced her to make a major concession in her testimony, which she had refused to make up until this point, that is, that "setting semantics aside, Nancy Doe is suffering from a post-traumatic stress disorder as a result of Dr. Roe's conduct."

At this point in the cross-examination, there is virtually no difference between the testimony of plaintiff's experts and Dr. Defense on the key issues of liability, causation and diagnoses. Two major fights remain, however. They are, the issues of the extent of plaintiff's injuries and the extent of the need for future treatment.

Q. In addition to the symptoms that Dr. Burstein laid out, Ms. Doe's having other problems as a result of Dr. Roe; is that correct?
A. I'd have to know which other problems you're referring to.
Q. Would you agree he aggravated her previous difficulties with trust?
A. Yes.
Q. And you would agree, doctor, that trust is essential for psychotherapy?
A. Absolutely.
Q. Is that going to make it harder for Nancy to get better?
A. It's going to make it harder for her to be able to establish a relationship with a new therapist.
Q. She isn't going to get better without a relationship with a therapist; is that correct?
A. It's a first step. She clearly has had difficulty in establishing such trust in previous therapeutic relationships, too.
Q. Do you agree Dr. Roe lowered Nancy's self-esteem; is that correct?
A. I think that the course of their relationship lowered her self esteem, yeah.
Q. These nightmares that she has, are these a serious symptom?
A. All of what she has are serious, yeah.
Q. And you believe those are as a result of Dr. Roe?
A. It's part of the PTSD symptoms that she's got.
Q. And you would agree that Dr. Roe's improper conduct made her dependent on Valium; is that correct?
A. Well, from my review of the records, she was dependent on Valium before she first saw him.
Q. Did that get worse with Dr. Roe?
A. I don't know because I don't know the doses when she saw him, but she's been on Valium since college.
Q. Would you agree that Dr. Roe made her dependent on stimulants?
A. Yes.
Q. What does that mean, to be dependent on stimulants?
A. It means to have a tremendous craving for the substance.
Q. And it was Dr. Roe's malpractice that has led her to have this?
A. I believe his prescription of the stimulants without adequate monitoring led to this, but I also saw in my records mention of illicit stimulants.
Q. We've already talked about that with other witnesses. You'd agree that Nancy didn't realize that she was betrayed by Dr. Roe until the end of the relationship with him; is that correct?
A. That's right.
Q. You would agree that she now has a loss of hope?
A. She reports having a loss of hope, yes.
Q. She has no sexual relationships; is that correct?
A. As far as I know.
Q. Do you believe that Dr. Roe contributed to that situation?
A. Yes, I think so.

COMMENT 9

Dr. Defense has come a long way in terms of describing plaintiff's injuries and damages as a result of Dr. Roe from the position that she took during direct examination and in her report.

Remember, Dr. Defense's opinion in her report was "She [plaintiff] was severely impaired with respect to her emotional condition at the start of the treatment and she remains severely impaired in her emotional condition to this day." By not directly attempting to take on Dr. Defense in this very global opinion, but rather, by getting Dr. Defense to concede points regarding damage caused by Dr. Roe piece by piece, plaintiff attorney has hopefully made it very clear that Dr. Defense is conceding that plaintiff was severely injured as a result of defendant's misconduct and no matter how impaired she was to begin with, she is far more impaired at this time.

Q. Do you believe that Dr. Roe injured Nancy's relationship with her son?
A. That one's harder because I think that anybody with a severe borderline personality disorder such as she had, almost inevitably, they have difficulty with parenting.
Mr. Jones: Objection. I didn't hear the rest of the witness's answer
The Witness: I'm sorry. I said inevitably it's quite common for people with borderline personalities to have difficulty raising their children.
By Mr. Winer: Q: Did Dr. Roe help Nancy with this situation?

A. With the raising of her son?

COMMENT 10

For one of the first times in her testimony Dr. Defense has disagreed with plaintiff's experts on a significant point, that is, Dr. Defense is not conceding that Dr. Roe injured plaintiff's relationship with her son. Rather than fighting with the defense doctor on this point, plaintiff attorney attempts to have Dr. Defense go out on a limb and testify that Dr. Roe helped plaintiff in her relationship with her son, a position which a jury will never believe and a position which will cause Dr. Defense to lose credibility.

Q. Did he help her with the difficulty that would have been anticipated that Nancy would have had anyway?
A. Not that I'm aware of, no.
Q. In fact, did he injure her in that area?
A. I think the nature of the sexual relationship, with the baby present, certainly could have confused her sense of boundaries, what's hers, what's the child's, what's Roe's. And all of that could have been difficult for her to sort out.
Q. Do you believe it was?
A. Probably, Yeah.

