DIRECT AND CROSS-EXAMINATION

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I. INTRODUCTION

Many lawyers spend a considerable amount of their trial preparation thinking about voir dire, or outlining a powerful opening statement, or crafting a killer closing argument, often to the exclusion of adequate preparation for direct and cross examinations. Of course, there are those who by skill or experience or dumb luck can effectively examine witnesses off the cuff. For the rest of us, however, there is no substitute for preparation and practice.

The good news is that much has been written about effective examinations and resources abound to help us hone our skills in this vastly important area of trial practice, and this paper is simply a modest attempt to gather and distill some of the fundamentals of good direct and cross examinations.

Caveat: This paper dwells primarily on cross-examination, as that aspect of trial work often involves developing skills that are not necessarily part of everyday communication. This is not meant to detract from the importance of good direct examination; however, good direct examination is generally more akin to an engaging, informative conversation, something most trial lawyers have mastered long before stepping foot in a courtroom.

II. GENERAL CONSIDERATIONS

A. Juror Expectations

Consider what the typical juror today expects from trial: They want what they've become accustomed to seeing in legal dramas on television and at the movies. That is, they expect trials to be fast-paced, interesting, entertaining, suspenseful, and brief. They will not jettison these preconceived ideas about how trial should unfold, and the trial lawyer should take steps to craft his or her presentation of the evidence in a way that taps into these expectations. With direct or cross examinations, that may mean paring down the material you wish to cover, getting creative with demonstrative aides, building suspense, and perhaps most importantly, knowing when to stop.

B. Courtroom Dynamics

Think of examinations as an intimate conversation among you, your witness and twelve good friends. You must engage the jury in the conversation, which has as much to do with your body language and positioning in the courtroom as it does with the questions you ask. Jurors will pay more attention to what is being said if they are drawn into the conversation through periodic direct eye contact with the lawyer and the witness, and physical gestures and verbal statements of inclusion.

Eye contact can of course be uncomfortable for some. Pay attention to the jurors whose body language suggests they don't mind eye contact and return to them periodically. On the other hand, tone down your eye contact with jurors who seem uncomfortable or disinterested.

Physical gestures include turning towards the jury when you ask an important question or sweeping one arm across the jury box as you invite the witness to tell "us" something. Inclusive verbal statements are those which draw the jurors into the conversation between the lawyer and the witness. Examples include:

- "Would you please tell the ladies and gentlemen of the jury…"
- "*We'd* like to know…"
- "Please explain to *us*…"
- "*Some of us* might be wondering about…"

Position yourself in such a way that you can easily direct the conversation towards the jurors. If the judge requires you to sit at counsel table or use a podium during examination, try to minimize the effect of these barriers. Move tables. Move the podium. Control the courtroom. If you're chained to a table, approach the witness with demonstrative aides and other evidence in order to get into the zone between the witness and the jurors.

C. Be Yourself

Jurors and judges dislike fakes. Everyone has individual characteristics and personality traits, including a particular method of speaking, mannerisms and personal patterns of thought. Don't try to mimic the actions or the mannerisms of someone else if it doesn't come naturally. Regardless of personality, however, lawyers who are sincere and confident win. As with any aspect of trial, when examining witnesses, stride to the podium and exude confidence even if there is a chance that the high school drop-out defendant on the stand is going to make you look like an idiot. Take command of the courtroom. Let the jury know that you are prepared and that you care about the case. This is the most important rule because if you do not care, the jurors will not care.

D. Practice the Art of Listening

Perhaps the most common error made by trial lawyers is the failure to listen to the witness's answer. The lawyer may be so absorbed in making notes, conferring with co-counsel, or thinking about the next question that he or she completely misses something very significant. In interviewing jurors post-trial, I'm amazed at how many things they pick up on during examinations that go unnoticed – and thus unexplained – by the lawyers. The most obvious dangers to this are that they may arrive at their own explanations during deliberations or they may infer reasons as to why the lawyer did not pursue the issue. Either way, bad things can happen.

The lawyer must remain attentive and flexible during the questioning, particularly during cross-examination. Organizing your examinations topically, perhaps with the benefit of a checklist of points to make, allows you to cover the necessary material while being flexible enough to go down any paths the witness may choose to take.

III. DIRECT EXAMINATION

A. Witness Preparation is Key

Good direct examination is the result of good witness preparation. Spend time you're your witnesses well before they take the stand so they know the areas you expect to cover with them. Let them in on your case theme, so that they understand the overarching message to the jury. Have them read their depositions and remind them of how devastating it will be if they get impeached on an inconsistency between their deposition and their trial testimony. If there are inconsistencies, discuss in advance how best to address them from the stand. If possible, take your witnesses to the actual courtroom sometime before trial and familiarize them with the witness stand. Have them sit in the jury box for perspective. Run through a mock direct and have a colleague do a mock cross examination. Consider videotaping the witness for later review and constructive critique.

