

Expertly Impeaching the Medical Expert

By James V. Painter

There are many different styles and strategies utilized in the examination of an opposing expert in a medical malpractice case. An approach that may work for one attorney will not necessarily serve other attorneys well. Whatever your tactical approach to the examination, there is no substitute for thorough preparation. Such preparation should include researching a number of potential sources that can be utilized to expertly impeach medical experts.

Curriculum Vitae

A copy of every expert's curriculum vitae (CV) should be obtained through a request for production of documents. It should be automatic for each side to request, through interrogatories and requests to produce, information and documentation about expert witnesses. The requests should require production of each expert's CV. The CV is often a fruitful source of potential impeachment material, both by what is listed in it and what is not. The CV is a great starting point for your expert material research. It typically provides the following:

- education
- specialty
- employment history
- board certification
- professional associations and affiliations
- publications

All of this information should be researched and investigated.

While a CV is typically inadmissible in evidence, it can be used against an opposing expert in various ways. For instance, if an expert lists service as an expert witness, presentations or publications for attorneys, and/or membership in an expert witness association, this information can be utilized to accentuate the professional nature of the witness's

expert activities. The CV can also be used against the expert for things it does not contain. If your research reveals that the expert has in fact given presentations to attorneys or malpractice insurance companies or published materials for attorneys or for physicians on the topic of medical negligence, the expert's failure to include those items on the CV can be pointed out as purposeful exclusions.

Internet Searches

As soon as an expert is identified by the opposing party, a general search utilizing any of a number of free search engines can be conducted using the expert's name. Such free search engines include google.com, AOL.com, yahoo.com, ask.com, and MSN.com. A simple name search on one of these search engines may often produce a wealth of varied documentation and information, including:

- one or more versions of the expert's CV
- literature authored by the expert
- reference to cases the expert was involved in
- the expert's practice website
- professional texts or other publications mentioning the expert
- post-graduate (medical) school or university information on the expert
- newspaper and magazine articles mentioning the expert
- photographs of the expert
- medical organizations or associations the expert belongs to
- non-medical civic or religious organizations/associations the expert belongs to

Prior Depositions or Trial Testimony

Testimony under oath is an extremely powerful potential impeachment tool against experts, particularly those

experts who testify so frequently they cannot recall what they have said under oath. Impeaching any witness with past deposition testimony is clearly appropriate and specifically codified in many states. An attorney is not limited to using only the depositions of the expert in the case at hand and may utilize any deposition the expert has ever given. With some experts, there may be no past depositions, with others only a handful, and with others still, the amount may number in the hundreds.

Depositions and trial testimony should be obtained prior to the expert's deposition to be most useful. This permits the cross-examining attorney to (1) have a very good idea of how the expert responds to questioning, and (2) identify all past potentially helpful testimony to be prepared to set up the expert, and, where necessary, update any older opinions so that the old testimony may still be used. For instance, "Doctor, the standard of care with respect to _____ has not changed in the last 15 years, has it?"

There are many ways to identify past expert depositions. These include:

- inquiry of colleagues
- online searches, e.g., American Association for Justice (formerly ATLA, www.atlanet.org), IDEX (www.idex.com), MDX International (www.mdxintt.com), DRI (www.dri.org), Lexis (www.lexis.com), and court websites (www.ncsonline.org)
- general search engine query
- verdict search, e.g., www.medmalreports.com, www.morelaw.com/verdicts, www.legaline.com/verdicts, and www.JuryVerdictReview.com

Once a past deposition and the attorneys involved in it are identified, a call to the attorney for the party on your side will often result in your obtaining

not only the deposition in that case but, if that attorney did his or her homework, additional deposition transcripts and potential impeachment materials as well. The same process is then followed with the attorneys identified in the additional transcripts and may ultimately result in an abundance of past transcripts.

The cost of obtaining past depositions will vary. Some law firms will charge a per transcript fee. Some firms, however, are good about providing transcripts in a digital format for free. Of course, gathering past depositions is of no use unless they are actually reviewed for relevant testimony. Depending upon the number of depositions collected, this can be an extremely time-consuming and costly endeavor. This task can often be accomplished by an associate familiar with the facts of the case at hand and a good eye for any potentially useful testimony. A well-qualified and trusted paralegal may also be able to perform the duty. While ideally every past deposition should be scoured for useful testimony, with very prolific experts, a cost-benefit analysis must take place. If the result is a decision to limit the number of past depositions reviewed, the following order of priority is recommended:

- All depositions of the expert in cases wherein he or she was a named defendant or an agent or employee of a named defendant. This is particularly useful to defense attorneys since it is probable that when defending himself or herself, the testimony is likely to be defense-oriented and may in fact contain extremely helpful generalizations.
- All depositions on the subject matter that is the same or materially similar to the subject matter in the suit at issue.
- The three most recent depositions, regardless of the subject matter or side

testifying for. These transcripts should give you the most up-to-date picture of the expert's professional and expert activities, history, and charges.

