Direct and Cross Examination of Medical Experts: Who Will They Believe?

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BIOGRAPHY

When Bill Liebbe began his career as a trial lawyer in 1980, he was handed a trial docket of car wreck, worker's comp and slip and fall cases. During his first six years, he averaged eight jury trials to verdict each year. Sometimes he won. Sometimes he got bloodied up. He learned from his mistakes, and from the masters like Jim Perdue, Sr., Gerry Spence, Scotty Baldwin, Frank Branson, Howard Nations and John Howie to list a few. Board certified in personal injury trial law since 1987 with an emphasis on medical malpractice, Bill has conducted hundreds of direct and cross-examinations of medical experts and deposed a "ton" of doctors.

Curriculum Vitae
of
William Howard (Bill) Liebbe

Personal:

Born:	September 20, 1953, San Antonio, Texas
Spouse:	Donna Inman Liebbe, R.N.
Children:	Jeremy (29), Kelly (28)

Education:

Southern Methodist University
Dallas, Texas
B.A. - Political Science - 1976
Departmental Distinction

Southern Methodist University
Dallas, Texas
Juris Doctor - 1980

Certifications:

Board Certified in Personal Injury Trial Law
Texas Board of Legal Specialization - 1987
Re-Certified - 1992, 1997, 2002, 2007

Licensure:

Texas - 1980
U.S. District Court - Northern District of Texas - 1981
U.S. Court of Appeals - Fifth Circuit - 1991
U.S. Court of Federal Claims - 1997

Professional Memberships:

State Bar of Texas
Association of Trial Lawyers of America - Sustaining Member
Texas Trial Lawyers Association - Fellowship Member; Director 1999-present; Associate Director 1997-1999; CLE Co-Chair 2004, 2005
Dallas Trial Lawyers Association - Director, President 2000, President-Elect 1999, Vice-President 1998, Secretary 1997, Treasurer 1996
College of the State Bar of Texas
The Million Dollar Advocates Forum

Teaching

Trial Advocacy Instructor - Trial Advocacy College of Texas -2001**,**2002,2003
Trial Advocacy Instructor - Southern Methodist University -Dedman School of Law - 2002, 2003

Honors and Awards:

WHO'S WHO In American Law
WHO'S WHO Among Emerging Leaders in America
Departmental Distinction in Political Science - SMU 1976
Southwestern Law Journal - 1980
Texas Super Lawyer - 2005 - 2008

I. INTRODUCTION

Who do we try cases for? We try our cases for the jury. At the end of the day, it doesn't matter what the judge, opposing counsel, opposing party or our client think about how we tried the case. At the end of the day, the only thing that matters is the jury's verdict. We must therefore keep the jury in mind as we prepare for and conduct the direct and cross examination of the medical expert.

The trial lawyer must be the thirteenth juror. The trial lawyer must crawl inside the jury box and ask: What are the jurors thinking about the expert? What are their concerns? What are their expectations? How can we, as litigators, use the jury's concerns and expectations to create expert testimony that is persuasive to them? What are the questions on the minds of the jurors that must be answered?

A. Jurors concerns about experts:

1. This is going to be over my head, complicated and confusing. I am afraid I will not understand anything this medical expert says.

2. Is this person really an expert?

3. This expert is so educated, he is probably going to be condescending and talk down to us.

4. The expert has bias. He is being paid a lot of money to testify.

5. This is going to be boring.

B. Whose expert will the jury believe?

In our everyday lives, we are bombarded daily with "experts" who have opposing views, opinions and conclusions. Experts have differing views on the cause of the oil crisis. The meteorologists on Channel 7 may have a different forecast than the meteorologist on Channel 11. How do we in our everyday lives decide which expert opinion to believe? We pick one side or the other and one opinion over the other on three primary factors:

1. Expertise - We look at the expert's training, education and experience.

2. Trustworthy - We tend to believe the expert who tells the truth based upon consideration of all of the information available. We tend to believe the expert who considered and then carefully and methodically ruled out other explanations. We tend to not trust and therefore not believe experts who have an agenda or a bias.
3. Likability - As with all other witnesses, jurors tend to believe those who are likable. Likable witnesses come from the same locality, are physically

attractive, have dynamic personalities, are interesting to listen to and have strong communication skills.