COMMENT 11

Dr. Defense refused to take plaintiff attorney's bait, but the result is almost as good, she concedes the point that Dr. Roe injured plaintiff's relationship with her son.

Q. And you'd agree that when she had her achievements as a teacher, this is the period of the greatest stability in her life; is that correct?
A. It appears like it was, yes.

COMMENT 12

Again, without taking on Dr. Defense directly on her position that plaintiff's condition was essentially unchanged from the time that she met Dr. Roe until the time that she left Dr. Roe, plaintiff is obtaining the defense psychiatrist's concession that major portions of plaintiff's life were injured by Dr. Roe.

Q. And do you believe that Dr. Roe participated in ending that stability?
A. It seemed to me what ended it more than anything was the pregnancy and a worsening of her depression after the pregnancy.
Q. Which Dr. Roe aggravated; is that correct?
A. There was a period of time that she wasn't even seeing him that often, during the pregnancy and in the immediate post-partum time. It was really unclear to me what exacerbated depression after giving birth to the boy.

People with mood problems, such as she's had all her life, often have what we call a post-partum depression, and I think she had that, and it just persisted.

COMMENT 13

Dr. Defense is not willing to concede the point that Dr. Roe is responsible for the end of plaintiff's teaching career. She is blaming it on plaintiff's pregnancy and post-partum depression. Plaintiff attorney believes that this opinion by Dr. Defense may have some validity, thus, instead of reinforcing this potentially harmful testimony, plaintiff attorney quickly switches to another point.

Q. Is the end of this litigation going to be a period of instability for Nancy?
A. Quite likely.
Q. Why?
A. I think at this point, she's assumed an identity as a litigant involved in a court case. That has some specialness to it. When the case ends, she won't have that. That will leave her with some emptiness, potentially.
Q. You'd agree that on your — well, strike that. With good treatment, strike that — When Nancy first saw Dr. Roe could she have been helped by good treatment?
A. It's possible, yes.
Q. Did she receive good treatment?

A. No, I don't think so.
Q. You would agree that for the seven years that are at issue in this case, she received bad treatment; is that correct?
A. Below the standard of care, as I've said, yeah, absolutely.
Q. So she went all those years without in any way being helped; is that correct?
A. Yes.
Q. And she wanted to receive help when she went to see Dr. Roe, didn't she?
A. Yes.
Q. And you mentioned that Nancy's a borderline. Borderline-Personality-Disorder people can have successful careers?
A. Excuse me. I didn't hear the last —
Q. People with borderline personality disorders can have successful careers?
A. Some, absolutely.
Q. Some can have, although with difficulty. They can have relationships?
A. Yes, but typically the ones that succeed at careers and have relationships have not had as tumultuous an adolescence and early childhood as she had.
Q. But good treatment can help a patient that's a borderline establish a career and maintain; is that correct?
A. It can help, but as I said, someone who is as severe as her, it's less likely that it would have a really dramatic impact on their future stability, but it would certainly help.
Q. You'd agree with me that Nancy never really did have adequate treatment before Dr. Roe, is that correct?
A. She had never had treatment that lasted a very long time. I think the longest was a couple of years with a female therapist.
Q. This was an opportunity where she could have made some improvement with Dr. Roe, is that correct?
A. As with her previous therapist, sure.
Q. And you agree that Nancy is a worse candidate for therapy now than she was when she first saw Dr. Roe?
A. On the issue of being able to establish trust.

COMMENT 14

The fact that Dr. Defense concedes that plaintiff was a worse candidate for psychotherapy, is a major concession as far as plaintiff attorney is concerned because it allows him to argue that all of the experts on both sides agree that Dr. Roe not only injured plaintiff, he also took away the cure; because the only way that plaintiff can be cured is through successful therapy and successful therapy requires trust.

Q. You met with Mr. Jones before you testified today?
A. Yes, I did.
Q. When did you meet with them?
A. Last night.
Q. For how long?
A. I don't recall exactly. About two or three hours.
Q. You went over what you would testify to?
A. We went over my deposition and my report.
Q. And I took your deposition in this case, right?
A. Yes, back in January, I believe.
Q. And you charged me for taking that deposition; is that right?
A. That's right. I charged for my time.
Q. How much did you charge for that?
A. $300 an hour.
Q. What's your estimate of how much you've billed in this case?
A. I haven't calculated it out entirely, but it's been about 25 or so hours, something like that.
Q. Doctor, before coming here, you actually took a course in forensic psychiatry; is that correct?
A. Yes, I attended a seminar in forensic psychiatry at one of the annual meetings of the American Psychiatric Association.
Q. What's forensic psychiatry?
A. The course is about how to work with attorneys in doing assessments of clients, in understanding what some of the questions are that will come up and understand legal terms.
Q. And you're actually taught in this course how to comport yourself in front of a jury, correct?