- Depositions wherein the expert was testifying as a witness for your side. If you represent the plaintiff/patient, obtain those transcripts where defendant's experts have testified for plaintiffs/patients and vice versa. These transcripts can be helpful

If, for some reason, the deposition is not taken at the expert's office, take the time to actually visit the office or have someone do it for you.

since experts, either subconsciously or purposefully, will tend to slant their testimony in favor of the side that retained them. This often leads to broad and general statements in favor of that side, which may be used against the witness now that he or she is working with the party on the other side of the "v."

- All past transcripts. Ideally, all past transcripts should be obtained and reviewed.

Expert's Practice Website

In this day and age, almost every physician, and certainly most medical groups, have a website. These sites usually contain a description of the practice as well as biographies and photographs of the physicians. They often also include the physicians' CVs, information produced

by the practice on certain medical issues, and links to literature and other websites and resources. The site may advertise the physician as a specialist in a practice area not at issue in the case; for example, gerontology or geriatrics when the case involves an infant. Literature produced by the physician or practice provided directly by the site or linked to by the site may actually support your case. Links from the site may provide helpful information, and if the witness disagrees with the information or claims the information is not authoritative, he or she will be in an uncomfortable position of having to explain why his or her site would refer patients and potential patients to unreliable resources.

Expert Office Materials

If possible, schedule the deposition of the expert to take place at his or her office. Arrive early so that you have plenty of time to collect and review all potentially relevant pamphlets and other handouts available in the waiting areas and read any signs or postings. Do the same thing in the room in which the deposition is taken, often the physician's office. Confirm on the record and identify the materials, any relevant signs or notifications, and the literature, or lack thereof, on his or her bookshelf. If, for some reason, the deposition is not taken at the expert's office, take the time to actually visit the office or have someone do it for you. This will not only enable you to obtain the handout materials, but you can also look at the office itself and take photographs of the office and its surroundings.

In conducting this type of activity, examples of useful materials include the following:

- In a case wherein a urologist testified that the standard of care clearly required a family physician to offer and

administer a PSA test to a particular patient, a publication by that same expert, located in his reception area, explicitly stated that PSA testing was extremely controversial in the medical community because there had been no study to date to support that it had any effect on morbidity or mortality. On the other hand, in that same case, a deposition of the treating urologist was taken at his office, wherein a sign was posted on the wall that stated any male over the age of 50 should consider a PSA test. This was certainly not helpful to the defense of that case.

- In a case against a family practitioner in which plaintiff's expert opined in his expert affidavit that he was basing his opinion on his practice and experience as an internal medicine primary care provider, materials obtained from his present office indicated that he was in fact involved in holistic medicine, and literature available in the office described many alternative approaches to patient care and treatment.

State Medical Boards

Almost every state medical board has a website, and most will provide free profiles of its physicians. Typically, the information provided includes license number and date; licensure in other states; address; practice location history; medical education and training; specialty board certifications; hospital staff privileges; disciplinary actions; criminal offenses; and medical malpractice judgments and settlement amounts. Some sites will actually allow you to save and print public disciplinary orders. Some states are also starting to track expert witness activity. For instance, the Florida Medical Board site will allow you to run a search of physicians who have testified

in Florida. The best place to start a medical board search is the Federation of State Medical Boards, at www.fsmb.org/directory_smb.html, which provides links to all state medical licensing boards.

Freedom of Information and Open Records Requests

Many experts in medical malpractice cases are or have been affiliated with one or more medical schools in some type of teaching or research capacity. As such,

Literature and links from a hospital at which the expert has staff privileges can be useful in that the expert may feel inclined or pressured to agree with it.

when the institution is a public one, it is obligated to respond to an open records request for its files on the expert. Arguably, since almost every medical school receives some extent of public funding, private institutions may be subject to these requests as well. The material that can be obtained through such a request can be quite impressive.

In one case, an expert's files were requested from a Florida public medical school. As it turned out, the particular expert had sued that medical school for failing to promote him to a full professor. In-house counsel for the school

was more than happy to oblige with defense counsel's request. The defendant's attorneys obtained voluminous documentation on this expert, including every request form he had to submit for permission to act as an expert in medical legal matters. In these permission slips, the expert had to identify the involved parties and for which side he was reviewing the case: plaintiff patient or defendant physician. Defense counsel was able to determine that in at least one of these requests, the expert indicated that he was reviewing the case for the defendant physician when in fact it was proven through his deposition in that case that he was retained and reviewing the case for the plaintiff patient. Additionally, it was noted on one of his requests for permission to conduct expert activities that it was not initially approved by the powers that be, and a meeting was held with this specific physician to discuss a concern that he was, in effect, shirking his clinic duties to attribute more time to professional expert activities. This is a sampling of the useful information obtained through an open records request.