Who were your favorite teachers in high school? They were the ones who made the subject fun to learn, easy to understand and interesting. You started algebra or chemistry or biology class thinking that there was no way you could ever comprehend, learn and understand the subject. The teacher met each and every one of your concerns and you mastered the subject. This great teacher:

A. Made things simple by avoiding too much detail and used logic, clear organization and non-technical language.

B. She demonstrated early on that she actually knew what she was talking about.

C. He talked like a normal human being.

D. They were fair-minded and reached conclusions based on good, solid information and objective analyses.

E. They were not boring.

When conducting the direct examination of a medical expert, the trial lawyer must enable the medical expert to satisfy each of the juror's concerns and expectations. On cross examination, however, the trial lawyer becomes the expert and the trial lawyer must meet each and every one of these concerns and expectations.

II. PREPARE YOURSELF

The successful trial lawyer in the courtroom is the trial lawyer who has more expertise and knowledge concerning the medical issues in the case than any medical expert who will testify in the case. The successful trial lawyer knows the medical record inside and out. The successful trial lawyer knows the strengths and weaknesses of the medical aspects of the case. The successful trial lawyer knows the terminology and how to pronounce each word. The successful trial lawyer has an intimate knowledge of the pathology, physiology and anatomy involved in the case. The successful trial lawyer knows how to explain the medicine so that any fourth grader can understand it.

A. Chronologies.

Prepare a summary of the medical record in a chronological fashion. I use a three-column format. The first column has the date and/or time. The second column has verbatim quotes from the record with a reference to the location in the medical record. The third column has my notes, comments, definitions, analogies, etc. You may want to provide a copy of the chronology with your notes, comments, etc. redacted to the expert. You may also wish to offer into evidence the redacted chronology under Texas Rule of Evidence 1006.

B. Medical Research.

Google the medical condition, illness or injury in question to search for articles written for medical professionals and articles written for patients. Your goal is to understand the topic on the same level as the medical experts, but also to be able to explain the medical topic to the jury in a way they can understand.

III. PREPARING THE EXPERT FOR DIRECT EXAMINATION

Whether your medical expert will be presented live at trial or by videotaped deposition, you must meet face to face with the medical expert before the testimony is given. Unless it simply cannot be done, this meeting should take place more than sixty days before the testimony is to be given so that any supplementation to discovery can be made in a timely fashion, additional information needed can be obtained and disclosed and any "rough spots" smoothed before the actual testimony. A final meeting before the testimony should also be held.

Here is a checklist of things to go over during the pre-testimony conference:

1. Make sure that the expert has a thorough appreciation of and understanding of the records and documentation. Remind the expert to look to the record to find answers and not to guess when answering.

2. Do not express opinions beyond the expert's training, education and expertise.

3. Be familiar with the literature that is available and relevant.

4. Understand the difference between the scientific and legal approaches to proof: Medicine looks for scientific certainty while the law deals with medical probability.

5. Qualifications.

    A. Curriculum vitae - up to date, accurate and not overstated.

    B. Practical and clinical experience with this particular issue, procedure or injury.

    C. Special training, research participated in, articles authored or co-authored.

6. Prior testimony.

7. *Ex parte* communications.

8. Basis of opinions

A. General: The records, material and depositions reviewed, experience and training in the area and relevant literature.

B. Opinions are based on the specific facts and circumstances of this particular case.

9. Experience and Reliability of Opinions.

A. Length of practice.

B. Number of similar cases.

C. The basis of the opinion reached.

D. The method used to get to that opinion.

E. The acceptance of the opinion in other circumstances.

F. The acceptance of the opinion among experts in the field.

G. The "logical" or "analytical" substance of the opinion itself. In other words, it just makes sense.

H. *Robinson* factors.

I. Publications in the peer reviewed literature that support.

IV. DIRECT EXAMINATION

A. Introducing the Expert.

The expert has been called to the stand and sworn in. What does the jury want to know? They want to know who she is, why she is here, what is she going to say and whether she can be trusted.

The conventional approach is to ask the witness to state their name, identify themselves as a medical doctor, state their specialty and explain what their area of specialty covers. This is boring and it fails to personalize the expert.

Q: Would you please introduce yourself to the jury?

A: (Turning toward the jury) My name is Jim Blanton. I'm a doctor here in town. I specialize in orthopedics. My office is at the professional building attached to the hospital.

Q: How long have you been taking care of patients in our community?

A: I've been practicing medicine here for the last 25 years.

