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The "money" cross-examination of the one-sided expert

ATTACKING THE CREDIBILITY OF THE ONE-SIDED EXPERT ON CROSS-EXAMINATION

In the majority of personal-injury trials, the crux of your case will come down to whether or not the jury believes your experts and disbelieves the defendant's experts. A money-hungry, defense-loving expert can and will hold less weight with the jury, when exposed in the right manner.

This line of inquiry is explicitly permitted by section 770 of the California Evidence Code. In fact, CACI Jury Instructions (including nos. 107, 219, 221) specifically instruct jurors to take into consideration each expert's credentials and motivations when weighing the evidence. Attacking the credibility of the defendant's expert witnesses can start as soon as you receive the expert designation, and should continue all the way through trial.

This article will identify methods by which to defeat the defense expert in both deposition and at trial through the "money cross" in order to discredit the defendant's position, while simultaneously solidifying your case.

Pre-trial planning

Discovery considerations

Upon receiving notification from the defendant as to which expert witnesses they intend on calling, it is important to begin planning how to effectively cross-examine the experts at trial. The best cross-examination will attack both the expert's income and pattern of testimony to establish bias both based on money and preference for the defense. In order

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to do so, more information on the expert's background, professional history, prior testimony, and income related to expert work is required.

Financial information — it doesn't hurt to ask

Often the best information comes from financial information on the expert's practice. Prior to setting the expert's deposition, consider asking for financial documents in an attached request for production to the notice of deposition. Examples of categories of information to ask for may include the following:

- Any and all billings, invoices, ledgers, statements for services or other records regarding *your* compensation in this matter.
- Any notices, announcements, advertising or promotional material, or printed material, pertaining to the availability of *your* services as an expert consultant, including any such items *you* have mailed or otherwise distributed to anyone within the last four (4) years.
- Any and all Federal Rule of Civil Procedure, Rule 26, expert disclosure reports prepared by *you* within the last five (5) years, whether in the instant case, or any other personal injury case in which *you* have been retained as a consultant.
- A list of all attorneys who have retained *you* within the past four (4) years.
- Copies of all deposition transcripts or trial transcripts relating to testimony *you* provided in as an expert witness in the last ten (10) years.
- A list of all insurance companies who have retained *you* within the past four (4) years.
- Any and all *documents/electronically stored information* that evidence or reflect a numerical estimate of expert medical work done by *you* for any law firms or insurance companies, for the period from 2012 to the present.
- Any and all *documents/electronically stored information* that evidence or reflect a numerical estimate of the amount of income generated by you for any expert medical work done for any law firms or insurance companies, for the period from 2012 to the present.

Of course, rarely will an expert just hand over all the information that you seek via the requests for production or at deposition. In this case, it is possible to try to obtain the information via a subpoena duces tecum. Note, however, that the *Allen* and *Stony Brook* cases limit discovery in this scenario, and you may not be entitled to details or specifics of billing and accounting practices. (See *Allen v. Sup. Ct.* (1984) 151 Cal.App.3d 447, 453; *Stony Brook I Homeowners Ass'n v. Sup. Ct.* (2000) 84 Cal.App.4th 691, 700.)

Other methods of obtaining information

If the expert is not being forthcoming, there are still multiple avenues you may take to get the information you seek. Prior testimony can reveal patterns in how the expert testifies. It can allow you to anticipate what routine opinions an expert will fall back on, establish what their income has been in the past and the number of cases they take on per side, as well as provide insight into how the expert will approach bias. Reading prior deposition and trial transcripts will allow you to see exactly how the expert will testify so that there are no surprises.

The CAALA ListServe and document bank are great resources for finding transcripts. In particular, Michael Alder of Alder Law PC has a vast collection of prior expert testimony. Asking other attorneys for prior deposition and trial transcripts is an easy way to gain insight into how they have approached derailing the same expert. Additionally, gathering such information can help you build a timeline as to when the expert has testified in trial, and for whom the expert testified. Then, at trial, if the expert claims to have only testified three times this year, but you know that he has testified in at least eight cases, you can easily impeach him on the spot.

Further information may be gleaned from the expert's CV and website. For example, we recently had success using the front webpage of a law firm's website for an employment and human resources defense expert, which explicitly states that the firm represents employers. Such obvious preference for employers was good evidence of bias towards the defendant. Information about bias might also be apparent from the expert's LinkedIn page (who do they have as professional connections?), a Google search, or legal databases where they are listed as experts in certain matters.