A. That was one of the many things discussed. Other things were laws of evidence, laws of depositions, things like that.
Q. And you were taught how to dress in front of a jury; is that correct?
A. That was one of the things they mentioned.
Q. And you're taught how to handle and avoid traps of cross-examination; is that correct?
A. As I said, it covered a lot of different material, but some of it was indeed how to — how to respond to questions in deposition and in trial.

COMMENT 15

Plaintiff attorney was obtaining so many concessions from Dr. Defense that he did not want to, up until this point, attack her credibility. However, Dr. Defense has now refused to concede a few points, so plaintiff attorney decides that this is an opportunity to demonstrate to the jury that she is a "hired gun" attempting to do her job for the defense. In fact, Dr. Defense has rarely testified in civil cases, which is why plaintiff attorney takes the time to point out that she has actually taken a course which was meant to increase her expertise as a testifier. Thus, attempting to create the impression that she has been trained in how to handle cross-examination, yet, she still concedes all of the major points of plaintiff's case.

By Mr. Winer: Q. All right. Dr. Defense, as part of Dr. Roe's duty to comply with the standard of care, he had a responsibility, did he not, to help Nancy prepare for the birth of her child during the times that she saw him during her pregnancy? Is that true?
A. I'm not sure what you mean by "prepare for the birth."
Q. Well, it could be anticipated for somebody like Nancy that she was going to have difficulty handling a child; is that correct?
A. Yes, as I said yesterday, anybody with a severe borderline personality disorder, it's quite common for them to have trouble with that.
Q. And as her treating psychiatrist during that time period, he had a responsibility to help her prepare for the birth — in other words, the emotional aspects of the birth?
A. Yes.
Q. And instead of helping her prepare for the birth, he engaged in sexual activity with her during the pregnancy; is that correct?
A. Yes.
Q. So he didn't help her prepare for the birth; is that correct?
A. Not emotionally, no.
Q. And that made — so not only did he not help her prepare for the birth, the fact that he's having sex with her and doing the other things wrong we've already gone over, is going to make it more difficult for Nancy to handle the birth; is that correct?
A. Potentially, yes.
Q. And then after the baby was born, then she comes to him. Dr. Roe had a responsibility, did he not, to help her with her issues around child raising, is that true?
A. Absolutely.
Q. And instead of helping her with her issues around child raising, Dr. Roe did things like breast fed from her; is that correct?
A. Yes.
Q. Was that helping her with child raising?
A. No. I don't think so.
Q. Was that making child raising more difficult for her?
A. It certainly was confusing for her in terms of boundaries.
Q. And Dr. Roe having sex with her while her son was crying on the floor, did that make things more difficult for Nancy?
A. As I said before, that behavior was totally inappropriate.
Q. And then when Nancy was getting ready to return to work in September of '89 and was still seeing Dr. Roe, she needed help preparing to go back to work, didn't she?
A. Probably, yes.
Q. And it would have been Dr. Roe's responsibility as her psychiatrist to help her go back to work; isn't that correct?
A. To help her prepare, yes.

Q. And telling her that she doesn't need to work, she could be on SSI the rest of her life, that wasn't helping her, was it?
A. I don't think so, no.
Q. That was hurting her, wasn't it?
A. Potentially harming her self-esteem, yes.
Q. And when he was telling Nancy, "You don't need to work, you can devote your life to me," was that helping her return to work as a teacher?
A. No.
Q. In fact, Dr. Roe, instead of helping her return to work as a teacher, made it a great deal more difficult for her to undertake that task; isn't that true?
A. Possibly, yes.
Q. Possibly or probably?
A. Well, I think that his behavior definitely contributed to her difficulty when she returned.
Q. And you know, Dr. Defense, that Nancy was only able to return to work for one day and she fell apart, right?
A. That's correct.
Q. And you know, doctor, that for two and a half years she'd been a successful teacher; isn't that true?
A. Yes.
Q. And she achieved tenure, despite the fact we know from '82 to '83 she was receiving extraordinarily poor treatment from Dr. Roe; isn't that true?
A. Yes. As I said, that was the period of the most stability she'd had in her whole life.
Q. But even with bad treatment, she was able to work and have this wonderful stability; is that true?
A. During that time, she had good stability, yes.
Q. And it's your opinion now, doctor, that Nancy will never be able to work again; is that true?
A. No. What I've stated is that with good treatment, it's possible she'll be able to work again.
Q. Doctor, isn't it probable that Nancy will never be able to work again as a teacher?
A. If probable is defined in a certain way maybe I'd been able to answer it better.
Q. Is it your opinion, more likely than not, that Nancy will never be able to return to work as a teacher?
A. I think it's possible, yes.
Q. In this case, things need to be decided by probabilities. In your opinion, she probably will not return to work as a teacher; is that correct?
A. If it's defined as more than 51 percent, yes.
Q. Thank you, doctor.

