

Medical Malpractice Trials: Winning The Morality Play in the Battle of the Experts

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Trials involve a search for truth and a morality play.

During press conferences John Warner, Esq., lead counsel for Microsoft in the antitrust case United States v. Microsoft, criticized the trial approach of the United States lawyers because the government focused its attention during the trial on demonstrating inconsistencies in the evidence that were not (in his view) substantively important. Karen Donovan, [*V. Goliath: The Trials of David Boies*](#), (Pantheon Books 2005), Kindle Electronic Edition: Chapter 9, Location 3138-3150. Ten years later, during a seminar at Harvard Law School United States v. Microsoft: 10 Years Later, ([posted on YouTube](#)), David Boies, Esq., lead counsel for the United States, responded to that criticism by indicating that every trial involves two things. First, a trial involves a "search for truth." Second, a trial involves a "morality play."

Mr. Boies pointed out that the search for truth in a complicated dispute can be difficult, complex, and ambiguous. Complicated disputes require juries to get into the details of difficult, specialized and esoteric issues. At the same time, the morality play that is part of a trial which is going on simultaneously with the presentation of data, plays out in a high level of generality. Morality plays drive you from the data to the dramatic. The drama involved in the morality play almost always concerns issues of credibility. Jurors are persuaded by data, but they are also persuaded by drama.

Boies believes that the more complex the issues in dispute are at trial, the more likely it will be that the result will come down to the morality play that takes place before the jury. There are several reasons for this. To begin with, people are not designed to make decisions solely in an objective fashion, it is not how we operate. Additionally, jurors are usually not schooled in the technical issues that are at stake in any given case. In fact, if they are, they are usually dismissed from juror service. Complicated issues of medicine or science are usually outside the scope of a juror's everyday-experience. When a juror has to process information beyond his scope of knowledge and outside of his personal experience, he becomes more dependent on what he hears from witnesses and lawyers when charged with making a decision. At the same time, because he is less capable of deciding whether the evidence he is evaluating makes sense, issues of credibility, whether real or apparent, become magnified.

When complex medical issues are at stake in a trial, attorneys have to address not only to the details of the science to allow the jury to engage in its search for truth. Attention must also be paid to the morality play the jury is watching, so that any credibility questions in your position are dealt with and the credibility problems in the position of your adversary are exposed.

If you only utilize your direct and cross-examinations of medical witnesses to present evidence that goes to the medical issues in a case, you will be ignoring the morality play going on during the trial. This will put your client at a significant disadvantage because if you fail to attack the credibility of you adversary's position, and you fail to anticipate attacks on your medical experts' credibility, you risk losing a trial even if the weight of the medical evidence suggests that your position is more accurate.

Highlight the importance of the morality play at trial by establishing during discovery that there are ethical rules that apply to expert testimony.

Insist on an expert's curriculum vitae in discovery, because many professional societies which experts belong to have ethical requirements specifically related to expert testimony . (1) Furthermore, even if an organization the an expert belongs to does not have ethical requirements specific to testimony, it will have broader ethical requirements that control the conduct of its members that are usually transferable to activities the witness engages in as an expert.

At their core, ethical requirements related to expert testimony almost universally require that experts conduct (a) a comprehensive analysis of the facts, (b) an objective analysis of the facts and (c) a review in accord with accepted principles of science. During the deposition of a defense expert, confirm that these ethical requirements exist, that they govern the expert's activities in your case and that the expert's compliance with these rules is mandatory. Additionally, establish that the expert agrees that in order to do his job fairly, these ethical requirements must be followed. Question the expert extensively about what these requirements mean. Ask questions that require the expert to provide examples of behavior that violate the rules. If you take the time to do these thing during the deposition of an expert who conducts a faulty analysis, at the time of trial you will be in a position to confirm that the expert's opinions were based on an unethical analysis by using the expert's own testimony against him.

To be in a position to attack the credibility of an expert's position, attempt to determine whether the expert has a credibility problem because of either (a) his factual analysis or (b) his medical or scientific analysis. Usually expert credibility issues arise in a litigation because of (a).