After gathering the transcripts and other information, it can be helpful to organize all the information into a chart to really highlight the patterns of testimony. In a car accident case, for example, a chart for the medical expert could be organized by prior record reviews, DMEs, and testimony. For each category, similarities in the reports and testimony could be laid out side by side. It might be surprising just how much each expert relies on the same phraseology and opinions in the records and transcripts. These tables will help you stay organized as you proceed on to trial and the cross-examination.

At the deposition

When at the deposition, it is important to lock the expert into their position. Having all the information discussed above will help you stay on track, and formulate your deposition outline so you know which areas need to be covered. In particular, the prior testimony will also help you understand the patterns this expert will fall back on, and will likely help you anticipate how they will testify in your case so nothing is a surprise.

Often, attorneys will only ask one or two questions regarding income and prior testimony in order to establish bias. However, doing so might not be sufficient to really get to the bottom of why this expert is biased. For example, in a recent case, over half the deposition was spent establishing (1) how many times the expert had testified for the defense in recent years; (2) which firms the expert testifies for the most; (3) how much he is paid for testimony; (4) how much he is paid for record review and examination; (5) how many times he has worked for plaintiff attorneys; (6) how many DMEs he

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does per year; (7) amount of med/legal income in the past five years; and (8) percentage of plaintiff-defense med/legal work, among other things. With each answer, it is imperative to follow through and work up the math with the expert. If the expert is saying he does 40-60 DMEs per year, ask if this means he does about four to five per month. If the expert says he makes between $75,000 and $200,000 per year in med/legal work, ask how much he makes per case and how many cases he has had this year, and make sure the math adds up.

The following excerpt from the deposition transcript of the above-mentioned defense medical expert is illustrative. The expert claimed to have a 40/60 percent split for plaintiff/defense in med/legal work. However, when pressed as to the exact number of plaintiff cases versus defense cases he has actually taken on, the math fell apart:

Q: So what percentage in the last three years would you say your medical/legal work is plaintiff versus defense?
A: About 60 percent, 40 percent.
Q: 60 percent for the defense and 40 percent for the plaintiff?
A: That's correct.
Q: How many plaintiffs' cases did you work on in 2015?
…
A: I can't remember. It may have been about – anywhere between three and five cases.
…
Q: Is it your best estimate that you did at least one deposition in the last five years on behalf of a plaintiff?
A: That's the best answer I can give you.
…
Q: How many cases have you been retained by [defense law firm] in the last five years, would you say?
A: I don't know. I would say probably around 50, less than 50.
…
Q: So it's your testimony that there's approximately three defense firms that retained you around 50 times in the last five years . . . ?
A: Those are three firms that I remember the most.

Clearly, three to five plaintiff cases in the past year, versus 50 defense cases each for three defense firms in the past three years, is not a 40-60 split. However, if the questioning had stopped at "what is the percentage of plaintiff versus defense med/legal work," these facts would not have been uncovered. Thus, it is crucial to keep pressing the witness to explain these percentages. The same holds true for any bias line of questioning, including on income. These are easy ways to trip up the expert in his own testimony, and great sound bites to use at trial.

The trial

You have now completed your discovery, you hear an expert works nonstop for one firm or for the defense in general, you hear how much they make, and you are ready to shock the jury's good conscious that these experts testify for money and say things to keep customers happy. So you set up your cross to hammer them on this: "You make this much?" "You do it this often?" After soliciting the large numbers and doing the math on the big blackboard for the jury, you sit down feeling like a conqueror slaying a dragon. But then you get a lower than expected verdict and hear these all too common phrases from the jury afterwards: "well he makes a lot of money because he's so well qualified." Or "your expert also made a lot of money too so we considered it a wash." Or "we didn't really talk about it, people should be paid for their time."

So where did the cross examination fall short? How could the jury not have seen the expert is clearly in it for the money, not for the truth? This is a common scenario many of us face. Unfortunately, many of us try to let money stand alone to show bias because we so often think the money will speak for itself without showing the jury why the money matters. One of the best books on cross- examining experts is Patrick Malone's *The Fearless Cross Examiner*. In the book, Malone lays out a formula that helps turn the money cross into a surgical destruction that exposes the defense expert's bias:

- Money
- One-sided testimony
- Evasiveness on the stand
- Contradictions
- A biased, untrustworthy witness

Some of the best take-downs of experts occur when the attorney uses each of these "bricks" to build a complete picture of why experts cannot be trusted because they are truly in it for the money. So let's go through some of these bricks, using a recent trial we had with a well-known defense orthopedist.