COMMENT 16

During earlier cross-examination Dr. Defense refused to concede that Dr. Roe contributed to plaintiff's failure to be able to return to work as a teacher. With the above line of questioning, plaintiff attorney took a different approach with the expert on the very same issue. This time, plaintiff attorney carefully asked a series of questions which would force defendant to concede that Dr. Roe failed to prepare plaintiff for childbirth and then child raising. Without noticeably changing the subject, he then attempted to have Dr. Defense concede that Dr. Roe also interfered with plaintiff's ability to return to work.

Finally, plaintiff attorney convinced Dr. Defense to concede that with "probability," which is the legal standard, plaintiff would not be able to return to her work as a teacher as a result of the conduct of Dr. Roe.

Q. Now, doctor, what I'm — I'll start talking about your opinion regarding Nancy Doe's future treatment needs. I want to ask some background questions first.

COMMENT 17

Sometimes, like in the last Section, plaintiff attorney does not want to telegraph where he or she is heading during questioning because plaintiff attorney wants the defense expert to be confused. Other times, plaintiff wants to make it clear exactly what subject matter he or she is covering so the jury can more easily follow the testimony. Plaintiff attorney and Dr. Defense both know that the issue of future treatment needs is going to be the major area in which attorney and defense expert will collide. Therefore, there is no reason for plaintiff attorney to not make sure that the jury also comes along for the ride and understands exactly what is at stake in this portion of the cross-examination. At this point, plaintiff attorney is confident that if the defense psychiatrist sticks to her position that essentially no future psychological treatment has been necessitated by Dr. Roe's misconduct, that, a jury is going to believe that the defense expert's testimony is incredible and will reject it. On the other hand, if plaintiff attorney can turn the defense

expert around to plaintiff's side of this issue, it is important that the jury is able to follow the significance of the testimony.

Q. You've never evaluated a patient or a litigant in a case like this — a case of sexual abuse and this kind of abuse by a therapist; is that true?
A. Not abuse of this magnitude. I have worked with people — one person who I remember who allegedly had had sex with a therapist.
Q. That was a male patient?
A. A male patient and a male therapist, yes, but some of the issues that patient spoke of were similar. The magnitude was not the same but the issues were similar.
Q. That was a patient who you just simply prescribed medication for?
A. No, that was a patient where I did an evaluation as to whether medications were appropriate. I didn't actually prescribe them.
Q. You saw that patient once?
A. No, I think it was three or four times.
Q. And that was just to see whether medication would be appropriate for that particular patient?
A. Well, I wouldn't say "just." It was to do a diagnostic evaluation, work with the non-psychiatrist therapist to — helping to understand the extent of this gentleman's difficulties.
Q. You've never evaluated a woman patient in a case like this; is that correct?
A. Not who's been sexually abused by a therapist, but I have evaluated numerous women who have been — had a similar character structure and were victims of other forms of sexual abuse from people in positions of power, such as people they were employed by or fathers and step-fathers.
Q. Just so we're clear, you've never evaluated a woman patient who's been sexually abused by a therapist; is that correct?
A. Yes.
Q. And you've never treated a woman patient who's been sexually abused by a therapist; is that correct?
A. Same thing as the previous question.
Q. And you've never supervised another therapist who was working under you who was treating a patient who had been sexually abused by a therapist; is that correct?
A. Let me try to remember. Actually, I think over the years there have been a few patients who have been under my supervision. Therapists were under my supervision where they had had such histories.
Q. Dr. Defense, you recall having your deposition taken in January?
A. Yes.
Q. And do you recall that I explained to you that if you didn't —
Mr. Jones: Page and line, please?
Mr. Winer: I'm not on a page and line.
Mr. Jones: It's improper impeachment then, improper cross-examination and argument.
Mr. Winer: I'm asking preliminary questions.
The Court: Go ahead.
By Mr. Winer: Q. I'll repeat it or rephrase it if you don't understand. You recall your deposition?
A. Yes.
Q. And I advised you were under oath and the oath would be the same thing as the trial?
A. Correct.
Mr. Winer: I'd like to read Dr. Defense's deposition, page 20, line 18 through line 21.
"Q. You had never been involved in terms of treating or supervising a case with a female patient who is alleging she's been abused by a therapist; is that right?"
"A. Not that I can recall."
The Witness: Uh-huh.

