

## Cross-Examining the Nonindependent Medical Examiner

By W. RUSSELL CORKER

In this day of specialization, it comes as no surprise that a new specialty has evolved: the "professional independent medical examiner" (IME). *Independent*, of course, is an oxymoron, since the medical witness performs the examination tainted by a perspective born out of financial allegiance. Gone are the days when the objective and scientifically minded physician performs an honest evaluation of a claimed injury. A cottage industry has developed where companies, for a fee, provide doctors to the insurance defense industry to perform the numerous physicals performed yearly.

For many attorneys, the only doctor they will ever cross-examine is one hired by the insurance company to examine the plaintiff and testify in court to dispute that plaintiff's injuries. It is essential, therefore, that the plaintiff's attorney master some basic cross-examination techniques. This article, while hardly exhaustive, suggests several "safe" lines of cross-examination in the typical neck-and-back-injury case. It will not discuss attacking the witness's credibility, always a fertile course against the professional witness. Instead, it will focus on several lines of examination directed at the substance of the evaluation.

The single most important goal of cross-examination is to elicit from the adverse witness testimony that will narrow the issues of conflict between the opinions of your doctor and those of your opponent. It must be assumed that the professional medical witness will be a trial-seasoned and court-wise veteran, so extreme care must be taken not to permit the witness to reiterate his or her direct testimony during cross-examination. It is also improbable that your cross-examination will get the adverse medical witness to change his or her opinion on critical issues. Therefore, the attorney must develop a strategy to at least neutralize the effect of this witness's testimony.

### Questions Regarding Duration of the IME

In preparation for cross-examination, it is always a good practice to send an assistant to the physical to take notes and record the amount of time spent by the doctor performing each portion of the IME. Although rare, it might be necessary for this assistant to take the stand and testify at trial, and therefore someone other than the trial attorney would probably be preferable to attend the examination. The assistant should keep accurate time records, record the complaints made by the client, and document the physical examination. The doctor can then be cross-examined regarding the amount of time actually spent performing the examination. Typically, a certain portion of the examination involves history taking. If the entire examination took only 20 or 30 minutes, at least half of the time will be spent taking and recording the history. This brief examination can then be contrasted with the numerous times the plaintiff's treating doctor has spent with the patient, supporting the theory that the treating doctor's diagnosis is founded upon more reliable information. The following line of questions can be used to address this issue:

Doctor, my assistant was present at the time you examined the plaintiff. Do you recall that?

It is true, is it not, that your examination began at 10:20 and ended at 10:40?

Did that 20 minutes include the taking of the history and the examination?

Doctor, isn't it true that the first 10 minutes was spent taking a history from Mr. Jones?

It is also true, isn't it, that your physical was performed in only 10 minutes?

### Questions Regarding the Number of Doctor/Patient Visits

Any doctor who evaluates a patient on only one occasion is very vulnerable on cross-examination when compared to the numerous assessments made by a treating doctor over a much longer period of time.

# trial technique

A safe and effective line of questions working off of this obvious fact can easily be developed, as follows:

Many conditions are best observed over a course of time, since the signs and symptoms may vary at any one given time, isn't that correct?

Comparing a physical condition on different occasions frequently gives a doctor more information about the patient's true condition than a single isolated physical examination, isn't that so doctor?

Doctor, in your own practice, have there been occasions when your initial tentative diagnosis, formed at the time of the initial examination, subsequently turned out to be incorrect?

You would admit that one examination frequently is not as good as a complete series of examinations, and therefore an opinion will occasionally have to be revised or changed.

Doctor, you have formulated clinical opinions concerning a condition that have not been confirmed at the time of surgery, isn't that so?

## Questions Regarding the Subjectivity of Pain

The most common opinion rendered by the IME is that there are no "objective findings" to substantiate the patient's "subjective complaints" of pain. Frequently, the only finding made by the doctor is that the patient subjectively complained of pain during a portion of the testing. The following line of questioning can be used:

It is well documented in the medical literature that a patient's complaint of "pain" is the most common reason for a patient seeking medical attention, isn't that so doctor?

Doctor, pain is subjective for all patients, not just Mr. Jones, is it not? There is no "objective" way to assess pain, isn't that so?

Even with all of the scientific advances, there is still no way to measure pain in an effective way, true?

In essence, when it comes to assessing pain, what the patient reports to you is really the most significant factor, true?

Doctor, in your own clinical practice, it would be fair to say that you have had occasion to treat patients who came to you complaining of pain where you have been unable to elicit any "objective" findings, isn't that true?