Q: Why did you decide to specialize in orthopedics?

Q: Do you know Paul Payne?

A: Yes I do.

Q: How did you come to meet him?

A: He became a patient of mine after he was severely injured in a car wreck on _____.

This conventional method may get the job done, but it is very boring. Consider the following.

Q: Are you the orthopedic specialist who was called in by the emergency room physician to treat Paul Payne following the car wreck on _____?

A: Yes.

Q: You did the surgery on his leg?

A: Yes.

Q: And you were in charge of all of the follow up including therapy and rehab?

A: Yes.

Q: Are you prepared to tell us today about Paul Payne's leg injury and what the future holds for him?

A: Yes I am.

This approach tells the jury the role the doctor has in the case and the jury knows what to expect from the testimony. The questions may be leading, but leading questions are proper for introductory and background information in matters not in dispute.

Can the jury trust this expert?

At this point, you want to bring out the doctor's background to show that he is qualified to render the opinions about to be given.

B. Education and training.

You want to make certain that the jury understands that the medical expert is very well trained and educated, but the expert must also appear humble, modest and unassuming. Again, leading questions are allowed and should be used. In this way, you can raise the impressive credentials of the expert and have the doctor modestly agree! For example, after marking and offering into evidence the doctor's curriculum vitae, the question and answer may go something like this:

Q: Before we get to your opinions in this case, I'd like to go over your education and training. I see here by your curriculum vitae that you graduated from Texas A&M in 1987 with a 4.0 in biology?

A: Yes.

Q: You then went to Harvard Medical School?

A: Yes.

Q: You then did a residency at Massachusetts General Hospital?

A: Yes.

Q: What was your residency in?

A: Orthopedics.

Q: Describe that residency program at Massachusetts General Hospital?

A: (Doctor describes)

Q: I see that you were Chief Resident in orthopedics? Tell us what that means?

Q: You also are board certified. What does that mean?

Q: Is that the highest certification recognized in your field of orthopedists?

Q: By being board certified in orthopedics, does that mean that other board certified orthopedic surgeons in this country have recognized your special accomplishments and expertise in the area of orthopedics?

Q: What did you have to do to satisfy the board of your competency and special knowledge and training?

Q: I see here that you are an adjunct professor of medicine at Southwestern Medical School here in Dallas? What do you teach, and who do you teach?

Q: Do you get paid a lot to do that?

Q: Why do you do that?

Continue on with the doctor's background and training. If during the conference before the testimony you learned that the doctor had a special program that he participated in that is of particular relevance to this particular case, you will be able to ask about that at this point in the examination:

Q: As we will learn later in your testimony, Dr. Jones, Paul Payne sustained a Le Franc's fracture of the right foot. During your medical education and residency program, did you have a chance to develop expertise with this condition in particular?

A: As a matter of fact, I was very fortunate to have trained under Dr. Oscar Metatarsal, the leading authority in the world on Le Franc's fractures. Patients came from all over the world for treatment of this devastating injury.

C. Experience.

No matter how impressive the doctor's credentials are, the jury will be most impressed if the doctor has handled literally thousands of similar cases. After all, if a juror is going to select a personal physician to operate on their back, they want the doctor who has performed this surgery hundreds, if not thousands of times instead of only a handful of times. Why? They trust the doctor with more experience.

What are some of the other factors that a patient/juror might look to in selecting a doctor they can trust? Some of the things might include:

$ Publications, speeches and presentations made to professional groups.

$ Consultations requested by other doctors, especially within the same specialty.

$ Peer review committees.

D. Opinions.

Now that the medical expert has been qualified, it is time to get directly into the opinions of the expert concerning the important issues of the case. At a minimum, the medical expert

opinion must be made to a "reasonable degree of medical probability." Although there are no "magic words" required, the greater the certainty to which the opinion can be addressed by a credible and qualified expert, the greater the likelihood that the jury will believe the testimony and opinions. The conventional method is to simply ask the expert if they have an opinion about a particular topic to a reasonable degree of medical probability. Although this style of questioning certainly meets the standard of proof, it is boring to the jury:

Q: Dr. Smith, do you have an opinion, to a reasonable degree of medical probability, whether Paul Payne's back injury was caused by the collision of November 14, 2007?

A: Yes.

Q: What is your opinion?

A: My opinion is that Paul Payne's herniation of the disc at L4-L5 level called the lumbar, the low back, was caused entirely by the collision on that day.

