



Top ten strategies to attack your opposition's medical expert

The goal of defendant's experts is to create confusion and gray areas. Here are strategies to keep your issues clear.



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In every significant case you undertake, your trier of fact (jury, judge or arbitrator) will rely heavily on the opinions rendered by each party's experts. Your experts must be consistent and firm on standard of care, causation, damage(s) (including future medical care and/or lifestyle changes). Your opponent will try to manipulate the testimony of witnesses and your experts' opinions to establish that the circumstances of the injury or underlying medical science appears confusing or unusual. Plaintiffs bear the burden of proof; therefore, any misinterpretation of the evidence or uncertainty about community medical standards and basic medical science will undermine your case. You cannot afford to risk any confusion in the juror's mind related to your case in chief, and you should outline a game plan to undermine the expert opinions of your opponents. Outline the facts that support your theories and what witnesses or experts can support that theory. The focus of this article is to identify and outline tactics to weaken the testimony and credibility of defendant's experts.

Preparation is the key to effective strategy

A well-thought-out case plan, that includes a thorough analysis of the facts and understanding of basic medical principles, will highlight your strengths and weaknesses, but should also include the same topic areas concerning defendant's case. Outline areas where you can obtain critical facts or medical principles that support your theories from defendant's experts. Your case plan should also include areas that potentially weaken any arguments against liability and damages

that will be raised by opposing experts. Identify areas where you can establish bias, lack of knowledge or expertise, inconsistencies with other opposing defense experts, as well as inconsistencies between the opposition's expert opinion that contradict strong or undisputed facts.

The following topic areas will help you to undermine and attack the credibility of defendant's experts:

- Thorough preparation of the facts and medical physiology of your case. Conduct a detailed background check of your opponent's experts, particularly related to experience and prior testimony. Identify topic areas where you can obtain concessions that support your case.

- Look closely at the credentials of the opposing expert to discern whether they are qualified to render an opinion on the subject matter at issue and narrow the scope of qualifications at the time of their deposition. Narrow and pin down the scope of your opposing expert's opinions and force the expert to identify in great detail the basis for every opinion rendered.
- Establish bias through prior experience, amount of work, charges, experience with defense firms, what they were asked to do and how much time they have spent on the case and where there was specific focus.
- Limit the scope of opinions to those rendered at deposition. Force the expert to give you all of their opinions and ask the expert to identify every piece of paper (including records and literature) he or she has reviewed and/or commented on. You should also identify the contents of their instructions, communications with counsel, parties and colleagues. If you can get the expert to agree that he or she was retained to refute the injuries claimed by the plaintiff, you have struck gold.



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- Obtain concessions supporting allegations or facts that he or she does not dispute, and obtain any inconsistencies the expert has found in the records, medical literature or other testimony. Have all facts or issues that the expert assumes are true stated on the record and attempt to reach an agreement that if any of the facts relied on by the expert are incorrect, his or her opinion would be altered. Get an agreement that their work has been completed or alternatively, identify what records they need to review in the future to provide an expert opinion.

Create a case plan

Even the most sophisticated juror cannot be expected to fully understand the nuances of injuries and/or standards of care in medical institutions. Therefore, it is of paramount importance to thoroughly prepare your case at the outset and develop a plan that includes theories of liability, causation, facts needed to support your theories, and testimony by supporting experts. It is also extremely important to anticipate those “gray” areas or smoking guns that the opposition will use to create inconsistencies or confusion to undermine your case. As part of your plan, design your outline to incorporate medical issues that can be understood by a lay jury. This same tactic should be carried over to the selection of your expert. Additionally, as part of your outline, include a section that identifies potential areas that could be interpreted as confusing so that you are prepared to address those gray areas with your experts, as well as prepared to discredit experts retained by your opponent.

At the outset, create a case plan that identifies the issues in your case, as well as your ultimate goals. One of your goals should include establishing all physical injuries, the impact of those injuries (financial, emotional and physical), as well as the impact on daily living and scope of future medical care. Long before any treating or expert physicians are deposed, create a detailed outline to identify topic areas where you can narrow the scope of

the opponent’s expert opinions. Analyze what you can reasonably accomplish with that expert. Although your goal is to discern all of the expert’s opinions, open-ended questions can be dangerous and risk opening the door to subject matter that might otherwise be limited at trial to the subject matter covered in their deposition. Either at the outset or shortly after obtaining background information, ask the expert to identify all subject matter that he intends to testify about at trial.