Get the helpful stuff first

Before you take down the doctor, it's best to get him or her to concede the things they must agree with to bolster your non-economic damages arguments. Here is an excerpt from our recent trial in *Benson v. Collister*, Case Number BC541250:

Q: You treat patients, right?
A: I do.
Q: Okay. And you treat patients for a long period of time?
A: I do.
Q: Patients that have long-lasting back pain?
A: Yes.
Q: Okay. And so you are their doctor trying to get them better, right?
A: That's right.
Q: Okay. And over the time you treat these patients, it's frustrating for the patients?
A: It can be.
Q: Back pain can weigh on someone?
A: It can.
Q: It can, you know, cause you – cause people to get frustrated, cause emotional issues?
A: It can.
Q: Do you see that?
A: I do.
Q: And chronic back pain, everyday back pain, that can really affect someone's life, right?

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A: Depends on the severity of it.
Q: Have you ever seen it affect someone's life, everyday back pain?
A: I have.
…
Q: The treater and patient relationship, that's a very important relationship in our society, isn't it?
A: It is.
Q: Because health is a very important thing in our society, isn't it?
A: It is.
Q: Without our health, it's hard to get through life, isn't it?
A: That's true.

Here we laid out obvious statements with which the doctor must agree for two reasons: one, it is coming from an adverse witness so, and two, it gives the treater the moral high ground. This also allowed the jury to hear from the defense's own expert that injuries can be devastating to a victim's physical and emotional state. It is important to do this before discrediting the doctor with his or her biases.

Get the expert to agree that the neutrality is the key

The next brick to lay before bringing down the hammer is to establish why it is important for an expert to take a neutral approach when hired by one side or the other. This is another simple setup that allows you to set up the expert for major contradictions later in cross. Here are some good ways to elicit this testimony:

Q: Doctor, you would agree that an expert must be objective, fair, and impartial?

Q: An expert is not supposed to advocate for one side or the other, correct?

Q: And it's important because an expert witness has specialized knowledge that is supposed to help the jury decide certain issues in a given case, correct?

The money

Once you have laid the groundwork and gained the most basic concessions from the defense expert, you can start exposing the expert's warts and stack up those bricks. As tempting as it is to immediately go after the earnings, money alone is likely not the answer to proving the expert is biased. First, it is highly likely your own expert is being paid an enormous fee to come into court and has made a nice living doing it over the years, so why should your expert be held to a different standard? Going down the money path in this scenario, with all other things being equal, will make you look hypocritical. Second, juries often expect highly credentialed professionals to be compensated highly for their time, and may even give more weight to their higher earnings because it makes them appear more valuable. The key to making the money cross work, is to show that the defense witness is a well-paid sellout and couldn't possibly give objective testimony.

The one-sided expert

One-sidedness is really the key to allowing money to establish bias. As soon as the expert is shown to testify for one firm frequently or for one side, then the jury can connect the dots and see that the expert is *testifying* for money and not the truth. Below is an excerpt from the same trial where the expert clearly is in bed with the same firm, but then lies about his partiality for the defense:

Q: Now, how many times have you been hired by [defense] law firm?
A: Are you talking about a specific period of time, like 20 years or so?
Q: Ever.
A: Ever – 20 years – in the past 20 years about a hundred times.
Q: 100 times you've been hired and paid by this law firm, right?
A: I don't know whether I've been paid by the law firm, but I've been hired 20 times – sorry, in the past 20 years, 100 times.
Q: In the last 5 five years, it's been 50 times, right?
A: 50 or less, yes.
Q: In fact, there's no other law firm in the country that hires you more than their law firm; is that right?
The witness: That's not true.
Q: Well, they're one of the top two, right?
A: Yes.
Q: So – okay. So they pay you for your services?
A: Yes.
Q: So it's kind of like a customer relationship, right?
A: Well, I wouldn't consider it a customer relationship. It's – it's asking me to do a particular job and I do it.
Q: You do a service for them. You get paid for it?
A: Yes.