If an expert is taking a position that is wrong, he is usually either (a) misrepresenting the facts of the case by ignoring, minimizing or overemphasizing evidence, or (b) misrepresenting the medicine by advocating medical science that is against the consensus of opinion. Medical experts do not usually misrepresent the science in a case. There are many reasons why. First, the majority of experts are not intellectually dishonest. Second, the prevailing consensus about an issue of medical science is usually set forth in writing either in published articles, textbooks or clinical practice guidelines. From a purely strategic point of view, it is not a good idea to for a medical expert to defend a litigation by taking a position that is contradicted by published documents which are relied on by colleagues to make medical treatment decisions. Third, if expert physicians are intellectually dishonest, over time they create a paper trail that sooner or later turns them into a liability, and lawyers stop using them.

When you review the expert's opinion and decide what the expert has done to create credibility issues, focus your attention in discovery on exposing these problems.

To exploit an expert's credibility problem stemming from a faulty factual analysis, you must establish at the outset of a deposition exactly what he reviewed prior to forming the opinions set forth in his report, and what facts the expert considered important to his analysis.

Make sure that you establish unequivocally at the outset of a deposition everything which was reviewed by an expert prior to the formation of the opinions set forth in his report. This is a prerequisite to exposing credibility problems because until you establish this baseline information, you will not be able to demonstrate that the expert ignored, minimized or overemphasized evidence. Do not merely confirm that a list of materials set forth at the beginning of an expert report is a complete accounting of what an expert reviewed. Establish that when the expert went through the trouble to list what he reviewed in his

report, he attempted to be accurate and comprehensive. Confirm that when the expert prepares reports in other cases, he also lists the materials he reviews. This establishes that the process is not unique to your case, it is something he does as a matter of course when he acts as an expert in every litigation. Confirm that he tries to be careful when he lists what he reviewed in other cases too. Take the preparation of an expert report out of the realm of a single task and turn it into a mode of operation.

Establish that the expert did not intentionally leave materials off of his list because the materials were either (a) harmful to the litigation posture of the party who retained him or (b) helpful to the other side. Confirm that the expert did not do either (a) or (b), because this would be violating the rules governing how he should behave as an expert. Go beyond merely asking an expert if the list of materials in his expert report is accurate and ask all of these ancillary questions because it makes it harder for an expert to say later in the deposition (when you confront him with materials he failed to list) that it is possible he reviewed things he failed to mention inadvertently. Further, if the expert disregards his prior testimony on the subject and later indicates he reviewed something he failed to list, all of these other questions amplify the inconsistency between the expert's report and his testimony.

Expert reports always contain a factual chronology. Establish at the expert's deposition that when the expert prepares reports in other cases, he sets forth factual chronologies in those reports as well, and this process is not unique to your case. Confirm that the expert tried to be accurate when listing the facts in the chronology in his report, and he tries to be accurate in other cases when he does this. Establish that the expert did not leave out facts in the chronology that were either (a) harmful to the litigation posture of the party who retained him, or (b) helpful to the other side. Confirm that the expert did not do either (a) or (b) because this would be violating the rules governing how he should behave as an expert.

Confirm with the expert that the facts set forth in his chronology are facts which he believed were important. An expert will often resist committing to this position because he recognizes that you are attempting to wed him to his factual analysis, and he is aware it is not objective. If an expert resists admitting that the facts listed are ones he considered important to his analysis, ask enough additional questions about the factual chronology to turn the expert's resistance itself into a credibility problem.

You can usually get an expert to stop resisting the idea that he listed important facts in his chronology by attempting to establish the converse conclusion. Ask the expert whether the facts listed in the chronology of his report were unimportant. Ask the expert whether the facts in the report were selected in an arbitrary fashion. Ask the expert to identify those facts in the chronology that he thinks are unimportant to his analysis. Ask the expert to identify important facts he reviewed that are not in his chronology. Ask him if he can provide a single important fact that he failed to list in his chronology. Eventually, the expert will either concede the point, or he will look evasive.

To expose credibility problems inherent in a faulty expert analysis, arm yourself with data from (a) previous similar analyses performed by the same expert in and out of the context of litigation, (b) analyses performed by other experts involved in the particular litigation, or (c) analyses suggested by experts outside the scope of the litigation in the form of clinical practice guidelines or published literature.

There are certain things that you should do every time you begin your analysis of a defense expert's position in a litigation. Always Google the expert's name because you inevitably find information about

the expert that is not listed in their curriculum vitae, which may lead to other sources of information that contradict the expert's position in your case.

If available, you should also visit any website in your state to determine whether the doctor has been previously sued or professionally disciplined. If a doctor has been sued, attempt to obtain the details about the litigation so that you can secure all deposition or trial transcripts.