Selecting an expert

In litigation, your greatest weapon is your own extensive preparation, but part of that preparation is retaining the best qualified expert you can find who meets the above criteria. A physician who has a strong educational background (i.e. residency programs associated with large academic and clinical institution(s), as well as a current active practice in their respective field will carry far more weight than an opposing expert whose main occupation is testifying as an expert or one who rarely sees patients with the types of injuries your client has suffered. Strong communication skills are equally important, so that the trier of fact can understand in layman’s terms what the medical standard in the community requires and how the deviation from that standard caused the plaintiff harm.

This issue is particularly important concerning standard of care and causation issues which can be highly confusing to anyone who is not employed in the medical industry. Lastly, work closely with your expert so that he or she is familiar with critical issues, documents, dates, times, names of medical providers. If your expert is weak on supporting data, his credibility may be questioned by the jury. You can be assured your opposition will be prepared to point out any inconsistencies stated by your expert.

Another critical point that is often overlooked, is retaining an expert who is likeable, yet strong and consistent. The moment your expert uses terminology like “possible” or does a 180 degree turn

and agrees with an important point on cross-examination, you will have a long haul to undo the damage created in that risky scenario. Work with your expert to avoid these pitfalls.

Explore background and expertise

Always conduct a background check on your opposing expert. Always make sure you have their CV long before you take their deposition. Ask your coworkers and other firms if they have had experience with that particular expert, and whether they have any sample former depositions you could peruse to identify testimony that may involve similar issues. You might even obtain prior testimony that completely contradicts the opposing expert’s opinions in your case. Typically, local trial organizations such as SFTLA have a list mate e-mail service with attorneys who have prior experience and transcripts containing testimony from your opposing experts. Jury Verdicts is another great resource for background checks, as is your local county’s docket history to discern whether the expert was involved in other lawsuits. Many defense organizations utilize the services of professional organizations to obtain experts, therefore ask if the expert advertizes litigation or medical review services, or if they are a member of or employed by any similar professional organization. State Medical Boards keep track as a matter of public record whether or not that expert has been reprimanded or had his/her license suspended or revoked. These same questions should be explored during the opposing expert’s deposition. Ask about the number of cases where they have rendered expert opinion (the opposing counsel may limit you to disclosed experts, but you can try for all cases related to record reviews and opinions). Inquire about publications and organizations and whether any research, work or publications have any similar issues to the facts at hand. Ask the expert if he or she has ever had privileges revoked or limited and discern what percentage of cases in



deposition and trial are on behalf of defendants.

Pin down the opposing expert

Although it is always difficult to depose an expert witness, the more information you have gathered about that individual's expertise, prior litigation experience and prior testimony will potentially arm you with information to discredit opinions or challenge his or her medical experience. However, save that strategy until after you have questioned the opposing expert about his background, training, medical experience, current employment and litigation experience. Keep in mind that your ultimate goal is to determine his or her opinions, narrow the range of opinions and identify the basis for every opinion rendered. If timing is an issue (and it typically is critically important in an injury matter), force the opposing expert to identify relevant time points when injuries occurred, when the exact point of no return occurred and when that expert believes medical intervention should have occurred. It can be extremely helpful to discern from the opposing expert additional timing issues such as, how long it takes to conduct certain tests, diagnose or medically intervene depending on your client's injuries.

Obtain concessions from the opposition

When feasible, ask questions that will obtain supportive responses regarding the theories in your case. Use records that support your theories in deposition and trial to obtain agreements from the opposing expert. However, since you are not a medical expert, avoid questions that may potentially backfire. In any case that involves medical injuries, including medical malpractice claims, the extra time you spend researching medical issues will help you understand the physiology of your client's injuries, particularly what went wrong and the extent of damages. Understanding the nuances of basic anatomy and physiology will increase

your knowledge base so that you can obtain information from your own treating physicians and experts to assist you in identifying and narrowing the scope of your opposing expert's opinions.

It is critical to pin down the opposing expert to every opinion and topic area that he intends to discuss at trial. Therefore, at the outset of the deposition, after the expert agrees that they have been retained by opposing counsel to render opinions on relevant issues in your case, confirm that the expert has reviewed all the records that they believe are relevant to support their opinions. Identify every single note and record reviewed and get an agreement at the outset of the deposition that they are prepared to tell you that they have looked at everything they need and are absolutely ready to offer their opinions which will be consistent with their intended trial testimony. Verify again that the expert has told you all of his or her opinions at the conclusion of their deposition, just as if that expert was testifying in court at the time of trial.

