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**Creating the Killer Cross; A Lesson in Doctors  
and Doodlebugs**

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## **CREATING THE KILLER CROSS; A LESSON IN DOCTORS AND DOODLEBUGS**

“Now, I can stop the bleeding.” This is the greatest thing an opponent’s expert ever told us as he left the stand. That is the goal of a great cross. If an expert leaves the stand, and doesn’t feel that way, then you have missed your mark. The method of creating such a cross is a combination of nuts and bolts and skill. Here, we will talk about both.

Cross examination is all about witness control. It is the chance to tell the story or report the science your way. A good cross examination demonstrates your points of view through an adverse witness. Because experts are usually more poised than the average witness, getting and keeping control of this type of cross is critical. If one starts with the premise that the art of cross is in the control, then it is imperative that the examiner take any and all steps necessary to assure that kind of control in the actual courtroom setting.

The cross examination of the expert is the single most fun you can have at trial. A great cross can affirm your expert, make the defendants look like liars and cheats, and impress your clients. The perfect cross is a function of knowledge, technique and art.

There are basically three ways to lose control. First, the witness controls the pace and mode of exam. Second, you lose control by a lack of preparation. Third, opposing counsel takes control by objections. A great cross does not permit any of these.

### **THE START OF CONTROL: THE DEPO**

The first step to a successful cross-examination comes from the taking of a good deposition. How that deposition goes is strictly a function of three things; your knowledge of the topic, your ability to size up “what kind” of expert you have, and your tenacity. We will explore each of these briefly.

It is axiomatic that to take a decent deposition of an expert you must understand the topic in an intelligent manner. Anyone who begins an expert deposition without a fundamental understanding of the topic is doomed to miss great cross-ex fodder. Since there is little chance that you will actually know the topic better than the expert, having the basics is essential to getting what you need for cross.

The easiest place to learn the topic is of course from your own expert. It is worth the time and money to sit with your own expert for a few hours and do your deposition on her to learn and understand the topic. Reading articles on the topic is also a must, as the more time you spend on the topic the more it will sink in. Finding articles authored by your expert deponent is extremely helpful to compiling terrific cross material. Some of your best cross can come from the expert disagreeing with your question when you are simply quoting from his work.

## WHAT KIND OF EXPERT DO I HAVE?

There are essentially three kinds of experts. They are the “pro”, the “word- smith”, and the “true expert”. Each requires a different deposition approach. Thus, you must be able to readily assess what type of person is sitting across from you.

The true expert is the rarest type. This is the person who is generally so well regarded in his field that he has no time, nor inclination to try to stretch, fudge or lie when being deposed. He will make no statements that he cannot defend with integrity. If you encounter such an expert, count your blessings. With this expert, you want to quickly nail down the essentials of the testimony that support your own expert’s opinion (ie. before the first break), so it is imperative that you not waste time with the usual background questions that we seem compelled to ask. Go straight to the heart of the issue and secure as much ground as you can for your own expert to use at trial. As quickly as you can, find out where this expert disagrees with your own, and find out the reasons for such a disagreement. After you have done that, then you can go back and get whatever other information you feel is necessary.

The more common iteration of expert is the wordsmith. This is the person who will do her best to parse your questions in such a way that her answers hurt you. It is this expert who requires tenacity. It may take you thirteen iterations of the question before you figure out how precisely you must word it to get to the answer you want.

In a nut shell, it is commonly known in allergy and immunology that persons exposed to aeroallergens (ragweed, dust mites, mold) and who have an allergy to them (rhinitis, asthma, etc.) can also develop atopic dermatitis (a very itchy rash) as a result of their exposure. In deposing the defendants’ expert the question, “Can aeroallergens cause atopic dermatitis?” was answered “No”. After many attempts and minor word changes, the question, “Can aeroallergens make symptomatic, ie. itchy, a previously asymptomatic atopic dermatitis”, was answered, “Yes”. Thus, being tenacious, not rude, got us the information our expert needed to defend his opinions at trial. (In fact, our expert could not tell the difference in the two answers. He was right, of course, it was a distinction without a difference)

The “Pro” witness is one we have all encountered. This is the witness who will say whatever is necessary for his team. With this witness the essential point is to tie him down to what he will say at trial. The best approach we have found to this guy, is to start with, “Tell me all the opinions you intend to render at the trial of this cause”. After about 15 minutes of argument with the witness and the lawyer, you should get a list. (It is helpful to have the discovery rule on disclosure here as it asks that same question.) After you have secured his list of opinions, go back to each and ask; “Now tell me the bases for your first opinion”, and get another list. Do the same for each opinion. After you get each list, repeat them back to the witness and get him to confirm that you have the list written down correctly. This not only provides you with certainty, but it gives you one short spot in the deposition where you can access the entire list for motions to exclude or for impeachment.