B. Write the Script, Direct the Show

Once at trial, the case theme you introduced in voir dire and opening statement begins to take shape through direct testimony. Like any good script, your direct examination should have a beginning, a middle, and an end, preferably a climax that sticks in the minds of the jurors and blunts adverse effects of the coming cross examination. With parties, the beginning of their testimony tells the story of who they once were or how things once were, prior to the incident that brings them in to court. The middle is the story of what happened. The ending is the story of how life is now, because of the incident. Think of your witnesses' testimony as following the acts of a play, with each act building on the last and culminating in a compelling, interesting final scene that sticks in the minds of the jurors and motivates them to action.

C. Use Props

Enliven your witnesses' testimony with the use of props. If you've got something tangible the witness can use to demonstrate a principle, use it. If you have photographs, blow them up and have the witness explain what they show. This is where practicing beforehand is essential, particularly if the witness intends to use a prop in some manner. Make sure it works!

Be creative in thinking up demonstrative aides. Get the witness off the stand and in front of the jury, if possible. Dry-erase boards or exhibit boards or ELMO presenters give the witness the ability to move around and explain his or her testimony. This movement – so long as it is coordinated and not distracting – can bring a new dimension to the testimony. Remind the witness beforehand that they are educating the jury and thus they must include the jury in giving their testimony.

By the same token, there are some witnesses who for various reasons should not be burdened with props because to do so might detract from their testimony. This is a case-specific judgment call by the attorney, which is another reason why advance preparation is so important.

D. Key Points in Any Direct Examination

- Develop your theme.
- Build interest in the story ("Show and Tell").
- Involve the jury.
- Use everyday language; avoid legalese.
- Ask clear, concise questions.
- Reel in the wandering witness.
- Inoculate against bad facts ("Rip Off the Band-Aid").
- Pre-impeach on credibility issues.
- End on a high note.

IV. CROSS EXAMINATION

One of my favorite trial lawyer maxims is "*Close for show; cross for dough*." In other words, while closing arguments are often the most enjoyable and flamboyant part of trial, cross examinations are where you score your big points with the jury. This should come as no surprise because in a good cross, you achieve two goals: you get favorable testimony in front of the jury from an adverse witness and you often discredit that witness in the process, thereby casting doubt on the other side's story.

A. Planning & Implementation

Most trial lawyers have at one time or another studied Professor Irving Younger's "Ten Rules of Cross-Examination," and those rules are certainly timeless and bear repeating. They are:

- Be brief.
- Use plain words.
- Use only leading questions.
- Be prepared.
- Listen.
- Do not quarrel.
- Avoid repetition.
- Do not allow the witness to explain.
- Limit questioning.
- Save for summation.

Larry Pozner and Roger Dodd[1] have distilled Younger's rules even further and recommend following the "Three Rules of Cross-Examination:"

- Ask leading questions only.
- One new fact per question.
- Break cross-examination into a series of logical progressions to each specific goal.

B. Witness Control

Try enough cases, and you'll run across all variations of cross-examinees, from the soft noodle to the granite block. Sticking to the "rules" helps you respond to whatever the witness tries to throw at you. Some common varieties of these witnesses include:

1. The Artful Dodger

This witness cleverly tries to avoid getting trapped by giving indirect answers or long-winded narratives designed to obscure their answer amidst a cloud of testimony. Bring him to heel by short, direct questions and re-direct him when he strays. When the witness dances around your question, stop him and politely say, "Perhaps you did not understand my question, and I apologize if I was not clear; let me ask you again…" When the witness drones on and on without ever answering your question, one way to break this behavior is to wait until he finishes and then ask, "Do you recall my question?" Either he will not remember the question, and thus look like a fool, or he will remember it, in which case you can then ask, "Now will you please answer the question?"

[1] *Cross-Examination: Science and Techniques, 2nd Ed.*, by Larry Pozner and Roger Dodd (Matthew Bender, 2004)

As the witness continues to dodge your clear questions (which are easily understood by the jury), his credibility plummets. Remind the jurors in closing argument that they are to weigh the *credible* evidence, and Mr. Artful Dodger's testimony was anything but credible.

2. The Clever Questioner

This witness like to show how clever he is by tossing questions back to the examiner. Unless his queries are legitimate (for example, to clarify your question), take charge over him by politely pointing out that the Rules of Evidence do not permit you to testify, but if they did, you'd be happy to explain why he was negligent (or broke the contract, or cheated your client, or rigged the Breathilizer, or whatever). Then repeat your question. By you remaining calm and polite, the jury gets angry at the witness for wasting their time.

