

LAWYER ALERT

Stopping Medical Injustice

How to Make Your Expert Witness Bullet-Proof from Cross-Examination

It's happened to all of us. Your expert witness takes the witness stand and you're ready to deliver a death blow to the defense. Then, suddenly and unexpectedly, the expert is no longer the same person you met before trial. The expert waffles and vacillates in expressing their opinions and offers opinions that seem weaker and more equivocal than you expected.

On cross examination, things get worse. The expert witness makes concessions to crucial liability issues and you quickly realize you are on a sinking ship. After the inevitable defense verdict, you blame your expert witness, but they are not at fault. You, my friend, are the one to blame because you did a poor job getting the expert ready for their trial testimony.

Preparing Your Expert for Trial Testimony is Everything

With rare exception, your experts are novices to the courtroom. Most experts have little or no previous experience and they have no idea what to expect at trial. If you don't spend time preparing the expert for their trial testimony, it's virtually guaranteed the expert will fall flat on their face.

Tell the expert that you will make their trial testimony as easy as possible, if they spend time preparing with you. There is no such thing as over-preparing your expert witness for their trial testimony.

14 Tips for Saving Your Expert Witness from a Brutal Cross Examination

So, what do you do? These 14 tips will save your expert witness from a brutal cross examination...and might even win your next trial.

Tip #1: Expressing the Expert's Opinions

When expressing opinions, there should be no waffling by your expert. Tell the expert that they must be firm in your opinions and do not back down from your opinions. The jurors want to see that your expert believes in the case.

Avoid Qualifying Language: The expert should never use qualifying language during their trial testimony, e.g., "perhaps", "slightly", "I can see how this happened." The expert must be firm and unequivocal in their testimony, e.g., "This is shocking and never should have happened."

Use Simple Language for the Deviations from the Standard of Care: Identify deviations from the standard of care in simple, easy-to-understand language. Remind your expert that every word out of their mouth concerning the deviations from the standard of care will be written down by the Judge and will form the basis for the questions on the verdict sheet.

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Your expert can explain the basis for his opinions later. First, have the expert give his opinion in the simplest language.

Question: Do you have an opinion with a reasonable degree of medical certainty whether or not the defendant deviated from good and accepted medical standards of care?

Answer: Yes. The defendant failed to tell Charlie [your client] about his PSA results.

Based upon the expert's testimony, the verdict sheet will be either simple and easy to understand for the jurors, or complicated and difficult to understand. **COMPLEXITY IS THE ENEMY.** You want to make the questions on the verdict sheet simple as possible, e.g., "Was the defendant negligent?"



Tip #2: Get to the Expert's Opinions FAST

Get to your expert's opinions within the first 5 minutes of the direct examination. You can discuss the expert's qualifications and medical-legal consulting experience near the end of direct examination.

The jurors want your experts to get right to the point and give their opinions ASAP—don't disappoint them. You don't want to bore the jurors with the expert's qualifications (the jurors don't care that your expert graduated from Harvard).

Tip #3: Research the Expert

Don't just ask the expert whether they have disciplinary or ethical issues. Do your own



research. Check with the New York State Department of Health's website, www.nydoctorprofile.com, to search for the expert's disciplinary issues and settlements of malpractice claims against the expert.

A Google search might reveal that your expert has had serious disciplinary issues, such as prescribing opioids for their own use. You should search for all of the information you can about your expert, including:

- Disciplinary problems with the Office of Professional Medical Conduct
- Testimony (depositions and trial) in cases involving similar issues
- Common themes in cross examination from other cases (e.g., a cardiologist giving testimony about the standard of care of a pediatrician)

After you research the expert, ask them:

"Is there anything I should know about you that we haven't discussed? If I know about it now, we will be ready to address the issues during your trial testimony. But if you don't tell me about any problems or issues that you have, the defense attorney will crucify you during cross-examination."

Tell the expert that you can deal with ethical or disciplinary problems that they share with you. But if they withhold information about their past, there is nothing you can do to help them during cross examination.

Tip #4: Review the Expert's File Materials

Review the expert's file materials for negative materials. Search for handwritten notes. Handwritten notes are fodder for cross examination.

Tip #5: A Mandatory Conversation with Your Expert

At least a few months before trial (and ideally, when you first retain the expert), you should get a promise from your expert that they will show up for trial and they will not back down from their opinions.

"I need to know if you have any hesitation or reluctance about testifying at trial. If you do, tell me now. Otherwise, I expect you will show up at trial, do the work with me to prepare for your trial testimony and not back down from any of your opinions."

"Can you give me your word that you will do this? I will hold you to your word."

Why is this a mandatory conversation? The worst thing is having your expert refuse to testify at trial in the final days or weeks before trial (sounds crazy, but this happens). Some experts enjoy the income from consulting in medical-legal cases, but they don't want to testify at trial due to the stress and anxiety.