## MORE FLIES WITH HONEY

Another important point when deposing an expert (except the pro) is to ask open ended questions, and let the expert talk as much as she pleases. Coming across as nice, interested, but a bit ignorant, will get you a lot more good information than being pointed or angry. By allowing the expert to choose her own words to describe or explain something, you will generally get better information than you will from a pointed question. When you hear an answer you like, you simply recap what has been said in a nice tight sentence so it is easily usable at trial. However, your recap needs to be camouflaged so you do not reveal your real interest. It is here that it is important to apply the lesson of the doodlebug.

The doodlebug, or grub, or pill bug, or roly polly can teach us a lot about experts and any witness. Being one of nature's slowest creatures and blessed with neither eyes, nor ears, the doodlebug relies upon two instinctive reactions when it senses a threat. It rolls into its armored ball, or, assumedly reasoning that it is far too slow to outrun whatever it may be sensing, it moves straight at the threat. Apparently, it reasons that its odds of survival are better if it can get lost underneath whatever is challenging it. Thus, if you tap a doodlebug on the head, it will continue forward. If you tap it on the behind, it will turn right around and come at you. Experts, and all witnesses, in fact, are much the same.

When questioning an expert, it is important that you never let him know where you are going. Like the doodlebug, as soon as he detects that you want him to go forward, he will retreat. If he senses you want him to back down from an opinion, he will strengthen it. Generally speaking, when he doesn't know where you want him to go, he will tell the truth. (It is inherent in human nature to retreat to the truth when all else fails.) Thus, you must keep your questions either open, with no apparent direction, or send a false signal, driving the doodlebug unwittingly to its demise. This technique is especially important to developing and executing a good cross. Thus, a good deposition of an expert is created in exactly the opposite manner of a good cross. Your expert deposition should be loaded with questions that start with "how", "why", "explain", "describe" and; "So if I'm understanding you right, then...".

The recap is one of the most important tools to use in your deposition. This is nothing more than your own iteration of what the expert has said. The point of the recap is to place the information you may need later on in your cross in one succinct sentence or phrase. Thus, after an expert tells you her opinions over a period of ten minutes, the recap is; "So then, if I understand you, you have three opinions you will give to this jury and they are...". "You have no other opinions". **One should do the same with regard to the bases of each opinion, and any other important answers.**

## THE NUTS AND BOLTS OF THE KILLER CROSS

### A. The Depo Summary

What can be more boring than the depo summary? Not much. However, the depo summary is the single most important work you will do in creating the killer cross. A great cross is all about witness control and your authority. Unlike in the depo, during cross, you are in control and

you set the pace and the rules. No longer can the expert be obtuse, at least not without consequence, and opposing counsel can't interfere, at least without looking obvious. But the key to this great control is in knowing everything the expert said and getting to it quickly.

Summarize your own depositions! It is critical to understanding your case and your cross. No matter how trained your staff may be, they will never understand the nuances of your case the way you do. If you simply cannot do it yourself, then review the depo summary and correct it or add to it as necessary.

My depo summaries are hand written. Not only am I a lousy typist, but more importantly, I remember better what I have written myself. The typical entry will look something like this:

Bias	1. 25 depos	<b>5/19</b>
Bias	2. 5 trials	<b>5/22</b>
Bias	3. All defense	<b>5/25</b>
Speed	4. Speed 34 mph	<b>6/7</b>
Light	5. Light red	<b>6/12</b>
Light	6. Saw it for 3.5 secs.	<b>6/15</b>
Bias	7. Worked for Def. before	<b>6/18</b>

The main sentences are what the witness has said, (either said it or affirmed my statement). To the right is a series of numbers that represent the page and line numbers where the statement appears. To the left of the statement is a shorthand topic that applies to that statement. For example, there may be a number of things that the expert tells me that relate to her bias. Such as pay, hours worked, percentage of defense work, prior work with the defense firm, etc. While each statement is summarized, the key word "Bias" appears to the left of each statement to which it applies. Therefore, even if "bias" statements appear in four totally different places in the depo, you can quickly find them all. Thus, when you create the portion of your cross on bias, you simply look for the key words in the left margin and you are assured that you have included it all in your exam.