3. The Preening Expert

Far too often you'll do more damage to your case the longer you try to wrestle with an expert witness, particularly in highly technical or specialized fields. The general rule of brevity is particularly true with experts: Outline the points you want to make, that you know you can make (either from the witness's own testimony or by making them look unbelievable in the face of, for example, authoritative treatises), make them, and stop.

A checklist of materials, resources and suggestions for cross-examining experts is attached to this paper as Appendix "A." A transcript from an effective cross-examination of a defendant's retained expert is attached as Appendix "B."

C. Questioning Tips

1. Use the Witness's Terms

The following example concerns the defendant in a criminal case who has been promised immunity from prosecution in exchange for testimony.

Q. Then you made a deal with the prosecutor, didn't you?

A. I don't know if you would call it a deal.

Q. Well, what would like to call it -- an arrangement?

The cross-examiner won this interchange instantly. It rests on a simple principle that can be applied whenever a witness argues with your choice of words: Do not insist on a particular word. Offer the witness a neutral term instead, or let the witness define the word. That way you are not arguing with the witness, but the witness may be viewed by the jury as arguing with you.

2. Don't Answer Questions

Do not get into a trap of having to answer the witness's questions. Consider the following exchange:

> Q. When you saw the tire coming at you, you did not stop, did you?
>
> A. Well, counselor, what was I supposed to do? The truck was on my right, the car was on my left, and then this huge truck tire came bouncing down the road, right in my path.

Do not answer this question. The next one will be even worse. Unfortunately, the typical response by the lawyer to questions from the witness is almost as bad as answering the question, because it sounds overbearing and seems to take unfair advantage of the witness:

> Q. I'm afraid you don't understand the procedure. I'm the lawyer and you're the witness. I ask the questions and you give the answers. Got it?

This is offensive and alienates the jury. Instead, try this:

> Q. I'm sorry, but the rules of evidence don't permit me to answer your question. If they did, I'd be happy to explain exactly what you should have done under the circumstances.

This stops the witness without being rude. And the real advantage is that you have the rest of the trial to think of an answer which you can give during final argument, when the witness cannot respond.

3. Force the Witness to Answer

Another way to deal with an argumentative witness is to explain that their answer really means either yes or no.

> Q. So you really didn't see my client before the collision, did you?
>
> A. As I already told you, I was looking straight ahead, and a car was in front of me. The car swerved sharply to the right, and I saw the car to my immediate right start to swerve into my lane.
>
> Q. So that means no, doesn't it?
>
> A. I suppose so.

Another method is to highlight the witness's refusal to answer by politely stating: "Sir, I must have the answer to this question for the benefit of the jury (sweeping your arms across the jury box; see II.B, above). If you continue to talk around my question, I am going to be forced to ask the judge to instruct you to answer." Then repeat your question.

4. Make Your Point and Stop

After you have made the desired point, stop. Don't ask the question aimed at driving the final nail into the coffin by asking the witness to draw the inference you seek to have the jury draw. Instead, wait until closing argument and remind the jury of the testimony. This suggests to the jurors that you credit their intelligence. Also, we are more likely to understand, appreciate and retain conclusions which we arrive at through inductive or deductive reasoning rather than those which are simply told to us. In this way, your favorable jurors are better prepared to argue your points when necessary to convince other jurors during deliberations.

5. Don't Cross-Examine Needlessly

Some lawyers assume that cross-examination is required or expected. If the witness has not hurt your case, or if cross-examination is likely to do more harm than good, you may gain more than you lose by saying self-assuredly, but very respectfully: "No questions, Your Honor." You thus convey a message to the jury that no damage has been done and you do not want to waste their time.

6. Don't Get Distracted

Effective cross-examination requires discipline. If you are following a particular line of questioning, stick to it and do not get distracted by testimony that invites further inquiry into other matters until you have completed your initial objective. This helps avoid confusion in the minds of the jury, and you can always circle back to these other issues. In fact, this gives you another opportunity to draw the jury back into the examination and refocus them with comments such as, "Ms. Jones, a few minutes ago you told *us* that…" or "I want to draw your attention back to a statement you made *under oath to this jury* a few moments ago."

V. Conclusion

Mastering good direct and cross-examination skills takes effort and, above all, experience. The legendary trial lawyers who seem to do it effortlessly have all at one time or another been humiliated by a witness in front of a jury or have had their trains of thought derail. It happens. Watch and read the masters, practice what works, get in the courtroom as often as possible, learn from your mistakes, and enjoy your successes.

