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Lessons Learned: The Offensive Use of Medical Evidence in Criminal Defense Cases

*Elliott B. Oppenheim**



In criminal defense, the main goal is to create reasonable doubt. In any case where there is medical evidence, the criminal defense lawyer must determine ways to use the evidence to create reasonable doubt. Unlike law, where almost anything is subject to debate or interpretation, science tends to be more black-and-white in that a lab test, for instance, is itself hard to attack as being inaccurate. That is the reason DNA evidence tends to be unforgiving. However, the attorney does have the ability to interpret medical facts using accepted medical theory.

The law of evidence and medical records collide in defending criminal cases when a charged crime includes medical evidence or medical records. Many popular movies and television shows illustrate the complexities involving the interpretation of the crime scene evidence. But these shows do not portray how a defense attorney would prepare the defense case, in large part because they favor the government.

Medical evidence comes in various forms: forensic evidence (such as blood and bodily fluids), laboratory analyses, photos, micrographs, x-rays, and various scans. Medical records often include the victim's or the perpetrator's medical records; medical records of treatment; or death. When a lawyer brings a case, either as prosecutor or as defense attorney, the lawyer must understand how to approach the criminal case when these issues come into play. This article discusses the use of these bits of medical evidence to defend the accused when the defendant's freedom or life hangs in the balance and the goal is to raise reasonable doubt.

Whether an assault is aggravated may depend upon a causation issue: did the accused cause the injury? What is the true nature of the injuries actually flowing from the charged crime? In sexual crimes, there often is much medical evidence. If there is no medical evidence, it may or may not prove

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beneficial for the defendant's case. How can a lawyer make some sense out of a rape exam? What about the validity of an autopsy in a murder case? What approach is helpful when one looks at the defendant's injuries? What medical forces caused the injuries? These are the sorts of questions one may face in a criminal defense.

The first step in any case where there is medical scientific evidence is to obtain all relevant medical records. Each jurisdiction has specific rules that govern the discovery of medical records in the criminal context. Further, various rules require reciprocal disclosures so that the prosecutor may not "sit" on medical records without sharing them with the defendant. Constitutional requirements mandate disclosure of potentially exculpatory materials in a timely manner.

Attorneys use the charging document as part of the medical evidence needed to prove the case for either side. Without citing much in the way of facts, some jurisdictions use very general statutory charges: "D did violate X statute." In that case, defense lawyers must send discovery requests to the state as early as possible and obtain the relevant medical evidence. Often, cases will be delayed in coming to trial; responses to discovery requests will insert delay since production of medical records may require some time in medical institutions. Also, there may be motions over privacy issues. Additionally, obtaining a medical expert may cause delay. The defense will need time to retain a medical expert, which may affect the trial setting. It is important to anticipate delay, and where possible, to stipulate with opposing counsel in order to avoid unnecessary judicial involvements.

Once counsel receives the appropriate medical records and is satisfied that they are complete, it is imperative to organize them in chronological order and then stamp them numerically so that the attorney creates a master record which can be used as the case progresses. This prevents mistakes and the awkwardness of referring to "the page that begins with X."

Various privacy rules prevent disclosure of healthcare information but, in general, privilege and confidentiality are "swords, never shields for wrongdoing." If the State wants to bring a case, the victim's relevant medical records will become ground zero. The same is true for the defendant. In general, courts will allow a foray into ordinarily private medical information "for good cause shown."

Should the lawyer involve a medical expert witness? Unless the lawyer is competent to interpret medical records at a professional level, which would be indicated by an R.N. or M.D. degree or similar, in this author's opinion, is it mandatory. There are two types of medical experts: consulting and testifying. In some cases, the experts may be one person, but not always, and there are good reasons not to use the same person. If you do plan on having a testifying expert, because you want that expert to be objective, it is important that the expert is not intertwined in the intimate formulations of

case theory and strategies.

In a consulting expert, it is imperative to find someone who knows the field of medicine and who understands how the relevant medical science, as contained in the medical records, relates to the respective case theories.

What is the prosecution's case medical theory? The approach here is to state it succinctly: To use X medical evidence to prove A. Part of the prosecution's case theory will be "hiding the ball." Many jurisdictions do not permit discovery or very much discovery, and if one asks about potential experts or witnesses at trial the prosecution sends the equivalent of the Chicago telephone directory. Also, the state often responds with vague generalities. This is another reason to justify retaining a medical expert. This ambiguity requires the lawyer to read through the medical materials carefully and anticipate medical theories which will play out on day one of trial.

Here are some examples about using medical records in criminal defense: in one case, there had been a fight at a party where the defendant allegedly struck the victim in the mid-face with the bottom of a beer bottle. The injuries were horrific. The defendant's theory was self-defense; the state charged aggravated assault, concluding that there was medical evidence to support that the defendant struck the victim twice, one blow for self-defense, perhaps, but one for retribution.

In careful medical analysis of photographs taken in the emergency room, it was clear that there was one blow. There was a discrete laceration which fit the beer bottle. There was no medical evidence that there had been a second blow. The treating surgeon testified that there was one blow, drawing his conclusion from the laceration pattern. The state had no medical witness and the jury acquitted.