COMMENT 18

The above testimony not only reveals how one cross-examines a witness to impeach them based on their deposition testimony but, also is intended to demonstrate to the jury that although Dr. Defense is a qualified psychiatrist, she does not have nearly the experience on the subject matter of therapist/patient sex abuse as does plaintiff's main expert, Dr. Peter Rutter, M.D. Dr. Rutter has seen a thousand female patients who have been through circumstances similar to what Ms. Doe has been through; Dr. Defense has seen none. The jury will later

be instructed that the qualifications and knowledge of the subject matter of an expert should figure into their decision of which expert to believe on an issue. Here, plaintiff clearly has the advantage.

Plaintiff attorney makes his point without trying to humiliate Dr. Defense, but in a matter of fact manner based upon her lack of expertise in the particular subject matter of this lawsuit.

By Mr. Winer: Q. Doctor, on your direct examination yesterday, you explained to the jury that it's important to stay abreast of the literature; is that correct?

A. Yes.

Q. And Dr. Defense, isn't it true that you have never sought out to read specifically any articles or any books on the subject of therapist sex abuse; is that correct?

A. Not — well, I don't know if I would say it the way you have phrased it. I read many different articles on many different subjects, constantly.

When a specific topic comes up because of a patient on the unit because of an issue brought to me by a resident I'm supervising, I will attempt to seek out information. I've attended some talks at conferences on this topic and have in my files a few different articles. The authors, I frankly don't remember right now, but I have on occasion read on this topic.

I haven't specifically gone and done a literature search and sought articles, but when they come across my desk in journals, I've read about it, like I read about everything periodically.

Q. But you've never sought out to read any books or articles on therapist-patient sex abuse even though you knew that today you'd be testifying in a case like that, correct?

A. No, I haven't read any books, no.

Q. And you haven't read any articles in the American Psychiatric Journal?

A. The main journal for our field is the American Journal of Psychiatry. It's called the Green Journal.

Q. You know, doctor, there's been extensive writing in this area, and it's true you have not done any — you have not read anything on the area other than the few articles that may have been in the journal that you read?

A. That's correct.

Q. Doctor, did you read "Sex in the Therapy Hour: a case of professional incest," by Bates and Brodsky?

A. No.

Q. Did you read "Therapist-Client Sexual Involvement: A Challenge for Mental Heath Professionals and Educators," by Jacqueline Bouhutsos?

A. No.

Q. Did you read "Harmful Effects of Post termination Sexual and Romantic Relationships with Former Clients," by Brown?

A. No. As I said, I have not read specific articles that I can recall the titles of.

Q. Did you read "Physician Sexual Misconduct and Patients' Responses," by Burgess?

A. No.

Q. Did you read "Sexual Intimacies Between Therapists and Patients," by Butler and Zelen?

A. No.

Q. Have you read Dr. Rutter's book, "Sex in the Forbidden Zone"?

A. No.

Q. Did you read "Therapist-Patient Sex Syndrome," by Kenneth Pope?

A. Not that I recall.

Q. If I went down all this list of books, you wouldn't have read any of them; is that correct?

A. No, that's not correct. As I said, I've read a few articles. I don't recall the titles or the authors, so I don't know if in that list would be the ones I've seen.

COMMENT 19

Plaintiff, through her experts, has made it clear that there is a substantial field of research and writing on the subject matter of therapist/patient sex abuse. Through the portion of cross-examination above, plaintiff attorney makes it clear that Dr. Defense is unaware of the great majority of this literature. Again, everything else being equal this should make her opinions carry less weight than the opinions of plaintiff's experts, particularly Dr. Rutter. The damage that is caused by therapist/patient sex abuse is unique. Virtually every scholar who has studied the subject matter has concluded that victims of therapist sex abuse require long-term, intense psychotherapy, and many victims require hospitalization. Plaintiff attorney is attempting to make the point that there is no way that Dr. Defense could know of all of this research and experience of the specialists in the field, because, she has never read about it. Thus, her opinions on future treatment needs should be called into question.

Q. Doctor, you — I think you mentioned to Mr. Jones that you've written some articles?
A. Yes.
Q. The articles you've written would have nothing to do with this case; is that correct?
A. The articles I've written had to do with psychopharmacology, new drugs in psychiatry, also a study of smoking in psychiatric patients. It's on issues pertaining to inpatient psychiatry, primarily.
Q. It would have nothing to do with the issues in this case; is that correct?
A. Yes.
Q. Am I correct?
A. Yes.
Q. Dr. Defense, you have no experience or expertise in psychological testing; is that correct?
A. That's correct. That's the purview of the psychologist, not the psychiatrist.
Q. You have no expertise in neuropsychological testing; is that correct?
A. Isn't that what you just asked?
Q. I asked about psychological testing. Now I'm asking about neuropsychological testing.
A. Neuropsychological testing is a subset of psychological testing.
Q. So your answer would be the same?
A. Uh-huh.
Q. And you would agree that testing by a neuropsychologist like Dr. Ruff — who's testing brain function — his tests are more sophisticated than the kind of mental status exam done in your office; is that correct?
A. The type of testing that is done in neuropsychological testing is more thorough than a screening mental status exam done by a psychiatrist.

