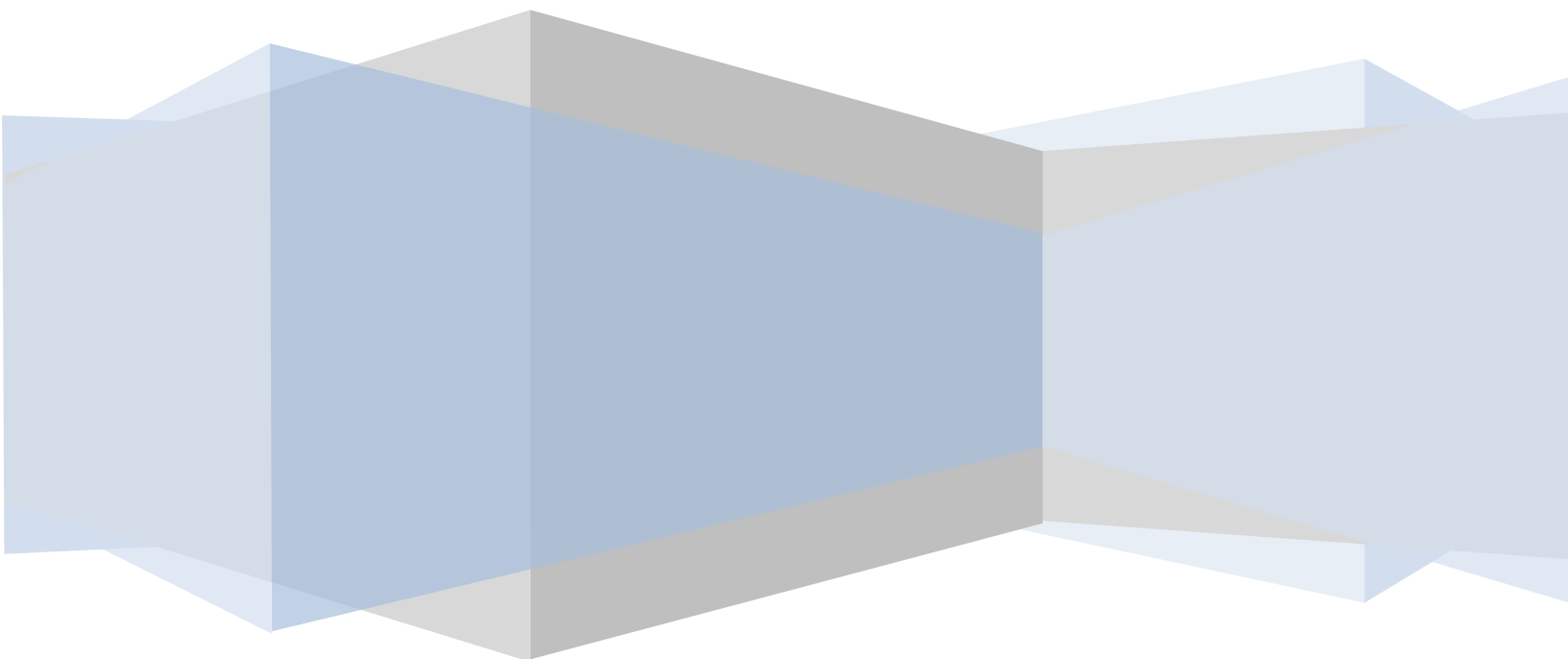


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# Rethinking Cross-Examination: A Primer

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## Part 1: Rethinking Cross-Examination

A lot goes through our minds when medical and vocational experts give their opinions to the ALJ at a Social Security hearing. We listen carefully, waiting to respond. Inconsistencies arise. We think of references in our notes. Our client gets visibly agitated at what he hears. Then, the ALJ says, “Counsel, your witness.”

Will a series of probing questions win your claim? What goes into good cross-examination? How do you get better? The answers to these questions lie in perspective and planning.

These materials are divided into three parts. Part 1 discusses the benefits of a new perspective on cross-examination. Part 2 explains how to create your “Theory of the Case”. Part 3 outlines how to implement your “Theory of the Case” at your hearings, with cross-examination playing a lead role.

### ***Why rethink cross-examination?***

*The overarching goal of your hearing is to persuade the judge to approve your client’s claim. Cross-examination is more effective when it is integrated into each step of the hearing process. You cannot hope the experts make your case for you. In football terms, your cross-examination is an important pass play to set up a scoring drive. It isn’t your first or last play. You don’t stop at cross-examination.*

You are advancing your theory of the case from your opening to your closing argument.