After the expert identifies the general and specific subject matter of his or her opinions, discern every fact and every document (including scientific or medical literature or treatises) that he or she has reviewed and/or relied on to form their opinions, including dates, timing and witnesses. Ask the expert what assumptions they have relied on in forming their opinion. When you are asking about records or literature the expert has reviewed and relied on, ask whether the expert has found any inconsistencies either supporting or contradicting his or her opinion. Much later in the deposition, hopefully after a little fatigue has set in, force the expert to break down into specific details the subject matter previously identified that he or she intends to cover at trial. At that point you can either ask for greater detail about the records and facts supporting each opinion or alternatively, obtain their agreement that they have already told you what records and facts they have relied on to reach their conclu-

sions. Always confirm that the expert has told you every area where he or she intends to offer an opinion and that he or she does not intend to conduct any further review or research. To the extent possible, evaluate topic areas where your opposition's medical experts concede issues that favor your strategy and the extent of your client's damages. The extra time and preparation that you spend researching relevant issues and medical physiology will also increase your knowledge base to facilitate working with your own experts, as well as non-retained medical providers to help you obtain concessions from the opposing expert. The effort you put forth in personal research, knowing your records backwards and forwards, and information obtained from your own experts will help curtail a well-trained opposing expert's efforts to side track questions and offer testimony that ultimately has no basis in fact or medical literature.

Tactics to establish bias

Send expert deposition notices far enough in advance so that the deponent has adequate time to gather responsive documents. Ask for the expert's CV from opposing counsel at least a week or two before their deposition so you have adequate time to gather information about that expert. Include in your request for documents information that identifies all cases and remuneration related to work as an expert in other cases. If the expert fails to produce information about prior expert work, particularly their financial profits, consider bringing a *Stony Brook* motion to preclude that expert from testifying at trial. (See *Stony Brook I Homeowners Association, et al., v. Superior Court* (2000) 84 Cal.App.4th 691)

Top ten strategies

1. Do your homework and know all nuances, including medical physiology, of your case.
2. Do a detailed background check on the opposition's experts, including prior testimony and current medical experience;



rein in the opposing expert's credentials (is he or she really qualified to render an opinion).

3. Use your experts to identify potential concessions from the opposing expert.
4. Narrow the scope of your opposition's opinions. Force the opposing expert to identify the basis of his or her opinions (records, literature, treatises and experience).
5. Establish bias: charges, time spent on review, what records were reviewed, experience with the opposing firm, as well as working with defense versus plaintiffs' cases.
6. Limit opinions to those rendered at deposition. Specifically ask about standard of care, causation, injuries, future damages and establish in detail about what the expert intends to testify at trial.
7. Identify every note, shred of paper, record, piece of literature, meeting and conversation reviewed and if possible obtain a concession that the expert was retained to refute the injuries claimed by the plaintiff.
8. Obtain concessions that the opposing expert does not dispute your client's credibility or injuries and that they have not met or examined the plaintiff. Also obtain, if possible, that the opposing expert does not contend that records have

been altered or written after the fact.

9. Identify all issues or facts that the expert has assumed are true. Obtain an agreement that any assumption made on an incorrect fact would alter their opinion.
10. Ask the expert to identify any further work that he or she intends to conduct. Ask whether she or he believes his opinion might change if he or she was provided additional information or contradictory facts. Lastly, ask the opposing expert if there are additional records or literature that she or he would like to review to solidify his or her opinion and always try to obtain the expert's prior financial remuneration and number of other litigation cases involving expert work for defense firms.

Arguing with an expert or naïvely thinking that the opponent will simply jump on your bandwagon is not likely to be successful. Treat the expert with respect. Act interested when you ask about all of his or her opinions and the basis for those opinions. This is often the best strategy to narrow subject matter and to the extent you can obtain concessions that support your case, you are one step ahead of the opposing party. An excellent resource concerning how to refute defense tactics is authored by David Ball's

Damages: A Plaintiff's Attorney's Guide for Personal Injury and Wrongful Death Cases. Ball emphasizes that the goal of an experienced defense attorney is to create confusion and gray areas so that liability and causation are not clear. Therefore, pin down the opposition's experts to specific issues and force them to identify the basis for all of their opinions.

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