It should be noted that each state has its own open record provisions, which should be consulted and referenced in the cover letter when attempting to obtain this type of documentation and information. It should also be noted that to date so-called private medical schools regularly refuse to comply with such requests.

Background Checks

There are a large number of online services that will perform various background checks for a fee. Some examples are www.accurint.com, www.PeopleFinder.com, web.public-records-now.com, and www.backgroundcheckgateway.com. Reports are generally provided within a week of the request and often include address history, household size,



median neighborhood income, potential relatives or associates, civil suits, criminal histories, and property ownership. While admittedly this type of search is often of little value, it is quick, easy, and can be done at a low cost, and every now and then will indeed provide some striking and extremely helpful information.

An example of one very unusual and productive result of conducting background checks occurred where checks on the address histories of both a plaintiff and his sole expert indicated that they both had lived at the same address for a significant amount of time and that the home at that address was in fact owned by the expert. In deposition, the expert initially refused to identify her home address, stating that she did not believe it was relevant, but affirmed the accuracy of a certain address upon further questioning. She further went on to admit that she and the plaintiff did in fact live together for an extended period of time and, in addition to that, had stayed together in a hotel room during a conference of some sort. Shortly after this deposition, the defendant physician in that case was dismissed.

Hospital Websites

The majority of experts will have staff privileges at one or more hospitals and often will have held supervisory positions. Just about every hospital now has its own website. Some provide information on its staff, and therefore may provide information specific to the expert at issue. Additionally, hospital sites will almost always provide their own information or literature on various health topics and will also link to other resources. As with information contained in the expert's or the practice's websites or links therefrom, literature and links from a hospital at which the expert has staff privileges can be useful

in that the expert may feel inclined or pressured to agree with it. If the expert disagrees with a statement or principle published on one of his or her hospitals' websites, he or she can then be questioned as to whether the concern regarding the validity of the statement or issue with the powers that be at the hospital was ever raised and whether he or she was involved in any way in preparing or reviewing the material as published on the website. It also may be useful to request and obtain a copy of the particular hospital's medical staff bylaws.

United States Census

It is considered very likely that most trial judges would take judicial notice of census results. This can be useful when addressing the issue of the foreseeability of an outcome and can be particularly helpful to the defense.

In one pediatric meningitis case, the claim was that it should have been reasonably anticipated that a child with fever and a history of vomiting was suffering from bacterial meningitis. However, the plaintiffs' experts agreed that the overwhelming majority of patients of that age presenting with those symptoms have viral illnesses and not pneumococcal bacteremia or meningitis. They each also deferred to the Centers for Disease Control and Prevention statistics, indicating that before the routine use of the pneumococcal conjugate vaccine (which was not in use at the time of the treatment at issue), the incident rate for bacteremia in children five years and under was 17,000 per year and meningitis was 700 per year. The United States Census Report for 2000 stated that there were approximately 23,140,901 children ages five and under. Therefore, the incident rate/probability that a child presenting such as the plaintiffs' son

did had bacteremia or meningitis were bacteremia: $17,000/23,140,901 = .00075$; meningitis: $700/23,140,901 = .00003$. Plaintiff's experts were therefore forced to admit that the prospective probability that a 20-month-old child presenting with a fever and vomiting would have pneumococcal bacteremia and/or meningitis was extremely remote and would be an exceptionally rare occurrence.

Professional Associations and Affiliations

Almost every expert belongs to at least one professional association or affiliation, even if he or she is not board certified in any particular specialty. The websites for the boarding entities, along with the associations and affiliations, can be fertile grounds for potential impeachment materials. Many have adopted ethical rules, which include rules or guidelines addressing a member's participation as an expert witness in medical malpractice actions. In fact, almost every academy, college, or other association of the practice of medicine or any specialty therein has some sort of guideline or ethical rule regarding the provision of expert testimony by its members. If the expert at issue is in non-compliance with such a guideline or ethical rule, it can be utilized against him or her.¹

In addition to the rules regarding expert testimony, almost every website pertaining to a board, a college, or an association of medicine or some specialty thereof contains both its own literature as well as links to other sources of information. Not only can these websites be useful educational tools regarding the medical subject matter of the case at hand, but they can also potentially be used to impeach the opposing expert, particularly when they are published by an entity of which he or she is a

member. Some of these boards, colleges, and other associations or affiliations will even permit you to inquire as to whether a particular physician is actually a member thereof. In essence, any general search on a particular area of medicine should bring up just about every board, college, and association thereof. Once you are able to link to one or two of these, most will contain links to other similar organizations as well. As an aside, boards, colleges, or other associations that the expert claims to be a member of can also be a valuable source for experts of your own, particularly if you can obtain a review of the case by the president or a high-ranking official of the entity who supports your position.