COMMENT 20

Again, plaintiff attorney is emphasizing the fact that although Dr. Defense may be a very fine psychiatrist, she is the wrong expert for this case. Further, she lacks the expertise on most of the issues in the case, as opposed to plaintiff's experts who have a great deal of expertise. Dr. Rutter has tremendous expertise on the issue of therapist/patient sex abuse, Dr. Defense has very little or none. Dr. Burstein has expertise on psychological testing, Dr. Defense has none. Plaintiff's neuropsychologist, Dr. Ruff is a leader in the field of neuropsychology, Dr. Defense has no expertise in that field.

However, defense attorney has billed Dr. Defense as an expert in the inpatient hospitalization of plaintiffs, a major issue in the case since plaintiffs' experts are stating that part of what plaintiff needs is a one-to-two-year long-term hospitalization at a specialty hospital at a cost of approximately three hundred thousand to eight hundred thousand dollars. Plaintiff will take Dr. Defense on, on this issue below.

Q. Now, you do a lot of hospital work, doctor; is that correct?
A. Yes.
Q. But the hospital work you do is called acute care hospital work; is that correct?
A. We don't use that label, but I suppose it fits.
Q. At the institute where you do your work, the patients that you see are generally there for just a couple of weeks; is that correct?
A. That's the average length of stay at pretty much all psychiatric hospitals.
Q. Acute care hospitals; is that correct?
A. Yes.
Q. And you don't have any experience in the long-term type of hospitals like Meninger's; is that correct?
A. That's right.

COMMENT 21

Despite defense attorney's earlier claim to the jury that Dr. Defense has more expertise in hospital work than plaintiff's experts, plaintiff attorney points out through the cross-examination of Dr. Defense that her expertise is in "acute" short-term hospitalization of several weeks. This is not the type of hospitalization recommended by plaintiff's experts and most of the experts who have studied the subject of therapist/patient sex abuse.

Q. And isn't it true, doctor, that you don't know, because of your lack of expertise in the area, whether Nancy would be or would not be a good candidate for Meninger's; is that correct?

A. I don't know the specifics of the admission criteria of a hospital such as that. What I know is from my work with patients who have similar character structure, similar stressors, and what seems to help them in the work we do at the hospital and also the outpatient work.
Q. But am I correct that you don't feel you know whether Nancy would or would not be a good candidate for Meninger's; is that correct?
A. No, in my opinion, she would not be a good candidate for that kind of long-term care. I think it would potentially cause worsening of symptoms as opposed to improvement.
I think it would also create a dependency on that sort of — being totally taken care of, and it would be much harder for her to return to the world.
Mr. Winer: I'd like to read from page 86, line 23, to page 87, line 5, of Dr. Defense's deposition.
Mr. Jones: What line on the pages? I don't think there's any foundation laid, your Honor.
Mr. Winer: Then I would like to read from 86, line 23, to 87, line 22.
Mr. Jones: No foundation. Objection.
Mr. Winer: Your Honor, it's impeachment.
Mr. Jones: I'm objecting; there's no foundation.
The Court: In what sense?
Mr. Jones: I don't think there's anything to be impeached. She hasn't testified to anything contrary to what she testified to at her deposition.
The Court: Overruled.
Mr. Winer: Thank you, your Honor.
The Court: Don't thank me. It may be against her.
Mr. Winer: I won't thank you next time.

[Reading from Dr. Defense' deposition]

"Do you have an opinion whether or not Nancy Doe would be a good candidate for a long-term facility like Meninger's if arrangements could be made for her son?
A. I'm not familiar enough with the admission criteria for the few long-term hospitals that remain to be able to answer that. I don't think at this point she would meet acuity standards for inpatient stay with the average general psychiatric hospital.
Q. What do you mean, 'acuity standards'?
A. A level of functioning that warrants a level of care that occurs in a hospital, or a level of suicidality that's severe enough, or a level of psychosis that's severe enough.
Q. Well, would you agree that a place like Meninger's would be better suited than a place like your institution, for instance, to handle people with long-term personality disorders, like borderline personality disorders, where you're not necessarily in for an acute problem but rather for a long-term illness?
A. I'm not sure if long-term inpatient treatment, such as a year long to two years long has been proven to be more effective than a long-term outpatient relationship. I've never seen any data comparing the two, and clearly, long-term outpatient treatment is something that can be of use to people with problems similar to her."