From this goal-oriented perspective, cross-examination is not the *only* opportunity to persuade the judge you have a set of reasons your client should win – your “theory of the case”. You have opportunities to persuade the judge *before* and *after* you cross-examine the experts. Cross-examination thus fits into this broader playing field.

With this perspective, you review for your hearing to create your “theory of the case”. You position it at each stage of the hearing. Then, you tie it together at the closing. If you do these things, your cross-examination is a means to test and validate your theory of the case *through the experts*. Regardless of the yards gained with the experts, your closing play allows you to assemble your theory together.

So, if you don’t currently focus on cross-examination, you should. If you get nervous and feel cross-examination blocks you, you shouldn’t. Having a firm purpose at each stage of the hearing provides structure and focus to your cross-examination. With some refined mechanics of cross-examination, you can distribute the persuasive weight of your theory to all parts of the hearing.

### ***How does rethinking cross-examination help me?***

Cross-examination is frequently considered a separate part of the hearing process. Certainly, the hearing can be broken up into parts. This helps us understand the flow of the hearing as it works through the sequential evaluation process. But in my experience, it is a mistake to think of the hearing as a patchwork of disintegrated parts. *All the elements of the hearing are platforms to persuade the judge*. Cross-examination is an integral – but not exclusive – ingredient of your advocacy.

A new perspective on cross-examination as part of the bigger whole of advocacy can help you in two main ways. First, it can break the conventional bias that cross-examination is only focal point of an otherwise flat hearing. This bias is destructive. We may remember a few wins based on asking just the “right” questions, but *many* other hearings produce neutral or negative expert testimony against your client. This creates a defensiveness about cross-examination that can make you feel like you are punching yourself out of a garbage bag.

Second, a new perspective on cross-examination helps you *improve* your success. Piece-meal cross-examination is bad. It is disconnected from your theory of the case and creates a Frankenstein in the hearing room. Its hobbled-together form steals attention and overwhelms logic. Refined mechanics and a plan to shape cross-examination toward your theory of the case create a form of logical beauty. Our questions have a natural outline and focus to them. The logical thrust of good cross-examination in its proper context also tends to blunt the edges of negative expert testimony.

### ***The transition: Setting cross-examination free***

If you feel that experts “sandbag” your cases, you are not alone. But this attitude can be a trap. There may be any number of reasons that an expert may not acknowledge what you know is true. An expert may not have properly reviewed the record, may have taken perceived cues about what the ALJ wants to hear, may have been tired, or simply may not have liked something about your client. The point going forward is that while you may not always know experts’ motivations, you cannot let this distract you from your primary objective: *Persuade the judge your theory of the case is true.*

How do you avoid letting cross-examination “get to you?” First, assume the expert won’t say what you want. If you always prepare to dig in, favorable expert testimony is a bonus. Second, consider that cross-examination is your way to argue your theory of the case *through* the expert. Consider the following propositions:

- Any useful expert response helps me.
- Any useless or negative expert response still allows me the final word.
- Any “off-the-wall” expert response also tends to help me.

Unless the hearing is a series of new (and unfavorable) revelations from your client, your theory is your agenda: (1) into your hearing day, (2) in your confirmations of your theory with your client before the hearing, (3) into the opening statement, and (4) into the direct examination. Cross-examination sets up as a crucible for persuasion.

Now, we shift to creating your “Theory of the Case.”

## Part 2 – “Theory of the Case”

Your theory of the case is your plan to get your client approved. It consists of 3 basic elements:

- When disability began,
- What the disability is, and
- Functional limitations that preclude work.

You build your hearing advocacy on the strength of your theory of the case. Before I describe the theory of the case, look at the next section below to see how your theory of the case can make a difference.

### ***Hearings of hard knocks: A case study of effectiveness over time***

I learned about Social Security hearings – and cross-examination of experts in particular – through trial and error (literally). I was alone (as we all are) in hearing rooms trying to think of new ways to improve. Law school teaches two essential rules about cross-examination: (1) Never ask a question for which you do not know the answer, and (2) Never ask why. These rules teach you what *not* to do. Unfortunately, these rules don't tell you what *to* do.