APPENDIX "A"

CROSS-EXAMINATION OF ADVERSE EXPERTS

Below are some useful areas of inquiry and tools you may want to explore and utilize in cross-examining the adverse expert:

- Obtain all of the past depositions, trial testimony, and literature authored by the expert. Nothing is more effective on cross-examination than finding contradictory positions previously taken by the expert in another case that support your position in your own case. There are many websites where you can find prior depositions and trial testimony of your opponent's expert. If possible, gather this information prior to the expert's deposition. It is also helpful to talk to the other attorneys who have gone up against the expert or who have used this expert for their own cases. Quite often these attorneys can provide valuable information on the witness's appearance and demeanor that you can not glean from simply reading a deposition.

- Do a criminal check of the expert. If the expert has been convicted of a felony or misdemeanor involving moral turpitude that conviction may well be admissible.

- List the "safe harbor" points which the experts agree on, and identify those facts that the adverse expert will concede (or look foolish not conceding).

- Plan and utilize hypotheticals to have the opponent's expert concede helpful points. Ask your expert to help you craft these hypotheticals. Be careful not to get too far astray of the facts of your case, lest the hypothetical blow up in your face.

- Use learned treatises that support your expert's opinions against the opponent's expert.

- Ask questions that allow you to find out the witness' bias, such as:

    a. How often has the witness given depositions, reviewed cases for attorneys and testified?
    b. What is the witness's percentage of income annually from doing expert review and testimony?
    c. Does the witness know any of the parties or the opponent's law firm?
    d. Does the witness have the same insurance carrier as the defendant?
    e. How much is the witness being paid for his testimony?
    f. Does the witness keep a list of cases he/she has reviewed and/or testified in?
    g. Does the witness have any billing or computer program that would show what cases they have served as an expert witness in?
    h. Does the witness advertise for their expert witness services?
    i. Has the witness been asked to testify about any matters in the case that the witness refused to testify about?
    j. Review what the witness has reviewed. Sometimes important factual information that hurts the party has purposely not been given to the expert witness.

k. Has the witness requested or does the witness need any additional information to formulate his/her opinions?
l. Has the witness reviewed any literature or materials that are contrary or inconsistent with his/her conclusions?
m. Was the witness asked to assume facts as correct in this case without further inquiry? How does the witness know that the facts he/she is assuming are correct, if at all? If the facts are in dispute, get the expert to admit that if different facts are provided that it could result in a different opinion.
n. If your expert has personally met with and/or examined your client, and the other side's expert has not, then emphasize how that expert has no hands-on, personal experience with this particular individual on which to base his/her opinions.

APPENDIX "B"

CROSS-EXAMINATION OF DEFENSE RETAINED EXPERT

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 067-214308-05

BERTRAM T. DANIELS	)	IN THE DISTRICT COURT
PLAINTIFF,	)	
VS.	)	TARRANT COUNTY, TEXAS
DAVID BRYAN WINTERS, JR. and CLARKSVILLE REFRIGERATED LINES I, LTD.	)	
DEFENDANTS.	)	67TH JUDICIAL DISTRICT

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EXCERPT OF PROCEEDINGS

CROSS-EXAMINATION OF DR. DAVID BAUER BY MR. LAIRD

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On the 26th day of September, 2007, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Don Cosby, Judge presiding, held in Fort Worth, Tarrant County, Texas:

Proceedings reported by machine shorthand.

MONICA A. LINDSTROM, CSR
OFFICIAL COURT REPORTER
67TH DISTRICT COURT

(Excerpt of Proceedings)

DAVID BAUER, M.D.,

having been first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. LAIRD:

Q. Good afternoon. Doctor, my name is Steve Laird. You and I have never met, have we?

A. That's correct, sir.

Q. Let me introduce you to Tom Daniels, the man you've never met also. I know you've already testified that you've never examined him. But you've never even laid eyes on him until you walked in the courtroom, correct?

A. Yes, sir.

Q. You didn't lay eyes on him when you were contacted by Mr. Bassett's firm to write a report, did you -- had you seen him by then?

A. That's correct, sir, I have not.

Q. Okay. You didn't lay eyes on him when you actually wrote the report?

A. No, sir.

Q. And you were provided just some records on his medical condition, correct?

A. I was provided with a fairly copious amount of records.

Q. But no films?
A. No, sir.
Q. You've never seen one MRI film on this man?
A. I've seen the report, sir.
Q. Excuse me. My question was, have you ever seen an MRI film on this man?
A. No, sir.
Q. How many films has Dr. Ward seen?
A. I believe he saw the X-rays.
Q. And the MRIs?
A. Yes, sir.
Q. As far as any other doctors who have actually treated Tom Daniels, you haven't been provided all of the information that they have because they've had access to radiological films themselves, and Dr. Ward has actually been inside this man's back, would you agree?
A. I would agree, sir.
Q. I've heard a phrase used by counsel for the trucking company many times already in this trial.