[End of reading from deposition transcript.]

By Mr. Winer: Q. Do you agree with that?
A. Yes, I think I just said the same thing.

COMMENT 22

Plaintiff attorney was not able to hit a home run with Dr. Defense on the issue of long-term hospitalization. However, plaintiff attorney hopes that he at least has severely discounted the defense position that Dr. Defense should be believed over plaintiff's experts on the issue because she has more experience with hospitalized patients. Below, plaintiff attorney attempts to establish that Dr. Defense has very little experience in the treatment of patients who require long-term outpatient therapy.

Q. Dr. Defense, you wouldn't treat — strike that. You've never done in your career, have you, long-term outpatient treatment?
A. Yes, I have.
Q. What do you consider long-term?
A. Well, there's no specific definition for that, but I contrast it with what's now called brief psychotherapy, which is usually a very specific course of, say, 12 sessions. To me that's brief. Long-term is a more open-ended, without-a-specific-termination-date kind of therapy, and I have done that.

Q. You've never treated a patient for more than two and a half years, have you?
A. Actually, yes, I have. You had asked if I treated someone with borderline personality disorder for any length of time, but for that specific diagnosis, two and a half years is approximately the longest time I've worked with somebody. For other diagnoses, I've treated some patients for as long as six years.
Q. How many patients do you treat on an ongoing outpatient basis?
A. Because my primary responsibility is the teaching of inpatient psychiatry, I have an outpatient practice now that's, oh, a little less than a quarter of my time. It runs from anywhere from four patients at a time to sometimes as many as eight.
Q. So approximately six patients?
A. It really varies, but I suppose if you were to average it out over the last six years, it would be about that. Some patients I see very regularly, once a week; others I see about every six weeks if they're on medication and I'm just doing medication maintenance.
Q. But in terms of treating somebody like Nancy, with a borderline personality, you've never treated someone like that more than two and a half years?
A. About two and a half years is my best recollection, yes, seeing them twice a week for supportive psychotherapy.
Q. It's true, doctor, that you wouldn't even take someone like Nancy into your practice; is that true?
A. At this time, because of my other responsibilities, it would be hard for me to be available to the degree necessary for someone who's as fragile as she is.

COMMENT 23

This final admission on the subject matter of long-term treatment of patients is critical. That is, that Dr. Defense concedes that at this point in her career she would not treat somebody like plaintiff. That is a strong indication that she would have no reason to be sensitive to the treatment needs of somebody like plaintiff and her credibility on the subject of plaintiff's treatment needs should be very low under the circumstances.

Q. Doctor, you have no experience in prescribing diet pills to patients; is that correct?
A. Yeah, that's not something that's done routinely at all. But let me just add one thing to that, if I could. Amphetamines are used, and I have had experience in prescribing amphetamines — not diet pills, but amphetamines, for people with depression. That is something that's within the standard of care in psychiatry for someone that can't tolerate the other antidepressants that we have available.
Q. You're not suggesting that Dr. Roe's medication of Nancy was within the standard of care, are you?
A. No. I've already testified it was not.
Q. And the kind of diet pills that were given her, those aren't even used at your institution; is that correct?
A. Correct.

COMMENT 24

Plaintiff attorney has decided to not take on Dr. Defense on the issue of whether or not plaintiff was brain damaged as a result of defendant's mis-prescription of drugs. Defense attorney barely covered it in the direct examination of his expert, whereas, plaintiff called two experts on this subject matter only. Under the circumstances plaintiff attorney decided to leave the subject alone, except to point out that Dr. Defense has no experience in medicating patients with the type of medication which plaintiff alleged caused the brain damage.

Q. You pointed out on direct examination that you found some inconsistencies in Nancy's report versus the records; is that correct?
A. That's correct.
Q. Did you ask Nancy to explain those inconsistencies to you?
A. No, for the most part they became clear to me after I was sitting down with my review of the records and with my thoughts of the interview and put my thoughts together in an organized fashion. That's when they really became clear to me.
Q. And one of your things that you thought was an inconsistency was that Nancy wouldn't dig her fingernails into her cuticles?
A. That there was no evidence that she had been doing that where she reported that she had. I don't think that that's a major point. I want to make that really clear, but that's just something I noticed.
Q. Isn't it true, doctor, that it didn't even cross your mind, even after you felt you discovered these inconsistencies to ask Nancy about them; is that correct?