Looking back at my development as a Social Security attorney, my *attempts* to improve my hearing advocacy followed a continuum of roughly 5 stages:

- Stage I – Dread of Cross-Examination
- Stage II – “Potshot” Cross-Examination
- Stage III – Cynical Cross-Examination
- Stage IV – Probing Cross-Examination
- Stage V – Cross-Examination for Truth

You may or may not have gone through these stages below. I sincerely hope you avoid a few. My missteps are a springboard for the discussion that follows.

## ***Stage I – Dread of Cross-Examination***

When I first started doing Social Security hearings in 1992, I would go into the hearing room with my client. I read the medical record, and brought my 20+ pages of notes about every headache into the hearing room. The ALJ did not request an opening statement. I didn't offer one. As the hearing progressed, I would wonder about one thing: What will the medical expert say? Questions for my client came and went. Then the moment: The judge invited the medical expert (usually a former medical school professor) to give an opinion. I would listen carefully to the ME testimony for cues. Either I would hear favorable testimony and be relieved, or I would hear the whooshing sound that objects make going over a cliff: "I don't see and listings met or equaled" followed by general functional limitations including avoiding ladders. I wrote all these down faithfully.

When the ME gave unfavorable testimony, I would grow cold. My heart would race. I would try to think through what the ME missed. Then the judge would say, "Counsel, any questions?" I would fumble with my notes, and begin with general questions that would buy time for some good questions – hoping that a question of mine might prompt the judge to intercede on my behalf. Then the whole process repeated itself when dealing with the vocational expert. I would not request a closing, and generally was happy to be done. Success for me was challenging a few points the experts made. Then, I waited for the hearing decision.

## ***Stage II – "Potshot" Cross-Examination***

After about 25 to 50 hearings, I felt more at ease in the hearing room. I knew what situations would be out of the ordinary because I knew what an "ordinary hearing" was supposed to be. I knew how some judges were more formal than others. Judges didn't interrupt my questions as often, increasing my confidence. I generally understood that medical records had a structure. How the medical evidence fit the disability law made some sense. I highlighted certain parts of my notes that I thought were the kinds of things that came up in previous hearings for my cross-examination.

I also began collecting a grab bag of questions for experts that allowed me to engage them – at least generically. For the ME, I could ask questions like, "Doctor, do you agree with the conclusions of my client's treating doctor?" And this: "What did you mean when you said that there was no evidence of these symptoms? They are in exhibits 10, 15, and 18." For the VE, I could ask, "How many of these jobs allow people to sit and stand?" And I learned to ask questions about annoying jobs, like,

“What if a person doing a surveillance system monitor job had anxiety and couldn’t handle an emergency?”

I still was nervous about cross-examination, but I could engage (I thought) somewhat intelligently. I made no opening or closing, but I interacted with the judges when they interrupted my questions.

### ***Stage III – Cynical Cross-Examination***

As I gained further experience, my work at hearings seemed to gel. I had handled a number of “standard” medical problems, and I could roughly classify their relative strength. For example, some clients had mechanical low back pain vs. degenerative disc disease. Some had low back surgery, and some awaited it. I lined up the supportive rulings and case law in my notes alongside highlights of the record. I began to understand how the individual judges viewed certain classes of cases. (Many of my early cases were *proving* chemical dependency). I expected some experts to give “bad” testimony, so I didn’t worry so much about their testimony. My questions were direct, such as, “Why did you disagree with my client’s treating doctor about the diagnosis?” Occasionally, they were even more direct. “About how much time did you spend reviewing this medical record?” “In your vocational experience, how is it possible to avoid stooping as a cashier?”

My cross-examination at this stage was driven by cynicism. The “system”, including all people in it, was set up to fail my clients. Oversights in my clients’ claims at the lower level denials were personal. I ascribed my client’s hearing losses to the people in the hearing room rather than to the medical evidence or my arguments. In my mind, the system was imbalanced, and getting favorable testimony from “bad” experts was a bonus that wouldn’t happen often. I felt vindicated by making certain arguments in certain cases, feeling that I made a difference by sometimes getting in the way of a denial. I was also haunted at times searching for the “perfect question”, which would come to me a few hours or days *after* hearings.