Now to be fair or let's be fair -- as a matter of fact, I think I heard it during your direct examination, didn't I?
A. You did, sir.
Q. Okay. To be fair, would you tell the jury how

many times your opinion has been limited or stricken by a court of law in a case like this? To be fair, tell them, please.

A. To the best of my knowledge, sir, it has not been.

Q. Well, you were an expert in the *Kathryn Johnson-Marshall v. Mastec North America Inc.* company case that happens to be -- have been filed and is pending right next door, in the Court next door, the 48th District Court of Tarrant County, Texas, correct?

A. I don't know, sir.

Q. You're not familiar with an order signed by the judge literally in the next room?

A. No, sir. I have not been provided with that.

Q. That eliminates your testimony? Who's the lawyer who hired you in that case?

A. I don't know, sir. I don't recall. If you would like to hand me that, I would look at it.

Q. You've never seen anything provided to you by the lawyer who hired you in that case right next door telling you about any part of your testimony being stricken?

A. No, sir.

Q. Okay. You ever heard of David -- Judge David Evans next door?

A. I may have, sir.
Q. But you are familiar with that case?
A. I recall the name.
Q. Okay. And you're still an expert in that case?
A. I don't know, sir.
Q. You've been deposed in that case?
A. I don't know, sir. I have no memory.
Q. How many other cases has your testimony been stricken or limited by a judge?
A. As I said, sir, I have not ever been provided with any information that my testimony has been stricken.
Q. Are you saying you don't know how many times?
A. I am saying that, sir.
Q. I just heard you say that a discogram should not have been used as part of the evaluation by Dr. Ward to determine whether surgery was necessary on Mr. Daniels; is that right?
A. That's correct, sir.
Q. Do you remember your patient by the name of Diana K. Rose?
A. I do.
Q. Does that ring a bell?
A. I do.
Q. Your own medical records on her indicated that

if there are no changes since March last year, we will recommend a lumbar discogram to see whether the pain is coming from the L-4, 5 level if indeed the discogram is concordant at that level. And she and I will talk about anterior lumbar interbody fusion.

A. What was the date of that report, sir?

Q. First of all, did you write that?

A. I did. I believe I can recognize my report.

THE COURT: Why don't you hand it to him if that's his. Let him identify it.

THE WITNESS: Thank you, sir.

THE COURT: Um-hum.

MR. LAIRD: May I approach?

THE COURT: Yes, you may. Go ahead.

THE WITNESS: May I see the report?

Q. (BY MR. LAIRD) Looks like the date is June the 9th, 2003.

A. Um-hum.

Q. I'm referring to the last page of your -- the last two.

A. May I see the report?

THE COURT: Give him the whole report.

THE WITNESS: Thank you.

Her accident was in 2002, and she had none of the disqualifying factors that the defendant does.

Q. (BY MR. LAIRD) I don't think I asked you anything about that, Doctor.
A. I'm sorry.
Q. Did you recommend a discogram and if was concordant with lumbar pain at L-4, 5, then the two of you would talk about doing surgery on her?
A. Back then I did, yes, sir.
Q. How many other patients have you done discograms on?
A. In -- as I said to defendant's counsel, sir, I have done it in the past. I no longer do it.
Q. You understand that other doctors and different types of specialists continue to use discograms as a valid medical tool, don't you?
A. It's not valid, sir, but they do use it. It's been disqualified by many societies at this point.
Q. You're not a neurosurgeon, are you?
A. I'm an orthopedic spine surgeon, sir.
Q. Does that mean you're not a neurosurgeon?
A. That's correct, sir.
Q. You're certainly not board certified in neurosurgery, are you?
A. No, sir.
Q. You never attempted to become board certified in neurosurgery, did you?

A. No, sir.

Q. As a matter of fact as far as your patient, Ms. Rose, was concerned, not only did you recommend a discogram and indicated that if it was concordant with the pain, that is consistent with the pain, that you would go ahead and recommend surgery to her.

Not only did you do that, but this was in a collision where the amount of the damage to her car was, in your terms, minor approximately $2,000, correct?

A. Correct, sir.

Q. Less than the damage to his car, to Tom Daniels' car, wasn't it?

A. Yes, sir.

THE COURT: Okay. Will you attorneys approach real quick?

Ladies and gentlemen, why don't y'all stand up and make noise.

(Discussion off the record)

THE COURT: All right. Here we go.

Go ahead, Mr. Laird. I'm sorry.

Q. (BY MR. LAIRD) And as a matter of fact in that patient, surgery was done on Ms. Rose, wasn't it?

A. It was. I've made mistakes. That was one of them.

Q. Then it's possible that you have made a mistake

coming into this courtroom at a $1,000 an hour for the defendants to testify that the treating doctor should not have even used a discogram, should not have done the surgery on a patient who you've never seen, talked to, or not even seen any films on; isn't that correct, Dr. Bauer?