A. What I was asked to do was to do an evaluation, which I did, spending three hours with her as well as hours reviewing her records, and putting together my opinions and impressions after that. It was not an ongoing process; it was being asked to do a certain task.
Q. When Nancy saw Dr. Roe, she deserved the chance to get quality treatment to help her get better, didn't she?
A. As with any patient.
Q. Wouldn't you agree she still needs and still deserves that chance?
A. Absolutely.
Mr. Winer: Thanks. That's all I have.

COMMENT 25

Plaintiff attorney has decided to end the cross-examination by pointing out that Dr. Defense has not exactly been fair in her evaluation of plaintiff. Specifically, in her report and direct examination she reveals a number of inconsistencies, but plaintiff attorney points out that she never asked plaintiff to attempt to resolve those inconsistencies. Plaintiff attorney was hoping that a jury would see this action as unfair.

Further, one of the supposed inconsistencies that Dr. Defense pointed out was that plaintiff did not dig her fingernails into her cuticles during the evaluation by Dr. Defense. However, other practitioners had reported that she had dug her fingernails into her cuticles during evaluations. In fact, plaintiff spent a great deal of her time on the witness stand digging her fingernails into her cuticles. Clearly, the jury had an opportunity to observe this. Plaintiff attorney was attempting to point out that the jurors, despite their lack of expertise in Dr. Defense's field of specialty, were able to notice actions by of plaintiff that Dr. Defense was not able to notice.

Finally, plaintiff attorney ended the cross-examination with one of the major themes of the case, that is, based upon defendant's horrific treatment of her she "needs and still deserves a chance" to get better. Dr. Defense agrees with this principal. Plaintiff attorney is confident that the overwhelming weight of the evidence at this point is that for plaintiff to get the chance she needs she will require the millions of dollars of future treatment recommended by plaintiff's experts as opposed to the paltry treatment recommended by Dr. Defense.

Checklist: Standard Questions to Use Against Adverse Witness

Every good litigation attorney needs to have some standard questions and lines to use in the situations which are common in litigation. So here are some handy phrases that you will want to have at the ready. Keep this sheet in your trial notebook and read it before each trial.

WHEN THE ADVERSE WITNESS IS SLOW IN ANSWERING, you want to rattle the witness into answering faster, and also tell the jury to suspect the witness because he is taking too long in answering to really be telling the truth. Ask in quick succession:

Are you thinking of the answer to give?

Did you hear the question?

Did you understand the question?

Are you trying to think of the best answer to give?

Don't you want to answer the question?

CROSS EXAMINATION ON DISCREPANCY FROM DEPOSITION.

Were you examined under oath on (date) at (place)?

Your attorney was present? Court reporter?

Sworn to tell the truth? Your attorney had prepared you for the depositions?

I'm going to read a question and an answer. Was this question then asked of you and did you give this answer? . . . . . ? Did I read that correctly?

Was that answer true when you gave it? Did you sign the deposition, saying it was true?

Is your memory of the accident better today than it was on (date of depositions)?

To EMPHASIZE WRITTEN MATERIAL, ask:

Did I read that correctly?

WHEN WITNESS ADDS AN ARGUMENT, point out that it was an argument, and not a fact, by quickly saying something like:

That is for the jury to decide.

Or, your attorney can do the arguing, I want facts from you. If you do not have a fact to answer with, just tell us you do not know. Here is my next fact question. "....."

TWISTING THE KNIFE: TO EMPHASIZE A POINT, you can get the same answer repeated to the jury a couple of times, by asking:

You have testified that " . . . "

Do you want to change your testimony?

Is your testimony true that " . . . "?

Or for variety, ask:

So, it is a fact that " . . . "

No question about that, is there, that " . . . ?"

WHEN YOU CANNOT CROSS-EXAMINE BECAUSE IT IS A TRUTHFUL, GOOD ADVERSE WITNESS WITH ROCK HARD TESTIMONY, BUT YOU NEED A QUESTION, to give the impression that you were not overwhelmed by the witness, you almost always can ask:

Did you say that it IS a fact that " . . . X. . . . ?" (X being a fact which was helpful to your case, or at least neutral in his testimony against your client.)

TO EMPHASIZE GOOD TESTIMONY say: (This works with your own witnesses, as well as with adverse witnesses.)

Will you please look to the jury, because they want to get all of this.

MIXING A WITNESS UP ON DISTANCES OR FIGURES. There is an old standby to make the jury think the witness has no real accuracy. When a witness has said "9," you almost always can get to them to say "it could have 8 or it could have been 10." Ask: "You have testified to a distance of 100 feet. Could it have been 110 feet? 118? Could it have been 82 f