Often the government will have no medical witnesses or will hire low level, less expensive witnesses, including lab technicians and nurses. It is important to obtain more qualified experts who will professionally "outrank" the state's witnesses. Hire the best: university professors or well accepted leaders in their field. When a person's freedom or life is on the line, it is imperative to "get the best."

Unlike medical negligence litigation, where the focus of the litigation is medical quality, in criminal defense, it is the interpretation of medical data or the quality of the opinion which comes under scrutiny. For this reason, where no one is criticizing another practitioner, it is easy to obtain expert witnesses. The ordinary professional hesitancy among physicians to criticize another's practice is not present and often physicians see a societal duty to help in criminal defense.

Criminal defense work often takes the posture of a "shoot out." It is quick, dramatic, and cross-examination techniques are brutal. When a lawyer seeks to retain an expert, it is important to state the purpose of the

contact and to provide the client name and case number. Make sure that the expert has not been retained by the opposing side and obtain an agreement that once you share case specific confidential information about your case, that the witness will not enter the case on the other side.

Be careful about expert witness fees. In the Elizabeth Smart case the defendant would not submit to psychological testing on the issue of his competence to assist in his defense. The U.S. Attorney paid \$500,000¹ to psychiatrist Michael Welner, M.D. for his role in the case. The psychiatrist spent over 1,000 hours at \$425 per hour. The defense paid \$50,000 to their expert witnesses. Here, the defense would argue that the defendant is mentally incompetent to stand trial where the government would argue the opposite. How will a jury react when it hears about these fees?

Juries will accept reasonable fees. Although the government stated that the fee was justified and “well worth it,” a jury may find such a fee excessive and discount the testimony as “bought.” Jurors live in a “real world” and may look at \$425 per hour as astonishing, where their wages may be less than \$20 per hour.

When an attorney retains a testifying expert, it is important to proceed in a business-like manner with a contract. Further, it is important not to taint the expert’s testimony. When the initial contact is made, it is important that the attorney allows the expert full latitude in the case analysis. There is nothing improper with sharing a case theory, but one must avoid a “quid pro quo” where the expert is told that he must adopt a particular theory. Often, it is a good idea to send out preliminary materials with a cover letter and to pay the expert for one hour to “look” at the materials and see what the expert thinks. If the expert will support the defense case theory, then the attorney can move ahead with confidence and retain the expert.

In many cases, if the defense attorney hires a consulting expert who can prepare medical cross-examination questions, it is possible to use the government’s expert as the defense expert where you have a strong case theory. For instance, where the findings are vague or non-existent on physical examination and in lab testing, it is hard for the prosecution to argue that its case finds support in that medical evidence. Typically, such an approach requires a person trained and well experienced in both medicine and law.

Well-trained, experienced forensic pathologists are formidable witnesses but, often, autopsy results are scrutinized. This is especially true and successful where the autopsy has been cursory, lacks details, measurements, or contains an opinion which is not supported by the autopsy data itself. It

1. Pamela Manson, *Psychiatrist at Mitchell hearing worth his \$500,000 fee, U.S. attorney says*, SALT LAKE TRIB., Dec. 22, 2009, available at http://www.sltrib.com/news/ci_14033588 (December 2009).

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is hard to conclude that a drug overdose, poisoning, or intoxication, without more, is evidence of a homicide since the circumstances of these ingestions may remain ambiguous. The same may be true for blunt force trauma where the facts are not well known. Generally, it is very expensive to “take on” a pathologist, and one must fully understand the medicine. Further, it may be catastrophic to a defense to get “blindsided” by wholly unanticipated testimony.

In one case where the actual cause of death was in question, the state dismissed the case. The defendant got into a fight and did beat up the victim; he punched him. The defendant received medical care for injuries to his hands from the punches. The victim was found dead a day later, at least fourteen hours after the fight. The autopsy showed that the victim’s skull had an impression from a 2.5 inch pipe. However, witnesses who saw the fight testified about punches said there was no 2.5 inch pipe. Here the defendant had committed a battery but he did not cause death.

In general, M.D.s prescribe medicines which create desired medical effects. Only a few jurisdictions permit Ph.D. psychologists to prescribe. Be cautious about using a Ph.D. psychologist to testify about areas outside of the expert’s actual clinical expertise as limited by licensure. The same is true for Ph.D. toxicologists. M.D.s prescribe medications; Ph.D. toxicologists do not. It is dangerous to attempt to proffer a Ph.D. toxicologist to testify about clinical effects since they do not treat patients.

Careful, too, about using a pathologist, who “treats dead people” to testify about actual “live” clinical matters. Remain a bit suspect when there is a pathologist testifying about a patient matter where the person is not . . . dead. Pathologists would express opinions on whether a set of circumstances were lethal, but because a headache can only occur in “the living” a pathologist would not be the best expert to express an opinion on whether a patient had a headache prior to death. A pathologist’s patient never relates symptoms. . . they are all dead.

In conclusion, use medical scientific theory for the basis to exclude “junk science,” speculative, and unsupported theories by motions *in limine*. The fact that an expert is willing to testify to some proposition does not make that proposition valid. Excluding expert witness opinions may save your client.

In the appropriate criminal defense case, complete, accurate medical analysis and preparation win the day. In the zealous defense of the accused, the criminal defense attorney must use medical science to raise reasonable doubt at every opportunity.