Tip #6: Instruct the Expert about Reports and Email

No reports or email. This will be fodder for cross-examination.



Tip #7: Give the Complete File Materials to the Expert

Always make sure your expert possesses a complete set of the file materials. And just in case the expert forgets, bring a flash drive containing the file materials to court with you.

The file materials, at a minimum, should consist of the following:

- Medical records
- Bills of particulars and discovery responses

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- Correspondence and email communication
- Billing invoices

When in doubt, give EVERYTHING to the expert.

Tip #8: Rehearse with the Expert

This is the most important tip to ensure successful testimony by your expert witness. Before the trial, ask a trial attorney/friend to help you prepare the expert for their trial testimony. During this simulated trial, your trial lawyer/friend conducts the direct examination and you take the role of defense counsel during cross examination.

Put your expert through a challenging and hostile cross examination, so they will be ready for the worst at trial. Interrupt the expert's testimony, remind them to limit their answers to "yes" or "no" and make the cross-examination uncomfortable and brutally hard for them.

- You've worked with plaintiff's counsel on other cases, right?
- You make a lot of money from coming to court, don't you?
- You make a lot of money coming to court for plaintiffs, true?
- You advertise for the legal work, true?
- Just last year, you earned over \$100,000 from coming to court for plaintiffs, isn't that right?
- Isn't it true that you consult only with plaintiffs?
- You never review cases for the defense?

Videotape the direct and cross examination and play portions of the video to a focus group. See how the focus group jurors respond to the expert's testimony and give their feedback to the expert.

Tip #9: Body Language and Eye Contact

Don't assume anything. Many experts have not testified at trial and they don't know what to expect. Prepare the expert for their trial testimony with the following tips:

- Maintain eye contact with the jurors.



- Connect and build a rapport with the jurors.
- Turn your chair in the direction of the jurors and face the jurors.
- Do not look up at the ceiling or down at the floor. Maintain eye contact with the jurors.
- Keep your hands away from your face. Your hands should always be on your knee or lap.

Does non-verbal body language matter? Non-verbal communication is often more important than the words used by the expert. Your expert witness should be told that their body language makes a difference in how they are perceived by the jurors.

Tip #10: The Expert's Preparation is Everything

Preparation is the key to strong trial testimony. Tell your expert that they should know the medical records, deposition transcripts and file materials inside and out. The defense attorney will try to make your expert appear unprepared if they do not know the file well, e.g.,

- "You didn't even review the deposition transcript of nurse Jones, did you?"
- You come to court asking this jury to find against Dr. Smith, and you didn't even read the deposition transcripts?
- "Are you basing your opinion on less than complete information?"

Your expert should not come across as an advocate, but rather, as someone who simply is there to tell the truth.

Tip #11: How to Act During Cross Examination

Tell your expert that they should not argue with defense counsel. Whenever possible, your expert should speak directly to the jurors, not to defense counsel.

- Speak with the jurors, not the attorney asking the questions.
- Concede obvious points, but stand your ground on key issues.
- Don't argue or fight with defense counsel.

Your expert should not come across as an advocate, but rather, as someone who simply is there to tell the truth.

Tip #12: Questions to Expect on Cross Examination

Incomplete Review of File Materials and Medical Records: Defendants' attorney will begin cross examination by reviewing their file materials. Make sure your expert possesses a complete set of the file materials and brings them to court.

Experience with Medical-Legal Consulting: Defendants' attorney will then question your expert about their experience consulting medical-legal cases.

Defendants' attorney will try to portray your expert as a highly compensated expert who is compensated to give the opinions favoring the plaintiff.

- You've reviewed 5 cases a year for 20 years?
- You bill \$500 per hour for your time?
- You make \$10,000 per case on average?
- You make \$50,000 per year from giving opinions for plaintiffs?
- You've earned \$500,000 over the past 5 years for testifying in court for plaintiffs?
- Over the course of this case, the plaintiff has paid you \$15,000 for your opinions?
- You never testify for doctors, do you?
- You came all the way from Buffalo, NY to testify?

Your expert might explain that they have very high standards for medical-legal consulting work and that they are a practicing physician who spends most of their time treating patients.

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"I have very high standards, and I decline most cases that I'm asked to review. I only get involved when I believe strongly that there were clear deviations from the standard of care."

"I am a practicing clinician and my practice is devoted to treating patients. Medical-legal consulting takes a very small part of my time and is a small part of my income. I do this work because I believe it is the right thing to do when there is clear malpractice."

Responding to a "Yes or No" Question during Cross Examination: When defense counsel demands that you answer "yes" or "no" to a question, you might not be able to. In that case, you should explain, "I cannot answer that question with a 'yes' or 'no'. May I explain?"