### ***Stage IV – Probing Cross-Examination***

Sometime after about 250 or so hearings, my perspective on my job – and on cross-examination in particular – matured. I had a better bird’s-eye view of medical evidence over time. I knew good medical treatment from bad. Certain medical facilities stood out as offering more thorough care (after all, the Mayo Clinic was under 2 hours away from me). I knew when I had a good case. I perceived my role to be to try to get in the way of denials and usher through strong claims into approvals.

As medical histories took on familiar patterns, the law had an inevitable quality to it. For example, a grid “fit” when I read the following kind of medical history:

Low back strain lifting led to an ER visit, then a primary care examination, physical PT would follow, another ER visit, an MRI, a neurologist appointment, injections at a pain, laminectomy, *client turned 50*, then underwent a fusion, followed by a pain clinic.

By contrast, I could also tell that a grid at 50 was a harder fit if my client was at the physical therapy stage above and lacked the MRI documentation. When I knew a win was not expected, I argued against the weaknesses. “Doctor, isn’t it true that although my client has radiculopathy and positive straight leg raising findings, that he would be expected to undergo more conservative treatment at this juncture?”

My view of the role of the people at the hearings changed. Although the experts tended to testify along certain lines, they were just “doing their jobs,” and they knew I was doing mine. My frustrations didn’t leave the hearing room. I ascribed patterns of denials at the lower level to bureaucratic oversight rather than a personal state agency agenda.

My struggle to ask the “perfect” cross-examination question morphed into something new: I would ask a *series* of probing questions to experts that *distributed* the logical weight of the argument. For example, I would ask a general question about the signs and symptoms of agoraphobia, follow that with confirmation by specific examples in the medical record, and conclude with a question like, “If a person cannot leave their home as shown in the record, what *other* pages of evidence support moderate limitations in social functioning?” My notes included trends in my client’s medical care over time, missed diagnoses, and the practical impediments to care that explained holes in the record. I also had enough confidence in the logic of my questions to tie things together in a closing. “Your honor, please consider an approval under 12.06 because of my client’s marked ADL’s and concentration, persistence and pace as mentioned in Dr. Karayusuf’s CE.”

### ***Stage V – Cross-Examination for Truth***

Over 15 years after my first hearing, I seem to be in a newer stage. (I, like many of you, still remember my first hearing client’s name.) My notes are shorter, and I (think) I can tell good medical care from bad. When my client’s pre-hearing answers to my questions aren’t quite credible, I push for more information because I know my client’s testimony may similarly suffer at the hands of the ALJ.

At this point, I (feel like I) know what “real-life” medical restrictions *should* be despite what is said. I also (hopefully) have a natural sense about when to stop cross-examination. For example, if an ME says my client does not meet a listing, I may not ask why. Instead, I ask to ME questions to straightforward evidentiary issues that I already know exist:

“Doctor, was there a positive straight leg raising in Exhibit 14F/2? Was radiculopathy and associated reflex loss found on examination in Exhibit 20F/16? Did the December 2008 lumbar spine MRI in Exhibit 15F/4 confirm nerve root impingement? Thank you.”

In my closing (which I always request), I might say to the ALJ, “Your honor, with all due respect to the ME’s opinion, please consider that he confirmed that my client has met all the elements of listing 1.04A.”

When I ask certain VE’s questions about various functional limitations, it now seems like certain VE’s carve out boundaries for certain jobs not unlike countries on a map (the “republic of surveillance system monitor” survives change). Bench assembly. Optical Assembly. Cashier II. Familiar groups of functional limitations reappear. VE’s work off slightly different maps, but you can develop an eye for recognizing the boundaries of functional limitations past which there are no jobs:

- Power gripping vs. occasional handling,
- No overhead lifting vs. occasional reaching,
- Sit-stand option hourly vs. at will, and
- Brief and superficial contact with public, coworkers, and supervisors vs. rare contact (1-4% of the time) with any coworker or supervisor.

At this point, cross-examination is not a battle against myself, the system, or the experts. It is a battle for proving what I already know is true. Here is the order I do things that seems to work for me:

I review the file for my theories of the case before the hearing, confirm my client’s experience, and introduce my theory whenever I can do openings. I finalize my areas of questions while my client answers the ALJ’s questions. My direct examination of my client draws out what I already confirmed and wasn’t discussed with the ALJ. I finalize my areas of questions for the experts while they answer the ALJ’s questions. My cross-examination, in effect, invites the experts to challenge *my* theory of the case. My closing argument reports on the strengths and weaknesses of my theory of the case. Then I explain why my theory is true and how it survived the experts.