## **B. Simple Steps**

There is not a lawyer alive who hasn't experienced those moments at trial where every page you look at seems white and blank. Here are some tips to survive those white outs and to be sure that the expert understands who is in charge. With these, you can take charge and control your examination.

All good offense starts with good blocking. This tip will seem odd, but it is amazing to me the number of times I have seen good lawyers get lost in their cross, or forget to ask a part of it, simply because they cannot find it on the page. The cure is simple, and it is a technique I call "blocking". "Blocking" is nothing more than literally separating the sections of your cross into topic areas, and physically creating a separate section on your page for each concept. For example, if you have a section you want to discuss on a certain study, then you simply create a title called "IMPLANT STUDY" and under that topic, place your questions in order. You then create a space for that section several centimeters away from any other question and circle it with a line (the block), that assures

you a separation from all other lines of cross. You may only have two blocks per page, but the benefits of the organization are huge.

Another advantage of blocking is that it gives you the means and the confidence to move through your cross in any order. How many times have you heard a lawyer say on cross, “Dr. we’re going to get to that, but let me finish these questions first.”? Because a great cross is all about control, you should be prepared to move to any section of your cross at anytime. Blocking makes that possible. Through blocking, if the expert takes you to another area of cross by answering in a certain way, then let him. Show him that you can cross him on any topic, at anytime. The control this establishes over the witness is powerful. You simply locate the appropriate block and go there. You will have the questions, the page and lines for impeachment, the exhibits etc. necessary to take the witness on in any turf.

### **C. The Stack**

Organizationally, you want to create your cross with an organization that is consistent and very user friendly. This is where you need “the stack”. The stack is simply a clipped pile of material that for me, is always in the same order. On top is my handwritten, blocked cross. Under that is the depo summary, followed by the depo. Behind the depo are copies of all of the exhibits I anticipate using with that witness. A copy of each exhibit you intend to use is necessary, as you do not want to rely on finding the original of the exhibit somewhere in the courtroom. Too many times the original is out of order or on counsel table and lost in the shuffle. Depending on what equipment you have available, you may want to append several copies of the exhibit, so you can leave one with the witness.

The total cross package should consist of your cross, the summary, the depo (preferably highlighted to your cross), and then your exhibits, in order. (Four copies of each, with the top one highlighted for you; the others are for counsel, the judge and the witness or screen.) That way, everything you need to do the cross will be right in front of you. With this sort of organization, your cross should be tight, and you should be able to maintain control of the witness and the courtroom.

### **D. Securing New Information in the Cross**

As with all things human, there are many times when a critical piece of information you need may not have been secured in your deposition of the opponent’s expert. You may have forgotten to ask, or perhaps the issue was unknown to you at the time. Regardless, most crosses require the closing of exits (excuses and explanations) to be effective. When you do not have a direct quote from the witness to shut down the possible escape route, you have to create a series of questions that do that for you. These questions should either be open ended or pointed in the wrong direction. That way the witness will most likely give you the truth or fudge in the direction you want.

We are all consummate liars. Preparing for cross examination is a time when that fact may actually prove to be an asset. Since we have all lied well, when you are preparing your cross examination, simply ask yourself the questions and attempt, truly, to escape. Do not limit yourself to the obvious, but pick any and all absurdities. If your cross can survive all of your own lies, then it

will likely survive the witness. Remember you have the luxury of coming up with your lies over time and in your office. The witness has only two seconds to think in front of a jury. Once you have tested the cross on yourself, or your partner, you are ready for action.

### **YOUR CROSS TO BEAR**

The cross itself is generally constructed of a series of short questions which each contain only one fact:

So you were on Main?	Yes
Driving South?	Yes
The radio was on?	Yes
You were doing 30 mph?	Yes
You saw the light?	Yes

This short, brisk questioning establishes a cadence and control of the witness. The jury and the witness get to know quickly that the answer to all the questions is likely to be “Yes”. It also allows you to grab instant control of the pace. It should be used in almost all circumstances.