A. Well, at this point, sir, I know much more about the medical literature than I did in 2002. And I would not do it again.

So I would say that the vast way to the medical evidence and my knowledge of Mr. Daniels' condition would say that I have not made an error.

Q. Is that a yes to my question?

A. I would say I have not made an error in this case.

Q. Do you know how much knowledge, medical knowledge, experience, and training as a neurosurgeon that Dr. Ward has?

A. He has about the same professional training as I do, sir.

Q. Do you know how much experience he has?

A. I believe that he is board certified about the same time I am, sir.

Q. Do you know how much experience in doing back surgeries he has?

A. About the same as I do, sir.
Q. Now you don't know that, do you?
A. I looked up when he graduated from medical school, sir.
Q. That's not going to tell you how much experience he has during -- doing back surgery, does it?
A. Not an exact number, sir.
Q. And you're a person who really doesn't even like to do back surgery, aren't you?
A. I'm sorry, sir?
Q. You're a person who really doesn't even like to do back surgery, aren't you?
A. No, sir. I do surgery when it's indicated, and I think the patient is going to get better.
Q. Have you ever said that you -- you think you're very, very, very careful and that's why you don't operate on a lot of people, you ever said that?
A. I said I was very careful.
Q. Have you ever said you don't operate on a lot of people?
A. I don't operate on as many people as others do.
Q. You've stated before that you don't operate on a lot of people, don't you?
A. I'm not sure what a lot of people is, sir.
Q. Well, what did you mean when you said that you

don't operate on a lot of people?

A. There are a lot of people who come to me asking for surgery, and I choose not to operate on them because I don't think that they're going to get better because of issues of litigation, depression, or secondary gain.

Q. Now, as a doctor, don't you have an ethical professional obligation to turn another doctor in if you think that that other doctor has committed malpractice on a patient? Don't you have such an obligation?

A. Yes, sir.

Q. Have you contacted the Texas State Board of Medical Examiners about Dr. Ward?

A. There is a difference between disagreeing whether something is necessary and committing malpractice, sir.

Q. Have you contacted the Texas State Board of Medical Examiners on Dr. Ward?

A. I have not, sir.

Q. Have you contacted the Texas State Board of Medical Examiners on any physician who has treated Tom Daniels in this case?

A. I have not.

Q. As a matter of fact, not only did you say that you don't think discograms are worthwhile and that Dr. Ward shouldn't have done that, shouldn't have used

it in any consideration for surgery, you even go farther and say epidural injections and facet injections are not useful in individuals with this type of back pain after a car wreck?

A. For long-term relief, they're not, sir.

Q. You yourself have ordered injections on your own patients who have been involved in car wrecks, haven't you?

A. I have, sir.

Q. So on one hand in your report for the trucking company, you put in here that epidural injections and facet injections are not very useful, but at the same time you go ahead and prescribe them for your own patients?

A. When I have informed the patient that they're for short-term gain only and that the patient understands that, yes, sir.

Q. You don't know anything about that, though, regarding the facet injections that Tom Daniels received, do you?

A. I don't know what, sir?

Q. You don't anything about what the gain was to be accomplished short-term, long-term, you don't know either way, do you?

A. I'm sorry. I only know what was in the

records, sir.

Q. That's right. You have a very limited knowledge of this case, don't you?

A. I have the knowledge of the medical records, sir.

Q. And that's all?

A. Correct, sir.

Q. But that didn't keep you from writing this report indicating that epidural injections and facet injections are not useful in the report that you did for the trucking company, did it?

A. There are several references in the medical literature that were appended to that opinion, sir.

Q. Medical literature, let's talk about that for just a second, because you do provide a couple of references in the report that you did?

A. I did, sir.

Q. As a matter of fact, I believe that you even wrote MRI is a very poor indicator of the source of lower back pain?

A. I did.

Q. That's what you wrote, right?

A. Um-hum, yes, sir.

Q. And, Dr. Bauer, I went and looked at those articles that you cited. And that's some of them.

A. Those are the two that I believe that I cited that said that lower MRI is a very poor indication of the source of lower back pain.

Q. And what the article really says is that MRI alone may be a poor source without clinical correlation, examining the patient, and finding out what the patient's symptoms are to see if they connect with the findings on the MRI, as opposed to just looking at an MRI in a vacuum without any context relating to the symptoms and examination of the patient.

That's what the article says, isn't it?

A. Um-hum. It says in that last sentence, therapeutic or prophylactic interventions should not be based solely on magnetic resonance abnormalities in the absence of clinical indicators.