The very close relationship between the expert and the defense firm having been established, something most defense experts will admit, it's time to attack the defense expert to see if they really are as fair minded as they say they are. Below is an excerpt from the same cross:

Q: You say you do about 60 percent defense, 40 percent plaintiff; is that right?
A: That's correct.
Q: Okay. And that's based on all of your medicolegal work, right?
A: Correct.
Q: And the medicolegal work, that encompasses what you call independent medical examinations?
A: Yes.
Q: It's also known as defense medical examinations. You've heard that before?
A: Yes, I've heard that before.
Q: Okay. That is where a defense firm hires you to examine a plaintiff, right?
A Right.
Q: Okay. And in your deposition you said you do about 48 to 60 of those a year, right?
A: I'm sorry. How many?
Q: 48 to 60 of those a year?
A: I said 40 to 60.
Q: Well, I'm just talking about just medical-independent medical exams. You said you do about four to five a month, correct?
A: Correct.

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Q: That was your average you gave in your deposition?
A: Correct.
Q: So 48 to 60 a year?
A: Whatever. We talked about it, you asked me and I said in my deposition 40 to 60.
Q: Okay. So that would be encompassed on your defense work, right?
A: Yes.
Q: Those are defense medical exams. That's your defense work, right?
A: Yes.
Q: Okay. Okay. And then on top of that, you're also sent records by defense firms to review the medical records, right?
A: Right.
Q: Okay. And then so is it fair to say that you handle more than 60 defense cases a year?
A: No. That's included in that percentage.
Q: Okay. But on top of that, sometimes you just do a record review for a defense firm, right?
A: Right.
Q: Okay. So is it fair to say that you handle more than 60 defense cases a year?
A: No. I was including that encompassing exams as well. I lumped in it into a general term.
Q: Because in your deposition I asked you specifically how many exams you do a month, and you said four to five. When you said that, did you mean that that also includes record reviews?
A: Also includes record reviews.
Q: Okay. So you misspoke in your deposition?
A: It's what I said at my deposition. Today it's 40 to 60, you know. Including that would be record reviews as well.
Q: Okay. So just so we're clear, 48 to 60 defense cases a year, right?
A: Correct.
Q: Okay. And you still contend that you do 60 percent defense and 40 percent plaintiff?
A: I do.
Q: Okay. But in your deposition you said you only handle three to five plaintiffs' cases a year?
A: It goes up and it goes down.
Q: Yeah. You said that. But then you said that your average is three to five a year of plaintiffs' cases?
A: Right.
Q: I mean, according to my math, that's about seven percent plaintiffs' cases?
A: You asked me for an estimate. It was an estimate at the time.
Q: Okay. But you haven't done a plaintiff's deposition in years, right?
A: It's been a few years, yes.
Q: To do even just a sit-down for a plaintiff's deposition, right?
A: Right. Because they typically settle before they get to that point.
Q: Okay. So you – your estimate is three to five plaintiffs' cases a year, but yet you do 48 to 60 defense cases a year. That math is 7 percent plaintiffs' cases and the rest defense cases. Right? Is that fair math?
A: That's the way you calculate it. I gave you an estimate. That was the estimate I thought at the time.
Q: Three to five plaintiffs' cases and 60 defense cases. That's not 60-40, is it?
A: Not those particular numbers, no.
Q: Those are the numbers you gave me.
A: Right. But that was the numbers I gave you that day. That changes from week to week.
Q: Well, I know, and I asked you that, because you said the same thing in your deposition. And I asked you, well, is that your average over the years? And you said it was the same in 2015, three to five plaintiffs' cases a year?
A: Right.
Q: Okay. So do you still contend that you do 60 percent defense and 40 percent plaintiff?
A: I do.

At that point there is no need to beat this proverbial dead horse any further, but it is crucial to go all in anytime you face the one-sided expert and not just touch on the topic and move on.

In the above excerpt, it is clear that the expert is in bed with the defense firm and really defense firms in general, but he tries to cover this up by saying he does nearly as much plaintiff's work, and then disagrees with simple arithmetic. It's at this point when the bricks start stacking up – now, you can put the cherry on top and start talking about the money.

Final thoughts

Cross-examining highly trained, educated, and experienced expert witnesses is one of the most nerve racking aspects of the trial lawyer's career. But when no stone is left unturned during pre-trial research, investigation, depositions, and preparation, cross-examining an expert becomes a beautiful showcase in revealing the true motivation behind the hired gun's testimony.

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