If you noticed improvements over the successive stages, consider why. Experience is not the *only* factor in being an effective advocate at Social Security hearings. A method of preparation is mandatory. The goal of the following materials is to give you insight into *what* you are doing and *why* you are doing it. Improve on this and you can deliver better results now at your hearings. (If you are relatively new, you will likely pass me up in the process).

Now, let's look at the "Theory of the Case".

### ***Why develop a "theory of the case"?***

It seems obvious, but you have nothing to argue if you do not know *why* your client should be approved. How can you ask intelligent questions of your client, let alone experts, if you have no point to make? Would you take a car trip without knowing where you are going? Your theory is your map.

In light of the 5 stages I've gone through above, a solid theory of the case underpins all your success. With it, you can improve ways you position yourself and argue your cases. Without it, you cede the momentum of the hearing to the ALJ and experts.

### ***How do you create a "theory of the case"?***

Over time, I've (somewhat randomly) developed the following method to swiftly review for hearings and create a theory of the case.

1. Determine your hearing file's procedural backbone: Filing date, birth date, onset of disability, DIB/SSI/CONC, and alleged onset date (AOD). Do you have a DIB only claim with a remote DLI?
2. Assess your client's medical complaints at application. The Adult Disability Report is a quick view of the original medical complaints.
3. Review the medical record, particularly the most recent treatment records. Determine if your client's *previous* complaints match his or her *current* diagnoses. If there is a change, why?
4. Develop your theory of the case. Why should you client win?
  - a. Is the medical event timeline logical?
  - b. Were there missed/latent symptoms or diagnoses?
  - c. What objective medical evidence meets listing elements?

5. Test your theory of the case. Any negatives that would cause a loss?
  - a. Do your client's recent complaints line up?
  - b. Any failure to treat, non-compliance, or CD?
  - c. Any evidence of malingering or dishonesty?
  - d. Any contrary medical records? Find them, mark them, and think of responses to them.
  - e. Why did the state agency deny? What is your response?
6. List off your client's physical and mental limitations that make up your theory of the case.
  - a. In what exhibit and page numbers are they supported in the record?
  - b. Can you visualize the vocational expert placing your client at any jobs despite these limitations?
  - c. Important: What functional limitations for approval are *least* supported? Why?
7. Prepare to press your theory of your case at: (1) Prehearing in writing, (2) in the hearing without your client before the hearing starts (when ALJ allows), (3) at your opening statement, (4) during your direct examination, (5) in your cross-examination, and (5) in your closing argument.

### ***What are examples of theories of cases?***

- ✓ Example 1. A theory of the case can be simple:

My client has bipolar disorder and his mood swings would causes more than 2 absences per month.

- ✓ Example 2. A theory of the case can also be more complicated:

My client would not meet 1.04A, but perhaps equal it under exhibits (A, B, and C). Alternatively, he would grid out at sedentary with an amended AOD because he cannot perform his semi-skilled past sedentary job due to depression that limits him to simple and unskilled work.

### ***How do I know that my theory of the case is sound?***

Ask questions about it *while reviewing the hearing file*. Do I have *all* the elements of my theory of the case I will need to "connect the dots" of my theory? If yes, your theory of the case has its footings.

## ***How do I prepare to support my theory of the case at the hearing?***

Four basic ways: First, be organized. How well-prepared are you to cite information? You do not need to memorize the file, but you should have an organized way to list the citations to the record for each element of your theory of the case. Your annotated understanding of your client's hearing record will make your arguments more natural.

Second, look for negatives. How would this theory of the case fail? Are there any weak links? For instance, do you *need* an experts' assistance to support some elements of your theory of the case? Taking Example 1 from the previous question:

My client has bipolar disorder and his mood swings would causes more than 2 absences per month. You need evidence of the severity and frequency of his symptoms. How many bad days does *he* say he has per month? Are there hospitalizations? ER visits? Also look for negatives. Is there CD? Non-compliance?

Third, find parallel theories of the case. A more complicated theory of the case can open different avenues for approval. While equaling a listing may require the assistance of the ME (a negative), a grid can arise from an RFC from a treating doctor. Taking Example 2 from above:

My client would not meet 1.04A, but perhaps equal it under exhibits (A, B, and C). Alternatively, he would grid out at sedentary with an amended AOD because he cannot perform his semi-skilled past sedentary job due to depression that limits him to simple and unskilled work. You will need neurological examination evidence of radiculopathy and information about difficulty walking. Does he use a cane? Treating M.D. may limit to sedentary. Is this RFC supported? Ask client whether anyone has offered surgery. Look for negatives, such as lack of insurance for updated imaging studies.