On your notes this should look like:

#### A. Pre Wreck

1. On Main 7/15
2. South. 7/24
3. Radio 8/12
4. Saw light 8/17

Section A will of course be in a block drawn on the paper around section A. You want your questions to be mere concepts or you get bogged down in wording and the page becomes too crowded. If there is a need to get a witness to repeat specific words, then fine. But generally you only want brief concepts that trigger your memory. This keeps you more relaxed and focused.

While the golden rule of cross is to never ask a question you do not know the answer to, there is one clear exception: when either answer is good for you. When you can ask a question on cross that presumably gives the witness the freedom of choice, but either answer is helpful to you, then your cross is even more powerful, as it does not appear that you are simply a lawyer force feeding a witness. The classic example of this is the infamous; “When did you stop beating your wife?”. While we all know and laugh at this example of lawyer chicanery, there are actually many instances in which a question has two or more potential answers and yet all are helpful to you.

We were in trial recently on a medical negligence case where an issue in the case was whether our client had gone to a hospital Christmas party. (We alleged he had and been fed, though he was NPO). A nurse for the hospital had testified that the NPO patients had red tags that they wore to identify them, yet the coordinator for the party testified that they had not used the tag system in

years. Our client had a blue tag on him, not a red one. Despite it being cross, the nurse was asked, “Who is right about your system, you or the coordinator?” Either answer hurt the defense. Then she was asked, “How could it be that your coordinator, in charge of the party was not aware?” Any answer would be painful. While the general rule of not asking a question you do not know the answer to is a very good one, there are times when the more effective cross occurs from knowing any answer cannot hurt you.

## **IMPEACHMENT AND THE ART OF CONTROL**

So why have all the page and lines and topics? The answer is simple; impeachment. Impeaching a witness is the most sure fired way to witness control. No witness, particularly an expert, likes to be impeached in front of a jury. Experts, no matter how shoddy, like to appear to be open and above board. To be able to impeach them not only hurts their pride, but brings them into line to do what you really need them to do, prove you are right.

When you ask the question to an expert and she fudges, you must be able at that moment to present her with her prior testimony. But first.... the buildup.

“Dr., you understand you are under oath?”

“You understand that that means that you have sworn to this jury, this judge, (and God), that you will answer my questions truthfully?”

“This is not the first time in this case, Dr., you have sworn (to God) to be truthful, is it?”

“That’s right, you raised your right hand and you swore at your deposition to be truthful, just as you did here today.”

“And you knew the importance of your oath then, just as you do now.”

“And you read your deposition?”

“And you checked it for errors?”

“And you swore again that what you said in it was true when you signed it.”

“So three times in this case, you promised to tell the truth.”

“So why aren’t you?”

At this point, or sooner, you will have drawn the objection or be asked for a page and line reference. In the game of control there is nothing so important as being able to immediately respond, “Page 146, line 13”. You can do this because the page and line is written and circled, right beside the question on your page. That simple response teaches your opponent, the judge, the jury, and especially the witness, that you are in control. Then you simply repeat his prior answer to remind the jury of the issue, and read the prior “truth”. If possible, it is best to put the earlier testimony on a screen so the jury can see for themselves the earlier version of reality.

After that initial impeachment, the next one is much quicker and neater.

“Dr., you remember that deposition?”

Page 237, line 14, counsel.”

With this type of authority you will soon have the expert corralled and your exam will roll along, most of the time. The good part is, if he keeps getting impeached, then he is shot with the jury.

## CONCLUSION

As simple as some of the techniques in this paper may seem, they are the key to a great cross. All great crosses are a combination of facts, technique and art. The facts come from the information developed in your case. The technique of open ended questioning in deposition, the depo summary, and the page and line cross are the critical factors to giving you the means to control the courtroom during your exam. In cross, there can be no sign of weakness; no slips or miscues. With the technique in this paper you will give yourself the best chance at getting and keeping control. The art of every cross is in listening. The techniques in this paper, tho simple, free you from getting bogged down and allow you to listen to the witness. As any great trial lawyer knows, when you listen, you hear answers that are better than you could ever make up on your own.

A great cross examination is one of the trial lawyer's greatest pleasures. Establishing control early of the expert helps your case in so many ways. It gives you and your client confidence. It demonstrates to the judge, the jury and your opponent that you are on top of your case and its facts. It allows you to prove your case, undermine your opponents' credibility, and destroy their evidence; all at the same time. Every attorney should execute the cross using the techniques in this paper or something similar. It will give you the freedom and confidence to leave the expert hoping to "stop the bleeding".

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