Doctor, it is fair to say that you have made a diagnosis and instituted a treatment plan for patients based exclusively upon a history of pain, isn't that so?

In some of those cases, you have prescribed medication for the pain based exclusively on patients' complaints alone, true?

Doctor, you are not saying that Mr. Jones was not in pain when you examined him, are you?

## Questions Regarding the Patient History

The IME usually will not have taken a particularly detailed history and frequently is vulnerable on the daily activities of the plaintiff before and after the accident. For instance, it is usually not too difficult to get the doctor to agree that a patient's inability to perform a certain physical activity, like lifting a heavy box without pain following the accident, is "consistent with" the type of injury that the plaintiff is claiming. "Consistent with" is a much more inclusive phrase and gets an affirmative response more often than suggesting that it is "diagnostic" of a particular condition. For instance:

At the time that you took Mr. Jones' medical history, he advised you that at the time of the accident he experienced severe pain in his lower back and that the pain has continued to date, did he not?

Now, doctor, this symptom is one of the classic symptoms consistent with low back injuries, is it not?

One of the potential causes for this low back pain "could" be an injury to a spinal nerve, isn't that so?

You also obtained a history that Mr. Jones experiences severe back pain after sitting for periods of time, isn't that so?

Pain with sitting is also a symptom consistent with herniated discs, true?

# trial technique

The same line of questioning can be followed for the entire history given by the plaintiff to the IME. By using reinforcements through the constant repetition of the medical history, the cross-examiner strengthens his or her case by repeating it to the jury. There are minimal risks associated with cross-examining the doctor on the history given by the plaintiff, particularly where the IME report details the history. While the lawyer is merely asking for the doctor's statement about what the plaintiff told him or her, juries frequently have a difficult time differentiating between what is told by way of history and what in fact the doctor actually feels is true following his or her examination. The most critical aspect of this type of safe cross-examination is to keep the doctor from interjecting editorial comments that are unfavorable to the plaintiff.

## Focusing on the Treating Doctor's Findings

It frequently occurs that two doctors, seeing the same patient, make different findings and arrive at different opinions concerning the cause. When the plaintiff's treating doctor has a diagnosis of a condition that is not confirmed by the IME following his or her physical examination of the plaintiff, one technique, called "mirroring," can be used to focus on the physical findings and recorded complaints made by the plaintiff's treating doctor. First, foundation questions are asked to get the IME to agree that the particular condition, such as a herniated disc, is a well-recognized medical condition known to cause specific signs and symptoms. The IME is then questioned extensively using the medical records of the treating doctor, as follows:

Before a doctor makes a diagnosis, it is good practice to get and review as much pertinent medical information concerning the patient as is reasonably possible, isn't that so?

When you examined Mr. Smith on the one and only day that you saw him, did you review the medical records of his treating physician, Dr. Jones?

You would certainly want to know what the treating doctor found when he examined Mr. Smith, would you not?

Doctor, in formulating your opinion, did you take into consideration the

physical findings of the treating doctor who saw this patient over a two-year period?

Doctor, isn't it a fact that herniated discs are frequently caused by trauma?

In the records of the treating doctor, it indicates, by history, that the plaintiff sustained a trauma to his back as a result of an accident that occurred on May 15, 1998, isn't that true?

The history documented at that time was that the patient complained of pain in his back, isn't that true?

Pain in the back would be one of the symptoms a physician would expect with a herniated disc, true?

For the next several years there were various tests performed by Dr. Smith, isn't that so?

And according to his records, there were restrictions in the plaintiff's range of motion (for brevity's sake, I have not gone into all the specific decreases in range of motion)?

And a disruption in the normal range of motion would also be a sign consistent with a patient having a herniated disc?

If you credit all the signs and symptoms in his office records, would it be fair to say that Dr. Jones was treating Mr. Smith for a herniated disc?

These several "safe" areas of cross-examination can be developed more fully using the treating doctor's office records, as well as the history recorded by the IME, the night before the actual cross-examination takes place. It is always a good practice to have the bulk of your cross-examination prepared before coming into court, rather than relying on reacting to the testimony from the stand. You should already know what you want to do with the witness before he or she testifies. The suggested lines of questioning above can be used in just about any type of injury case. It will keep the experienced witness under control and strengthen issues consistent with your case.

*W. Russell Corker is the senior trial attorney for the firm of Shayne, Dachs, Stanisci, Corker & Sauer in Long Island, New York, where he concentrates in the area of plaintiff's personal injury and medical malpractice litigation.*