Not only is this style boring to the jury, you must repeat these same questions with the same answers for each injury sustained by Paul Payne. How might a juror ask the doctor for his opinion?

Q: Did Paul Payne get hurt in that wreck of November 14, 2007?

A: Yes, he did.

Q: How did he get hurt? What were his injuries?

A: He herniated a disc in his back. His right ankle was broken and the airbag knocked out two teeth.

Q: How confident are you that each and every one of those injuries were the result of this wreck?

A: There is absolutely no question in my mind.

E. Bases for opinions.

1. Treating physician. The treating physician can explain how she came to the conclusion that a particular injury was sustained based upon the chief complaint, history, physical examination and objective testing that was performed. Have the treating expert tell the story.

Q: Dr. Coleson, let's go to the emergency room at ABC Hospital on the day of the wreck. How did you come to treat Paul Payne there?

A: I was the thoracic surgeon on call that day. Dr. Emergency Room called me because Mr. Payne had chest trauma.

Q: Tell us what happened?

A: First thing I did was go to Mr. Payne and get a history of the collision and do a physical examination.

Q: What do you mean by "history of the collision?"

A: I wanted to know how the wreck occurred, the speed, point of impact, etc.

Q: Why did you want to know that information?

A: Knowing what happened during the wreck and the speed of the vehicles helps me begin to know what injuries to look for.

Q: What did you learn about the facts of the collision?

A: This was a head-on collision when the other car swerved into Mr. Payne's lane. The speed limit was 55 miles per hour. According to the police, Mr. Payne's car left 75 feet of skid marks before the collision, and the other car left no skid marks whatsoever. Mr. Payne's speed was 50 mph and the other car was traveling at 80 mph.

Q: How did this information help you?

A: It told me that there was a high speed impact and rapid deceleration. This raises the potential for traumatic aortic aneurysm.

Q: What did you do?

2. Medical records of other healthcare providers - The expert should emphasize that medical records from other health providers are reliable and that healthcare providers routinely rely on the records on other specialists.

3. Learned treatises - If the expert will recognize a treatise, textbook or other reliable source as authoritative on the topic, the expert can read from that

treatise. This can be an extremely powerful tool to support the opinion of the expert, but be careful! Make certain that there are no statements contained in the portion of the treatise relied upon that could damage your case.

4. *Robinson* factors - Consider using the non-exclusive factors under the *Robinson* decision. Having the medical expert explain that his opinion with regard to future incapacity, disability and pain is founded in good scientific methodology can prove to be extremely persuasive for the jury.

5. The "why question." - Asking the expert why he holds a certain opinion gives the expert the opportunity to teach as well as to provide a basis for the opinion itself. Liberal use of the "why question"on direct examination should be liberally sprinkled with its cousin, the "please explain that" question.

Example:

Q: Why do you believe that Paul Payne will develop traumatic arthritis as a result of this elbow fracture?

The doctor can then explain the anatomy and physiology behind traumatic arthritis. He can explain how it has been studied, researched and written about. He can explain how various textbooks and treatises teach it in the medical school. He can also explain to the jury that in his own personal professional experience as well as the professional experience of his colleagues, people who suffer elbow fractures and are followed over the ensuing months and years will inevitably develop traumatic arthritis.

F. Exhibits and Visual Aids.

Anatomical models, drawings, photographs, x-rays are invaluable tools to place the medical expert in the role of teacher. The expert has the chance to get out of the witness chair and on his feet in front of the jury for a little show and tell.

G. Cover the sore spots.

$ Pre-existing injuries.

$ Pre-existing medical conditions.

No shows.

Failure to take medication as prescribed.

Compensation for the doctor's time, not his testimony.

V. PLANNING AND PREPARATION OF CROSS EXAMINATION

The most effective cross examination has the appearance of being extemporaneous and brilliant. In cross examination, the trial lawyer is the expert who tells the story in an uncomplicated and non-confusing way, that is logical and most importantly, not boring. Execution of a brilliant cross examination requires intense planning and preparation.

You must have intimate knowledge of every important fact and statement in all of the medical records, deposition testimony and documents produced. You must not only know what the statements are, you must be able to go to them immediately when they are needed. If, for example, you are going to point out an error in your opponent's recollection of a medical record entry or testimony in a deposition, your credibility will be lost if you must fumble around searching for the record or deposition statement and fail to find it.