Witnesses' Publications

To the extent that the opposing witness has published anything, you will certainly want to obtain copies of any publications even remotely related to the issues in the case prior to the taking of the expert's deposition. Additionally, if any of the publications were for attorneys or geared toward medical malpractice litigation, you will want to obtain those as well. This collection of publications should not just be limited to textbooks, chapters thereof, or actual periodical articles or research publications.

Medical Literature

If you start out by first addressing those public associations and affiliations that the experts belong to, in almost every case, they will admit that those groups produce literature that they receive and, in most cases, regularly review. Most will be hard-pressed to say that this literature is not commonly read and referred to, at least by members of their specialty, and thought of as a generally reputable standard source of reliable information. From there, one can move

on to other well-known medical publications such as *The Journal of American Medical Association*, *New England Journal of Medicine*, *Annals of Internal Medicine*, *Archives of Internal Medicine*, *American Family Physician*, and texts such as *Harrison's Principle of Internal Medicine* and *Kelly's Textbook of Internal Medicine*. If the physician at issue is an internal medicine practitioner, or perhaps even a family practitioner, more likely than not, he or she will agree to either owning these resources or that they are at least commonly read and referenced by similarly situated practitioners.

Before literature is provided to an expert or identified in discovery, it should be completely and thoroughly understood.

Once this has been established, one approach is to move into other areas of questioning, such as the physician's expert testimony history, initial involvement in the case, and opinions on standard of care and causation. Finally, question the expert about helpful quotes taken directly from the resources that have been covered initially with that witness. The witness will either agree with the helpful quotes, which accomplishes its purpose in and of itself, or disagree and thereby, at the judge's discretion, be subject to cross-examination by the actual literature itself.

Using medical literature can also be very dangerous. For instance, before

literature is provided to an expert or identified in discovery, it should be completely and thoroughly understood. This includes not only the article itself, but every source reference contained therein as well.

One vivid example of the potential dangers of utilizing medical literature is a case involving the standard of care applicable to a general surgeon's insertion of a subclavian catheter for purposes of dialysis. The defendant surgeon admitted that it took him more than two attempted "sticks" to successfully cannulate the right subclavian vein. After he had done so, a plain film was taken, which showed a sliver of a pneumothorax. This was not atypical, and the surgeon discharged the elderly patient to a dialysis center for her dialysis treatment. The patient initially tolerated the treatment well, but midway through the treatment, she began having difficulties. The employees had the family take her to a nearby emergency room. Once she arrived, she was in cardiopulmonary arrest, and CPR was conducted. She was revived and ultimately found to have a massive hemothorax. The claim against the defendant surgeon was that he caused and/or contributed to the hemothorax by puncturing the pleura of her lung when he was attempting to cannulate the subclavian vein.

In this case, plaintiff's counsel provided his general surgeon expert with a number of medical articles which, upon their face, did in fact seem to indicate that the more "sticks" it took to successfully cannulate the subclavian vein, the higher the rate of complications therefrom. However, a careful reading of the literature showed that even though the complication rate increased, not one of the complications was a hemothorax as a result of a stick in the lung pleura. Therefore, the literature this particular expert had been provided



and relied upon actually showed that no matter how many sticks of the needle were used to cannulate the subclavian vein, not one of them caused a hemothorax in the method claimed in this case. Even when hemothorax caused in a manner other than the needle sticking the pleura were included, the highest reported rate was 0.7 percent.

Do Not Forget Your Own Experts

When researching resources for impeachment material of the opposing

experts, you should not assume that your own experts are not impeachable. Rather, it would be time well spent to conduct the same research upon your own experts. Experts you retain may not always be forthcoming about prior contradictory statements or literature they have been involved with, or they may simply have forgotten it. In either event, the last thing you want is to find out about it for the first time at trial. Therefore, a thorough background check utilizing these same

steps on your own experts is likewise advisable. ■

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Endnote

1. See Dean P. Laing and Laura J. Now, *A Radiologist's Duty to Communicate with the Treating Physician*, HEALTH LAW LITIGATION, Vol. 8, No. 1, Winter 2010.