Fourth, burn the midnight oil. *Preparing to support your theory of the case is the lion's share of your duty at the hearing.* It gets easier from here. So, confirm the procedural background for the case. Did I verify the DLI from the Certified Earnings Record? Lay out your client's basic medical event timeline. What surgeries happened when? When was the work injury? Confirm dates with your client. For extra credit, find multiple sources to support the main elements of your client's crucial functional limitations.

## ***How do I know when I am done researching my theory of the case?***

Like any research, you will know when you are done when you circle in on the same information.

# Rethinking Cross-Examination: A Primer

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## *How do I know I am improving my advocacy at hearings?*

Winning or losing your hearings is not always useful feedback about your advocacy. The facts of your cases can override your best efforts. There are, though, three basic areas that allow you to monitor your advocacy:

- What kind of notes do you take?
- What is your focus on cross-examination?
- How do you review the medical records?

The chart below tracks general improvement in each area:



	Good	Better	Best
<b>Note taking <i>before</i> hearing</b>	Lists of all symptoms and diagnoses	Highlights of relevant symptoms and diagnoses	Highlights of symptoms and diagnoses tied to relevant law
<b>Note taking <i>during</i> hearing</b>	Extended notes about all comments by everyone	Notes limited to relevant areas for questioning	Notes focused to remind you of questions for your client, the experts, and your closing
<b>Cross-examination focus</b>	<u>Focus on self:</u> Will I ask the right questions?	<u>Focus on expert:</u> Will the expert agree with me?	<u>Focus on judge:</u> Will my questions persuade the ALJ?
<b>Review of medical record</b>	Beginning to end	Selective reading of relevant diagnoses with procedure in mind	Ordered review: Procedure, client's complaints, recent treatment review and summary, progress of longitudinal history, flagging for listings and/or functional limitations

## Part 3 – Putting your “Theory of the Case” into Action

This section discusses how to implement your theory of the case throughout the “points of persuasion” at the hearing, starting in your opening statement, going into the direct-examination of your client and cross-examination of the experts, and finally in your closing argument.

### ***How do I assert my theory of the case in my opening statement?***

The goal of an opening statement (when the ALJ’s allow it) is to introduce your theory of the case. Opening statements serve to put everyone at the hearing on the same page. Here is an example:

Your honor, procedurally, this claim is DIB only with a DLI of September of 2008. His cancer treatment started when his oncologist diagnosed his leukemia in January of 2009. DDS thought the diagnosis was past his DLI, and also that the effects of treatment would not last a year. Note, though, on page 3F/27 that his primary care doctor was suspicious of labs done a few month before the January 2009 diagnosis. This means that we have medical evidence that, in retrospect, is near my client’s DLI. Although his 6 weeks of chemotherapy for his leukemia was completed last year, it has caused ongoing health issues for my client. He can describe the daily difficulties he is having at home.

### ***What purposes do my opening statements serve?***

Opening statements serve five purposes. First, they remove surprises for the ALJ. If the ALJ didn’t realize a listing applied, a grid was 6 months off, or there was a new diagnosis, your later questions and arguments about these matters would tend to confuse the ALJ rather than persuade him or her.

Second, opening statements address threshold obstacles to approval. If you acknowledge and answer challenging issues that affect your case, you offer a clear path for the judge to get past them. In the example above, if the judge assumed the DLI would preclude benefits, nothing else would matter.

Third, opening statements insert the persuasive power of logic on your side. After listening to your theory, the ALJ may adjust the questions he or she asks your client. In this way, the ALJ is testing your theory of the case for you.

Fourth, your theory of the case puts ME's on notice about your questions for them. An unprepared ME may be persuaded to think twice before relying on his or her first impression – a subtle but obvious advantage.

Fifth, opening statements prompt human curiosity. In the previous example of an opening statement, I have purposely left out details about my client's current difficulties. One reason is that my client is more credible when he describes his symptoms in his own words without prompting. Another reason I leave out selected details in my openings is that it focuses the ALJ on what he or she wants to ask my client. What are the side-effects of chemotherapy? Why didn't your primary care physician properly interpret the lab work? The opening statement functions somewhat like a store window.