Many lawyers are tempted to write out their cross examination questions in advance and read the questions to the opposing expert. A "scripted" cross examination does not appear spontaneous, extemporaneous or brilliant. A "scripted" cross examination makes it extremely difficult to immediately incorporate information learned from the direct examination.

The better practice is to prepare checklists with references to medical records, documents and prior testimony. Prepare a separate checklist for bias, potential errors in assumptions, potential errors of impeachment, positive agreements, enhancement of your expert's qualifications, credibility and integrity and verification that your theory is at least reasonable. During the direct examination, you can then add topics and areas of cross examination to your checklist.

VI. CROSS EXAMINATION

Goals: In general, there are three goals on cross examination. You want to prejudice your opponent's case. You want to bolster your own case. You want to lay the framework for final argument.

A. Prejudicing your opponent's case.

1. Focus on errors - Since you have meticulously prepared for cross examination, you know the medical records, testimony and facts better than the expert. During the direct examination of your opponent's expert, you must listen very carefully and watch the witness closely to find errors in the foundation of the testimony. Some of the things to watch for are misstatements of facts, improbabilities in the testimony, conflicts with common sense and most importantly, testimony that is inconsistent with the expert's prior testimony or the testimony of another witness. Highlighting errors, confusion and inconsistencies will diminish trustworthiness in the eyes of the jury.

2. Bias - In pre-trial discovery, you will want to find out if the expert testifies pre-dominantly for plaintiffs or defendants, if the expert is a relative, co-worker, professional colleague or close friend of the defendant or opposing counsel and how much money the expert makes as an expert witness. You should also read any publications or articles that have been written by the expert to see if there is any particular bias or slant the expert has expressed publicly. You should always Google the expert and find out if he or she has a Myspace page. Check the Texas State Board of Medical Examiners website and download the physician's profile. Check Accurint.com and Public Data.com for any criminal convictions and other useful information.

3. Impeachment - Nothing destroys the credibility of your opponent's expert more than a prior inconsistent statement. Defense lawyers access IDEX. Plaintiff's lawyers who are members of the Texas Trial Lawyers Association access Depo-connect. Obtain copies of depositions given in previous cases. Look at articles written by the expert. Websites are a fertile ground for informal discovery of prior inconsistent statements. Look at the doctor's website. Look at the websites of any professional association the doctor holds membership in.

If you are going to attack the character of the expert, you must use caution. The evidence must be conclusive and more importantly, the jury must agree that the demonstration of bias was important and significant. If the jury believes that you have unfairly attacked the character of an otherwise credible and qualified expert, it is your credibility that has been lost, and you will have inflicted major damage on your case.

B. Bolstering your case - Whenever possible, you should always get your opponent's expert to agree with the undeniable positive aspects of your case, enhance the credibility of your witnesses and verify your theory of the case as reasonable.

1. Agree Points - The plaintiff's' lawyer will want to have the defense expert agree to the nature, extent and permanency of the injury as well as the effects of the injury on the individual in terms of pain, mental anguish, disability and loss of consortium where appropriate. The defense lawyer may want to focus on the idea that patients have a responsibility to follow doctors' orders so that they can reach maximum recovery. The defense lawyer will then want to bring out missed doctor appointments, missed therapy appointments, failure to complete therapy and failure to take medication as prescribed.

2. Enhancing the Credibility of Your Expert - Focus on the difference between your expert and your opponent's expert to enhance the qualifications, integrity and credibility of your expert. If your expert is the

treating physician and the other side's expert is a retained expert, you should bring out the fact that the treating expert became involved in the case to provide medical care and treatment for the plaintiff, while the defense expert became involved in the case to provide testimony favorable to the defendant. The treating expert has been paid to provide medical care and treatment, while the defense expert has been paid to provide testimony. The opinions and conclusions of the treating medical expert were made for purposes of proper diagnosis and treatment, whereas the opinions and conclusions of the defense experts were reached for purposes of providing testimony for which he is being compensated.

Compare the curriculum vitae of the two experts. Differences you will want to focus on are specialists v. general practitioners, board certified v. non-board certified, residency programs, publications and other differences. This line of questioning, if properly executed, is a "win-win." Your opponent's expert will have to agree that your board certified orthopedic surgeon is more qualified than the non board certified family practitioner or look ridiculous and biased and have absolutely no credibility with the jury.