Q. And clinical correlation is essential to the importance of abnormalities on MR images, right?

A. That were not present in this case, yes, sir.

Q. You've never seen the films?

A. I've seen the report, sir.

Q. But you've never seen the films, have you?

A. I agreed to that, sir.

Q. And you didn't put the full statement in your report, you only put part that MRI is a poor indicator.

You didn't put anything about the clinical

correlation that should be used with an MRI, did you?

A. I actually quoted that sentence from a textbook that directly quoted these two articles.

Q. I'm talking about the articles that you cited. You left out part of the critical information from some of the articles that you cited, didn't you?

A. These articles were written one in 2001, one in 1996. And I'm telling you what they've come to mean at this point.

Q. Wasn't my question, Doctor. You left out part of the critical information from some of the medical articles that you cited when you wrote the report from the trucking company, didn't you?

A. In my report, I drew a conclusion and cited the reference, yes, sir.

Q. Now, you know that a motor vehicle collision can cause a spinal injury, don't you?

A. Yes, sir.

Q. And just like Ms. Rose, for example, in the collision that she had that had even less property damage than Mr. Daniels' car, she ended up with not only a spinal injury but a spinal surgery, didn't she?

A. She did.

Q. But when a defendant hires you -- and I think you said that you do, what, 75, 80 percent of your work for defendants like the trucking company in this case; correct?

A. Yes, sir.

Q. When a defendant comes and hires you, you really want to look at the situation to see if you can avoid connecting the trauma with the injury, don't you?

A. No, sir. What you want to do is prepare a fair evaluation of what happens. And about 50 percent of the time, you are able to make that connection. And obviously a report or testimony is not required in those cases.

Q. What trucking company were you working for when you wrote your report on Juan Paredes, P-A-R-E-D-E-S?

A. I was not working for any trucking company, sir. I was hired by the defense attorney.

Q. Okay. What defense attorney representing a trucking company were you working for when you wrote your report on Mr. Juan Paredes, P-A-R-E-D-E-S?

A. May I see the report, sir?

Mr. Johnson, Wesley Johnson.

Q. In Dallas?

A. I believe so.

Q. That was a case where in 2005, Mr. Paredes was

injured after 18-wheeler struck -- truck struck a building and Mr. Paredes was caught underneath the collapse of the building that the truck ran into, correct?

A. Yes, sir.

Q. What was the weight of the material that fell on him?

A. We never established that anything fell on him. He was caught in an air pocket underneath the desk, sir.

Q. So you don't know how much weight fell on him?

A. I don't, sir.

Q. Initial primary complaints centered in his low back?

A. Yes, sir.

Q. What type of material fell on him? Were these concrete blocks, were they stucco walls, what type of material -- even though you don't know how much they weighed -- how much -- what type of material was it that fell on him?

MR. BASSETT: Judge, I'll object at this point as relevance in this case. I don't think, thank goodness, anything fell on Mr. Daniels.

MR. LAIRD: The point to establish is that even with a history and knowledge of a building collapsing on an individual after a truck ran into the

building, primary complaints of low back and pain ultimately as we can probably --

THE COURT: I'll give you some leeway, limited leeway. We'll get through this.

Q. (BY MR. LAIRD) Just a few more questions.

What type of material was it that fell on him?

A. I don't remember. I believe that it was the metal side of the building.

Q. You go to great lengths to criticize his operating surgeons too, don't you?

A. Yes, I do.

I just -- if you're going to keep asking me, I'd like to refresh my memory. Thank you, sir.

Q. What type of doctors were you accusing in this case of doing inappropriate things?

A. I was not --

MR. BASSETT: Your Honor, excuse me. I object. This doctor never said that Dr. Ward did anything inappropriate. And if we're going to keep down this line --

THE COURT: I sustain it.

Rephrase the question, Mr. Laird.

Q. (BY MR. LAIRD) What were you accusing these doctors of doing that you were saying they should not

have done?

A. In that case -- sir, first of all, I accused no one. I said that the scientific evidence states that the -- one of his doctors was trying to say that the disk bulge was directly related to the accident, which as we know is not true.

He also did a procedure that scientifically has been shown not to make any difference, if not a negative difference. In other words, it's hurt more people than it's helped before he then went on to do the fusion, which also did not help that person.

Q. Did you report these doctors that you felt so strongly about to the Texas State Board of Medical Examiners?

A. There's a difference between best levels of care which we achieve and something well down here which is below the standard of care which is called medical malpractice.

So no, sir, I did not report that.

Q. You just --

A. However, as a portion of our society, we have been working as best as we can to stop some of these things from happening.

Q. You just got through saying that the procedure utilized by these doctors were produced even negative

effects to patients.