### ***How can I argue my theory of the case through the direct-examination of my client?***

Your direct-examination of your client is a way for *your client* to supplement the elements of your theory of the case. Don't waste it on general questions. Build on your questions without leading, drive to the heart of your theory of the case, and get out of the way.

If persistence and pace is an issue after chemotherapy:

Q. "Did the chemotherapy cause you ongoing fatigue?" [followed by] "Everyone gets tired, is this fatigue any different?"

If absenteeism is an issue with bipolar disorder:

Q. "Does your bipolar disorder cause you mood swings?" [followed by] "Do you have good and bad days?" [followed by] "What makes a bad day?" [followed by] "How many bad days do you have on a usual week or month?"

If staying at the immediate work area is an issue with Crohn's disease,

Q. "How often do you typically need to use the bathroom in an eight hour period?" [followed by] "How long do you usually need to spend in the bathroom at a time?"

Consider that your questions at this point address functional limitations from your theory of the case that you'll ask the vocational expert. The VE and the ALJ are on notice about the nature and severity of your client's "reasonable" work limitations.

## ***How do I prepare for cross-examination of the ME?***

With my theory of the case in mind, write questions in your notes about the ME testimony as it happens, including exhibit and page references that you already noted. If the judge asks some of them during his questions, you can cross them out or add an additional note to follow-up.

## ***How do I prepare for cross-examination of the VE?***

Your theory of the case has considered your client's significant functional limitations. You can list them near your notes about the hypotheticals and jobs to verify they are included. I visualize my client doing the particular functions of the jobs that come up. This may help you think of additional restrictions and remind you of other elements of your theory that may preclude each new job.

## ***Is there anything I should remember as I start my expert cross-examinations?***

Yes. For ME's, consider that you have a fully developed theory of the case, and that you are likely going to confirm with the ME that parts of your theory are in the record.

For VE's, remember that they *may* personally agree with the restrictions you add to the ALJ's hypotheticals. Just know, however, that you are choosing crucial restrictions that stem from your theory of the case. Ask that the VE to consider [limitation X] in addition to the hypotheticals posed by the judge. Whenever possible, I also add the diagnosis and hearing file citation for my restriction. An example VE question:

In addition to the first three hypotheticals, could you please add that this person can only perform occasional handling due to bilateral carpal tunnel syndrome as listed in Exhibit 3F/29? If this were true, would this person be able to perform the jobs you testified to?

## *Are there good ways to structure your cross-examination questions for ME's?*

Much of this depends on your style and experience. However, there are some good foundational questions for common situations that arise. I have categorized them below:

- Missed functional limitation: “You testified that my client is limited to [restriction X], did you consider the effect of my client’s [diagnosis] on Exhibit 4F/50 on his ability to do [X]?”
- Missed listing elements: “You testified that my client did not meet or equal listing [X]. Is finding [element A] found in exhibit 6F/22?” [continue asking about elements and **stop** when they are satisfied].
- Disagreement with treating physician/CE: “Please refer to Exhibit 35F/18. Did the treating physician diagnose [X] and state that his patient could not do [Y]?” [followed by] “Do you find any errors in his diagnosis?”
- Minimizing effect of pain: “Doctor, you testified that there were no objective findings on examination that explained my client’s pain. Is it possible that a patient can have chronic pain despite [treatment D]?”
- Implying malingering: “Doctor, you testified that the level of pain does not relate to the examination findings. Do you have any citations from the medical record from treating professionals that questioned my client’s complained level of pain?”
- Psychologist ignoring functional limitation(s): “Please go to page [F]. Are the findings on this page supportive of marked [“B” criteria elements]?” [Continue with other pages for about 2 to 3 more examples, and **stop**.]
- Psychologist finding “material” chemical dependency: [Set-up question] “Do you have a prognosis for how long the symptoms of [condition] will last into the future?” [Response:] “I cannot speculate on records that are not there.” [Reply:] “You stated that chemical dependency is material to my client’s [condition]. Without speculating beyond the record, could you please find an exhibit and page number in which a mental health professional determined that chemical dependency caused my client’s current symptoms of mental illness?”

## ***Are there patterns to how experts avoid directly answering our questions?***

Yes. For the sake of these materials, I offer some general categories and possible responses to each.