The defense attorney will not let you explain, but your response is a cue to your lawyer that you'd like the opportunity to give a complete answer to the question.

Tip #13: Anticipating Defense Arguments During Direct Examination

During direct examination, your expert must address the strongest defense arguments, "When a doctor recommends a chest x-ray and the patient declines the test, what are the duties and obligations of the doctor?"

Ask your expert to define the strongest defense argument in the case. Ask your expert, "If you were contacted by the defense and had to make an excuse for the substandard medical treatment, what would you say?"

Tip #14: How to Handle the Expert's Fees/Compensation

Near the end of direct examination, ask the expert about their fees:

- Are you being paid for your time?
- Have you spent time reviewing the medical records and deposition transcripts?
- How much time have you spent? (e.g., 32 hours)

- How long have you spent time working on this matter? (e.g., 1 ½ years)
- If you weren't in court, what would you be doing? (e.g., "Caring for my patients.")
- What is your fee for your time?
- Is your fee in any way contingent upon the outcome of this trial? ("No.")

Your Secret Weapon for Winning the Trial

There's a good chance that defense counsel is not preparing their experts. Defense experts often come to court without having spent more than a few minutes with the defense counsel. You have a big advantage.

Meet with your experts in person at least a few weeks before trial, conduct simulated direct and cross examination, and meet with the expert a final time on the night before their testimony. And with enough preparation, your expert will enjoy the experience, their testimony will be well received by the jury, and you just might win the trial.

The MOST IMPORTANT Advice I Could Have Given to the Younger Version of Myself

If you could go back in time, what would you tell yourself when you were just graduating from law school? Work hard, never give up, pave your own path...blah, blah, blah. You are already too familiar with these platitudes. But what advice would truly make a difference in your career?

In October of 2013, our new law firm was only 6 months old and the first year was a struggle. We began with \$205k in our operating account and it was not nearly enough. Turns out, running a catastrophic injury law firm was much harder than I expected. Then, by some strange turn of events, I was invited to attend a high-level mastermind run by the owners and executive leaders of Infusionsoft (now known as Keap) in Chandler, Arizona. I had no idea what a mastermind was, but I decided to give it a shot.

Over the course of 3 days at the mastermind, I spent time collaborating and brainstorming with some of the leading business owners from Australia, South Africa, England and across the U.S. The highly successful business owners and executive team of Infusionsoft shared everything they knew about running their businesses and I just prayed that no one would realize that I did not belong in the room. The sharing and collaboration was something I had never experienced.

When I went home, I could not have been more excited. I told my wife that I just had the 3 best days of my professional career, but she was not nearly as excited. My wife asked, "How much did this cost?", and she insisted that I answer. When I told her (\$10k), my wife expressed her dismay at the cost, but I knew I had discovered something special.

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(above) Seth Price conquering the gorgeous beaches of Oahu on a day trip around the island at the Hawaii Mastermind.

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An Elite Board of Advisors for Your Law Firm

A mastermind is essentially a board of advisors for your law firm. Just imagine that your board of advisors consists of Bill Gates, Warren Buffett, Mark Zuckerberg, Jeff Bezos and Elon Musk. With such guidance from leading advisors, your success would be virtually guaranteed. Does this seem crazy? Perhaps for those who have never been in a mastermind, and that's why you have to experience this for yourself.

*We wanted to be unique
among masterminds by
bringing 50%
new members to every
mastermind to ensure a
fresh flow of new ideas...*

Our mastermind (www.MastermindExperience.com) was born in Chicago in 2015 and when we began, our only goal was to create the best mastermind for lawyers in the country. We wanted to be unique among masterminds by bringing 50% new members to every mastermind to ensure a fresh flow of new ideas, and we wanted to keep the cost reasonable so that our motives were pure and not motivated by \$. We wanted to bring elite lawyers to the mastermind, but also ensure that younger lawyers had the opportunity to share the experience.

The Greatest Thing I've Done in My Career

8 years later, I now know that the Mastermind Experience is the greatest thing I've ever done in my career. Our tribe is fanatical about helping each other and the sharing and collaboration is ongoing after the day of the mastermind. The relationships that you will make at our mastermind are what makes it special.

And that, my friend, is what I would have told the younger version of myself. Specifically, that you must leverage the knowledge and wisdom of more experienced lawyers and learn from their mistakes and successes, so you can create the law firm that surpasses your peers and provides the lifestyle that you never thought possible.



(above) Just a special group of lawyers and friends at the Hawaii Mastermind.

I would tell the younger version of myself that you should find an elite mastermind, learn from the best and stay engaged with the tribe. And if you do that one thing, you will be on the path to success that you could not have previously imagined. (I probably would not have listened, but all it would have taken was a single mastermind experience and I would have understood). To share the experience.