And yet knowing in your own mind that these doctors were performing a surgery that produced negative effects on patients, you didn't turn them in to the state authorities?

A. When you say "negative effects," sir, you mean -- what I mean by that is that their medical condition did not improve and sometimes declined after it.

Q. What type of doctors were you critical of in this case?

A. Dr. Marx is an orthopedic surgeon.

Q. And Dr. Morgan?

A. Dr. Morgan is a neurosurgeon.

Q. And, of course, you didn't ever examine a patient in this case either, did you?

A. No, sir.

Q. And as a matter of fact, you didn't even look at any films in this case, did you?

A. I don't know, sir.

Q. And if none are listed on here, if no films are listed, would that mean you didn't see any films?

A. No films were listed at the time of that report. I believe that I did see films later, sir.

Q. Now, I want to finish up. We're short on time.

But you've got cases pending all over North Texas as a records reviewer, don't you?

A. I do.

Q. And as a matter of fact, not only did you have testimony stricken by the judge next door concerning opinions from you, but you've got at least one other case presently pending right now in the court next door, the 67th District Court --

THE COURT: That's me.

MR. LAIRD: -- concerning --

THE COURT: That's me.

THE WITNESS: That's you.

MR. LAIRD: I'm sorry.

Q. (BY MR. LAIRD) It's right here. We don't even have to go next door. You've got another case pending right in this court.

The *Davila* case, does that sound familiar?

A. With just the name, no, sir.

Q. *Davila and Amanda Dubois v. Jan Riles*?

A. I'm sorry. I've had to see them.

Q. You know when that case is set for trial?

A. No, sir.

Q. You got a case -- and you were just a records reviewer in that, weren't you?

A. May have been, yes, sir.

Q. In a case of -- okay.

In some of the studies that you cited, the people that were studied, some of them had no back complaints, didn't they?

A. That's why they were studied, sir.

Q. That's not like Mr. Daniels, is it?

A. What those studies do is what they show the unreliability of a study in a normal person.

Q. That's not like Mr. Daniels, is it?

A. It prevents us from drawing a conclusion about the cause and effect on Mr. Daniels, no, sir.

Q. You're still charging a $1,000 an hour?

A. Actually, it's a set fee for this afternoon, sir.

Q. So they are getting a break, the defendants are getting a break then?

A. Depends on how long you talk, sir.

Q. Well, you've been over here since 12:30. It's five o'clock.

So they are getting a break, aren't they?

A. That depends on your definition. I agreed to a set fee, sir.

Q. Haven't you stated that it's important to look at MRI films?

A. When possible, yes, sir.

Q. Doctor, you can't come in here and actually state that you're in an equal position to give medical opinions on Tom Daniels compared to someone who has actually treated, examined, and actually operated on Mr. Daniels, actually been inside his spine.

You are not in an equal position to that physician, are you?

A. In some ways, I'm in a better position because I've been able to review the whole record. I also don't have to defend my own work, sir.

Q. You are not in an equal position to somebody like Dr. Ward, are you?

A. I have not treated him, no, sir.

Q. Is that a yes to my question?

A. I'm sorry. I was agreeing with you. I'm sorry.

Q. Okay. So if I gathered up medical records on everyone in this courtroom, regardless of how long anybody in this courtroom has been seeing a particular doctor, maybe a specialist, you'd be willing to come into court for a $1,000 an hour and testify to your medical opinions based only on records and feel that your opinions were just as valid as a doctor who knows the patient so well?

A. Only if it were the truth, sir.

Q. You'd be willing to do that?
A. If it were the truth, yes, sir.
Q. And it doesn't matter how much more information the treating doctor might have on anybody in this courtroom, it doesn't matter, you'd be willing and able to come into court just based on some records and be willing to dispute, if you wanted to, whatever the treating doctor might say about a patient that they have known, examined, treated, and maybe even operated on; isn't that true?
A. Yes, sir.
Q. Thank you. I appreciate you letting me visit with you.

MR. LAIRD: I'll pass the witness.

THE COURT: Is there any redirect?

MR. BASSETT: Three questions.

THE COURT: Okay.

MR. BASSETT: You can count them.

REDIRECT EXAMINATION

BY MR. BASSETT:

Q. Are you aware of any limit that this judge has put on your testimony in this case before this jury this afternoon?
A. No, sir.
Q. Question No. 2, do you feel as though Dr. Ward

committed malpractice?

A. No, sir.

Q. Question No. 3, after Mr. Laird gets done grilling you, tell this jury what opinions you want to change.

A. None, sir.

MR. BASSETT: Pass the witness.

THE COURT: Mr. Laird, do you have any follow-up cross?

MR. LAIRD: I think he's answered all my questions. Thank you.

(End of Excerpt of Proceedings)

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