You should also visit TrialSmith to look for transcripts of past testimony. Experts who testify in specialized areas often confront similar fact patterns. Occasionally, an analysis performed by an expert in another case involving similar issues is inconsistent with the analysis performed in your litigation. Even if you do not find testimony that you can directly use to contradict a defense expert's position in your case, you will often find other information in a deposition transcript relevant to the morality play at trial, including what literature the expert believes is authoritative and how much income an expert receives through providing expert services.

You should perform a PubMed search to make sure that an expert has provided a comprehensive list of articles which they have published on their curriculum vitae. Obtain articles authored by an expert that are pertinent to the subject matter of your case to determine whether the analyses performed by the expert in your litigation is consistent with the one performed by the doctor in an academic setting.

When an expert performs an inadequate analyses in a litigation, he is often practicing his profession in a way that he would not do in "the real world." To expose the credibility issues that arise in these circumstances, do not merely establish during the deposition that the expert does something in "real life" that he did not do in your case. Establish why the expert does the thing he failed to do in your case when he is acting as a professional in the "real world." This will (a) highlight the importance of the contradiction to the jury and (b) make it more difficult for the defense to downplay the importance of the contradiction.

For example, don't merely ask the expert whether he looks at radiographic films in his medical practice when he failed to look at the films in your case, ask questions that establish the importance of the activity he neglected to perform as an expert: Why do you like to look at the films yourself when you send your patient for an MRI? When you are going to operate on a patient, is it a good idea to look at his films to get a better understanding of his injury and anatomy? Have you ever disagreed with a radiologist's opinion? Similarly, if a medical expert is disregarding important facts, establish that when he is actually caring for a patient, he takes a careful history that investigates all of the pertinent facts including the mechanism of injury. If an expert is opining beyond the scope of his specialty, establish that when he is practicing medicine he refers the patient to a specialist.

Treating physicians who have opinions consistent with your expert's conclusions can provide powerful evidence in the morality play at trial by bolstering the credibility of your experts. If an expert ignored, minimized or overemphasized evidence to be in a position to conduct a faulty factual analysis, their analysis will often be at odds with that performed by the patient's doctors. It is important to place before the jury evidence that demonstrates that treating doctors, whose opinions were not merely the product of an academic exercise, but resulted in care or medication which had health consequences, disagreed with the other side's expert and agreed with yours. Further, unlike experts, treating physicians usually form their opinions prior to litigation, "before the lawyers got involved."

You may obtain many practice parameters from professional medical societies at no cost off of the internet. These are excellent tools to use against an expert who conducts a faulty analyses because they discuss the clinical importance of symptoms or findings. Further, the medical conclusions in these guidelines represent the consensus in the field. An expert who conducts an analyses at odds with a practice parameter of a medical organization which he is affiliated with will have a credibility problem by virtue of that fact alone. At the same time, practice parameters that are consistent with your expert's opinions are an asset to your case in the morality play at trial because they are from an independent source, generated without reference to your particular litigation.

Google Scholar should be your first search source for medical literature, because many articles are provided free of charge. Sometimes you will be able to read an article, but it cannot be printed. Other times, only an abstract of an article is provided. In these circumstances, if your review of the article indicates it is useful, you can purchase it from another source. Google Books provides online access to many medical textbooks.

PubMed is a comprehensive source for medical literature from periodicals. You may order any publication that is on PubMed through Loansome Doc . To do this, you register with an ordering medical library, which obtains articles you order either through its own collection, or through other medical libraries. You list the price you want to pay for the article and the deadline for delivery, and the articles are then emailed or faxed to you within the parameters you set. You are billed for the articles after they are delivered.

Conclusion.

Jurors may not always completely understand complex medical issues but they are quick to pass judgment on any witness who provides incredible testimony. Jurors have little tolerance for anyone who gives inconsistent evidence after swearing to tell the truth. Attorneys must be cognizant of the morality play that goes on in front of a jury during a trial and prepare their cases in discovery with this process in mind.

There are ethical rules that apply to experts opinions. To be fair, an expert opinion should be (a) based on a comprehensive analysis of the facts, (b) the product of an objective analysis and (c) a review in accord with accepted principles of science. Every time an expert gives a faulty analysis in a case, he is violating ethical principles. These principals, by his own admission, need to be followed for his opinion to be fair and valid. In addition to exposing the substantive deficiencies in an expert opinion, use the methods in this article to expose the ethical violations an expert committed in reaching his conclusions so that the jury understands why an expert opinion is not merely technically incorrect, but fundamentally unfair.