3. Confirm the Reasonableness of Your Theory of the Case - When both sides present expert witnesses with opposing views, the jury must decide which expert to believe. During the deposition of your opponent's expert, you should get your opponent's expert to agree that doctors do not always agree on everything, that one doctor may have one opinion, and another doctor a different opinion. It does not necessarily mean that one doctor is always right and one doctor is always wrong. Hopefully, your opponent's expert agreed in deposition that your expert is a qualified, competent and respected physician with excellent training and education and although he may disagree, your experts opinions are not unreasonable.

C. Laying the foundation for final argument.

During your cross examination of your opponent's expert, he or she may make statements that bolster your case, recognize the qualifications and credibility of your expert and verify that your theory of the case is reasonable. When your opponent's expert makes these concessions, you should write the testimony on a flip chart with quotation marks and write the doctor's name at the bottom. In final argument, you will be able to remind the jury exactly what your opponent's expert said during cross examination.

VII. CROSS EXAMINATION TECHNIQUES AND PRINCIPLES

In his treatise on *The Art of Cross-Examination*, the famous New York trial lawyer, Frances Wellman wrote over 90 years ago:

> "It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject matter itself; and extreme caution; and, above all, the instinct to discover the weak point in the witness under examination."

There is nothing more exhilarating nor more difficult than cross examination. It is an art and a skill that can only be learned through diligence, practice and experience. Consequently, it is the most difficult skill to teach. There are, however, techniques and principles that have been passed on from one generation to the other.

A. The silent cross-examination.

The first question you must ask yourself is whether you want to cross-examine the witness or not. Sometimes, the most powerful cross-examination is to simply state, "Your Honor, it is not necessary to cross-examine this witness." The silent cross-examination might be utilized under the following circumstances:

1. The witness did not hurt your case - If the witness was ineffective in persuading the jury, there may be nothing to be gained and much to lose by cross-examination. Perhaps the ineffectiveness of the witness was due to the lack of planning and preparation on the part of opposing counsel. If so, cross-examination may simply give the witness the opportunity to clarify his opinions and testimony and give opposing counsel the opportunity to conduct a more effective redirect examination.

2. The baited trap - On rare occasion, the wiley opponent may choose to not direct examination of her witness on a topic that is important and detrimental to your case. The wiley opponent may think that having his expert drop the bomb on cross-examination will have more impact on the jury. The wiley opponent calculates that if you do not go into the minefield during cross examination, he can try to bring it up on redirect. In this situation, you may not want to cross.

3. The unassailable witness - Two of the primary purposes of cross-examination is to bolster your case and damage your opponent's case. If neither can be accomplished on cross-examination, you should strongly consider the silent cross-examination.

4. Repetition of favorable facts - Occasionally, your opponent's expert will provide testimony that is favorable to your case. While it is tempting to cross examine your opponent's experts for the purpose of having them

repeat the favorable testimony, the temptation must always be avoided. The witness may have realized that he gave favorable testimony to "the other side" or if there has been a break, it may have been pointed out to the expert witness by your opponent. Cross examination solely for the purpose of restating or reaffirming the expert's favorable testimony to your case only gives the witness the opportunity to explain, clarify or retract. Proceed to cross examine on other points. If your opponent tries to "clean up the testimony" on redirect examination, it will appear rehearsed, contrived and therefore lack credibility.

B. Conducting the cross-examination.

Unlike direct examination where the witness is the storyteller, on cross-examination the trial lawyer is the storyteller. To effectively and persuasively tell your client's story to the jury, you must demonstrate your expertise, your credibility and your likability. You must become, or at least remind them of, their favorite teacher in high school. Keep things simple. Use logic, clear organization and non-technical language. Demonstrate that you know what you are talking about by having mastery of the medicine, anatomy and terminology but talk like a juror. Be fair. Do not ever be boring.

The key to a good cross-examination is control. Control of the witness. Control of the evidence. Control of the courtroom. Remember, it is your show and on cross-examination, you are the star. If you allow the witness to take control, you become at best a supporting actor and at worst, a stagehand.