- **Ignoring specific examples:** [ME] “I see this evidence here, but the overall record supports my conclusions.” [Respond with 2 or 3 further examples and **stop**].
- **Not seeing it your way:** [ME] “I don’t agree that [problem X] causes [limitation Y].” [Response in line with your theory of the case]: “Is it *possible* that this problem can cause this limitation in some people?”
- **Overarching summary:** [ME] “I don’t see very much evidence of [problem X].” [Response]: “Is this notation on [exhibit citation & date] evidence of [problem X]?” [Continue with 2 or 3 more examples and **stop**].

Note the “stops” in bold. In some respects, stopping your questions is more effective than continuing with more examples. Why? There is a natural order and length to making your point. The ALJ will understand how a few points lined up in succession reflects a conflict between: (1) the medical record and the ME or (2) the reality of the workplace and the VE. Make a note about these conflicts so you can refer to how your theory of the case resolves them in your closing argument.

Note: Your questions may (hopefully) prompt more questions from the ALJ – a sign that you are raising relevant issues.

In summary, plan to use your cross-examination as a lead in to your closing argument. *Your cross-examination, then, is a means to an end.*

## ***How can my closing argument tie together my theory of the case?***

Your closing argument allows you to report to the ALJ how your theory of the case did through the hearing. A good closing is brief and to the point. It usually addresses the following areas:

1. Your theory of the case.
2. Brief medical event timeline.
3. Challenges in the record to your theory of the case.
4. Your response to these challenges from the medical record.
5. Statements by the ME that were supportive and unsupportive.
6. Answers to unsupportive statements with citations from the record.
7. List of functional limitations that led to no jobs.

Here is an example of a closing argument [directly after ending my questions for the VE]. Note how it weaves in the theory of the case and addresses the above areas:

“Your honor, may I make a brief closing when appropriate?” [ALJ: Yes, proceed.]  
“Thank you. My client’s anxiety disorder keeps her from leaving her home. This caused her to lose her job in 2007. She’s treated for this, as noted in [exhibits and page numbers]. There was a 6 month stint that she didn’t treat. The ME thought this reflected improvement, but my client stated that she lacked insurance and without her meds for that time, her symptoms kept her from getting help. Her symptoms continue, and should cause marked limitations in her ADL’s and social functioning under the B criteria. Please consider that [Exhibits A/B/C] support her meeting listing 12.06. In the alternative, please consider that she cannot be around the public or coworkers, and would have a difficult time with supervision – particularly during her weekly panic attacks. Thank you.”

### ***What if I think cannot get in a closing?***

If you believe you may not be allowed to get in a closing based on your experience (perhaps the ALJ is running late), I sometimes simply talk as if I am asking another question of the VE, shift my attention to the ALJ, and go right into a shortened closing argument: My theory of the case and a key functional limitation or two.

If you are unable to do this, I recommend a post-hearing brief that summarizes your closing (about two paragraphs) with citations and dates. I find these are most effective within roughly 3 days of the hearing, when memories are fresh. After this, my thought is that after a few days, the ALJ’s memory is drawn from his or her hearing notes – which are deliberately for or against your client.

### ***What does it mean to “cross-examine for truth?”***

Lawyers and representatives bring their credibility into the hearing rooms with their clients. It is more persuasive, in my opinion, to comment on the negatives of your theory of the case rather than to argue either: (1) No negatives exist, or (2) hope that no one sees the elephant in the hearing room.

Negatives are usually surmountable. For example, in the closing above, it is understandable that an ME might reach a negative conclusion about a client failing to treat. There is, however, a *truthful and reasonable* explanation for the conflict in the record. If negatives are not surmountable, you should let your client weigh options for withdrawing the hearing request before the hearing (when appropriate).

# Rethinking Cross-Examination: A Primer

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If you have adequately prepared for your hearing, you have already anticipated negative challenges to your theory of the case. If you include and address these negative elements in your arguments, you will be fulfilling your role to help the ALJ's do their job. Conversely, if you leave out negative elements, you relegate yourself to the "other side," and the ALJ's will still address negative issues without your input.

### ***A final note about your credibility...***

As you develop your professional career, map out how you are growing in your reputation as a credible advocate. Then, when unique situations arise, you will be prepared to accept and argue the truth – no matter how difficult the situation.

*Thank you to everyone that e-mailed me before this conference about their experiences doing cross-examination. These perspectives helped greatly.*

Sincerely,

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