The Mastermind Experience is Coming to Atlanta on April 21st

And you have the same opportunity. On **Friday, April 21, 2023**, the Mastermind Experience will come to the Ritz-Carlton Hotel in Atlanta. We will have elite law firm owners from across the country meeting for one day to work on their businesses and help you build a better law firm. But not everyone is invited. You must be honest, have no disciplinary issues, be willing to share everything you know and our existing members have veto power of new members.

You can bring members of your law firm to the mastermind. And on the day of the mastermind, you will get feedback from some of the most successful law firm owners in the country (and Canada) about the biggest challenges facing your law firm in marketing and management. This is an experience unlike any that you've previously had, I promise.

Apply at [www. MastermindExperience.com](http://www.MastermindExperience.com)

You can apply for the Mastermind Experience at MastermindExperience.com and if you have questions, call my cell, 518-265-9131.

Dont Miss The 7-Figure Attorney in Atlanta on April 20th

On the day before our mastermind, Craig Goldenfarb's seminar, "**The 7 Figure Attorney**", will be held at the Ritz-Carlton Hotel in Atlanta on Thursday, April 20, 2023. At **The 7 Figure Attorney**, Craig and his executive team will show you exactly how they grew their law firm from a one lawyer/secretary firm to an 80+ employee powerhouse law firm in South Florida (this seminar should have been more appropriately named, "The 8 Figure Attorney").

Craig's success has been nothing short of amazing and he wants to share everything he knows. If you've never met or spoken with Craig, he is one of the most generous lawyers/persons I've ever known. Craig doesn't hold back anything at The 7 Figure Lawyer and he and his executive team will share their successes and biggest mistakes. This is the best seminar I've ever attended and I attend every year.

Register for The 7 Figure Lawyer at www.7FigureAttorney.com

WARNING! Space is limited for **The 7 Figure Lawyer** and the **Mastermind Experience**. Once we reach our limit, that's it—you're out of luck. Quite a few were turned away from the **The 7 Figure Lawyer** in NYC in April, 2022, and we don't want this to happen to you.

Make 2023 a special year for you and your law firm by joining us for these 2 special events on Thursday, April 20, 2023 (**The 7 Figure Attorney**) and Friday, April 21, 2023 (**Mastermind Experience**).

We hope to see in you Atlanta!

THE NEW YORK

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FROM JOHN'S CASE BOOK

\$900,000 Recovered for a Delay in Diagnosis of Breast Cancer

Our 75-year old client recovered \$900,000 for a delay in the diagnosis of breast cancer in Chenango County, NY.

In 2017 and 2018, the patient underwent annual screening mammograms to check for breast cancer. The most important screening test for breast cancer is the mammogram. A mammogram is an x-ray of the breast that may detect a mass, a cluster of calcifications or an enlarged lymph node. The radiologist looks for any abnormal signs or patterns on the mammogram before a lump can be felt on the breast.

During routine screening mammograms in 2017 and 2018, the mammograms revealed dense left axillary lymph nodes and increased calcifications that were clustered in a tight group (not diffuse throughout the breast). The new findings on the mammograms should have been worrisome for breast cancer, but the radiologists did not order additional imaging studies or recommend a biopsy.

In 2019, the patient was diagnosed with stage IV breast cancer. The claim in the lawsuit is that the radiologists should have reported the abnormal findings on the mammograms in 2017 and 2018 and recommended additional imaging studies, such as a breast ultrasound or chest MRI, or a biopsy. The delay in diagnosis led to stage IV (metastatic) breast cancer that spread to the femur, spine and pelvis.

The settlement funds will be used to provide a better quality of life for our client.



(above) Kate Nachazel, Lily Fisher and our amazing paralegal, Danielle, taking in the sights of Oahu during the Hawaii Mastermind.

WHAT THEY'RE SAYING About the Mastermind Experience



John Markey John Fisher you are a truly exceptional person and leader. I enjoyed sharing some funny and inspirational fishing stories with you on the water in D.C. on Thursday Evening and I especially enjoyed learning from you and from so many others that you brought together on Friday. Your kindness, enthusiasm, and attention to detail regarding the experience of Mastermind Experience participants is extraordinary. I am very grateful for your example and your friendship.



Marco Brown • 1st

Protecting you by removing your fear about divorce and helping you ma...
1w • Edited •

Last week, in Honolulu, I attended **John H. Fisher's** amazing mastermind. If you don't know John, he's a truly gifted attorney in New York who specializes in catastrophic medical malpractice cases. Very high end, very good at his craft.



(above) Could not be more grateful for the special presentation and insights of John Nachazel and his amazing daughter, Kate, at the Hawaii Mastermind.

Practice Limited to the Representation of Seriously or Catastrophically Injured Persons

www.MastermindExperience.com