1. Primacy - Begin your cross examination by scoring a point. Do not begin cross-examination with the last topic covered on direct. Beginning cross-examination where the direct left off is merely a continuation of the direct examination. Jurors expect a strong frontal attack on cross-examination and you must meet this expectations. Your preparation has already told you where your opponent's case is weakest and you are strongest. Go there first. It may be a point that discredits your opponent's case. For example, the defense lawyer may begin his cross-examination of the plaintiff's treating medical expert as follows:

   Q: Patients ought to follow their doctor's advice, shouldn't they?
   A: Yes.

   Q: If patients follow their doctor's good advice, they are more likely to recover from their injuries and return to their previous level of health?

   A: Absolutely.

   Q: You gave good advice to Paul Payne?

A: I think so.

Q: You set out a plan for physical therapy three times a week for six weeks?

A: Yes.

Q: You prescribed medication for his pain as well as medication to relieve his muscle spasms?

A: Yes.

Q: You did that because a combination of pain reduction, muscle relaxers and physical therapy was designed to return him to his previous health?

A: Yes.

Q: You expected Paul Payne to get better if he followed your advice?

A: Yes.

Q: Paul Payne didn't follow your advice. He missed eight physical therapy sessions and refused to take the pain medication and muscle relaxers because according to your own records, "he didn't like the side effects." ?

A: Yes, that's true.

Q: And you are here today telling the ladies and gentlemen of the jury that Paul Payne still has disability and pain?

A: Yes.

2. Brevity - When the witness is passed to you for cross-examination, you have the jury's full and undivided attention. It is time to hit the opposing expert with your three or four most important points of your case while incorporating your theories, themes and labels. Do not repeat the direct examination. Do not ask unimportant questions. Think missile strike, not a march across the mountains.

3. Flag the testimony to the issues - The jury question on damages will instruct them to consider pain and suffering, mental anguish, disability,

disfigurement, etc. Let the jury know that you are about to ask a question that will cover that particular topic.

Q: Dr. Independent Medical Examiner, let's talk about pain. When you did your independent medical examination on Paul Payne, you felt muscle spasms in his neck.

A: I did.

Q: With respect to the physical pain suffered by Mr. Payne, the muscle spasms that you felt in his back are an objective sign of the presence of pain, isn't it?

A: Yes, it is.

4. Recency - People remember the last thing they heard from a witness. Primacy and recency are important, but recency is more important than primacy. Always end with a strong point before a recess or break. Save your strongest point for your last point. You never want to end cross examination with the witness in control and you disoriented.

Sometimes you may forego a remaining point or two on your cross examination if you have reached a climactic point. For example, if the opposing expert has just conceded a point vital to your case, weigh the importance and significance of your remaining cross-examination against the importance of finishing on that strong point.

C. Maintaining control.

1. Use leading questions only. Open ended questions on cross-examination turns control of a courtroom over to the witness. Avoid asking the opposing witness on cross-examination "why," "how," "please explain," or worse yet, "how could you possibly have come to that conclusion?"

2. Keep the leading questions short, simple and direct. If the question on cross-examination is complex and lengthy, the jury will have difficulty following the story you are telling.

3. Phrase the leading question so that it must be answered either yes or no. Since the question is leading, it necessarily contains the answer that you seek. The leading question should be phrased in terms of your theory of the case so that affirmative answers advance your position. The witness is under your control because the witness cannot give lengthy answers.

4. Controlling the evasive and argumentative witness. If the witness is evasive, keep your calm and keep your cool. Remember that the jury is

> seeing the evasiveness and will weigh that fact in determining the credibility or lack of credibility of the witness's testimony. The same is true with the argumentative witness. Shorten the question, repeat the question and politely insist on a responsive answer. If the witness continues to argue, the jury will look upon the witness with disfavor.

Resist the temptation to cut the witness off. Jurors dislike lawyers who cut witnesses off because it gives the appearance that you are trying to keep something from them. Allow the witness to continue to ramble and argue, and when he is finished, look him directly in the eye and say: "Mr. Expert, my simple question is _____. Will you simply answer my question?"

If the witness continues to be evasive and argumentative, good things will happen. The judge will likely admonish the witness in front of the jury. If the witness continues to be evasive and argumentative after the admonishment, the jury will give you permission to attack the witness. Never attack the witness unless you have a firm belief that the jury has given you permission to attack.

VIII. CONCLUSION

Preparation is the key to a well executed direct and cross examination. Preparation will give you the confidence to present the story that is fair, simple to understand and makes sense. If you are properly prepared, you can more actively listen to and watch the witness like the thirteenth juror and try the case for them.