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Is It Really a Homicide? Working With and Crossing the Pathologist In a Gunshot Case

A forensic pathologist testifies in every homicide trial, the only exception being the rare case in which the prosecutor contends a murder took place even though a body has never been found. This article contains some basic information to help defense attorneys examine a case before trial, decide whether they need to retain their own forensic pathologist, and effectively conduct trial cross-examination of the doctor who performed the autopsy.

I. What is a forensic pathologist?

Pathology is the study of disease. A forensic pathologist is a physician who examines a corpse and reaches an opinion as to the reason a person died. In order to qualify as a forensic pathologist, the doctor will have completed four years of medical school, a three-year residency in pathology, and a one-year fellowship in forensic pathology.

“Cause of death” is defined as the actual reason a person died, such as exsanguination due to a gunshot or stab wound, death by ingestion of a toxic substance such as poison or a heroin overdose, or death from diseases

such as cancer or a heart attack. This is not identical to the manner of death.

“Manner of death” is the opinion of a medical examiner or coroner as to what classification should be used when stating how a person died. These classifications are homicide, suicide, natural causes, accident, or undetermined.

Being a coroner is not the same as being a forensic pathologist — though in some jurisdictions the same person holds both positions. Some large cities have a medical examiner’s (ME) office run by a forensic pathologist who will determine both cause and manner of death and do so in a professional manner, guided by science.

On the other hand, in most locations a coroner is an elected official, not necessarily a physician, whose duty is to certify the manner of death. This is an important distinction to be aware of in jurisdictions in which political considerations may enter into a coroner’s determination of cause or manner of death. Sometimes the coroner’s determination will not be supported by the physician who conducted the autopsy.

Manner of death seems to be a straightforward decision (and in a homicide prosecution, the prosecutor will certainly represent it as such). It is important to remember, however, that it is an opinion by a professional, and that in some cases reasonable people may disagree. Every criminal defense lawyer must be prepared to challenge cause or manner of death in the appropriate case.

A good forensic pathologist should be completely independent of the prosecutor or law enforcement officers. The ethics of forensic pathologists’ profession demand that they perform their duties on behalf of the patient, which in this case is the deceased.

BY DEJA VISHNY

Unfortunately, many doctors who perform autopsies are improperly influenced by law enforcement officers or the prosecutor and conform their interpretive findings to the state's theory of the case.

II. Obtain and review all the proper documents.

At the outset of the case, defense counsel must make sure she has all of the relevant materials related to the autopsy. Some, but not all, of these documents are found at the ME's office. What documents should the defense attorney obtain? The list below is comprehensive, but not all items exist in every case. The defense should collect these documents:

- ❖ Autopsy protocol.
- ❖ Medical investigator's report.
- ❖ Death certificate.
- ❖ Radiographs.
- ❖ Scene photos taken by police or ME's investigator.
- ❖ Digital version of autopsy photos — both taken by police and the ME's office photographer.
- ❖ Doctor's handwritten notes if these exist.
- ❖ Dictation tapes by the doctor.¹
- ❖ Toxicology report.
- ❖ Histology report.
- ❖ Tissue sample and slides if they exist.
- ❖ Body fluid samples.²
- ❖ Inventory of what was sent to a crime lab for analysis.
- ❖ EMT reports.
- ❖ Photos of clothing of the deceased.
- ❖ Hospital reports (if deceased was treated at hospital before death).
- ❖ Prior medical records of deceased if available.
- ❖ Copies of email correspondence among law enforcement officers, the prosecutor, and the doctor regarding the case.

This list of materials is much more than the prosecutor will have. If the defense team can obtain some of these items by doing an open records request or ordering them from the ME's office, the prosecutor may not know at an early stage in the proceedings how thoroughly the defense is reviewing the case. This can be a huge advantage for the defense. Why? Prosecutors often do not closely review their cases until shortly before trial, and if they want additional time to hire experts, an aggravated judge may deny the request to do so.

The defense must pay careful attention to all the details in the documents when reviewing them. Often there will be material in the documents that will help the theory of defense apart from the conclusions regarding the cause of death. The doctor who performs the autopsy will conduct an external and internal examination of the deceased. Here are examples of information to look for in the documents: Does the deceased have gang tattoos? If the theory of defense is that the defendant fired in self-defense, look for abrasions and contusions to the deceased's body that can be indicative of a fight. What do the toxicology reports show regarding whether the deceased was drunk or high at the time of death? Are there metabolites that indicate recent drug usage? Sometimes the ME's scene investigator will document witness statements reported to them by the police that do not appear in any police report.

III. Study forensic pathology.

When reviewing the materials, be sure to understand what all of the terminology means. Look up all unfamiliar terms. Lawyers who are lucky enough to have doctors as friends or doctors in the family should ask them questions. An excellent book for those who are not familiar with the human body is *Clinical Anatomy for Lawyers*.³ Many terms can be looked up for free using the Google search engine. "Innerbody" is an interactive website that allows visitors to view anatomic locations of the body.⁴

A few basic texts are helpful in reviewing cases. Spitz and Fisher's *Medicolegal Investigation of Death* is a classic text. If the deceased was shot, defense counsel must consult DiMaio's *Gunshot Wounds*.⁵ Reading these texts will give defense counsel a good basic working knowledge of some of the

issues and will help him to prepare to meet with the doctors on the case.

IV. Meet with the doctor who performed the autopsy or will testify for the state.

In many locations, the forensic pathologist who performed the autopsy will meet with defense counsel. In fact, many are happy to do so and comment on how rarely they are consulted by the lawyers on the case. However, some pathologists will refuse to meet with defense counsel unless the prosecutor is present. If so, the defense team must make a strategic decision regarding whether or not to meet under those circumstances. If the doctor who performed the autopsy was privately retained or contracted by the county, she may refuse to meet unless the defense pays for her time.

In order to know what questions to ask at the meeting, defense counsel should form a theory of the case — insofar as it relates to the medical evidence.

The meeting with the doctor will be most productive if the doctor shows the autopsy photos on a screen and can show defense counsel exactly what she saw when she conducted the autopsy. There is no dumb question. Defense counsel should ask about everything he does not understand and have the doctor explain the basic findings and terminology.

Many times lawyers will complain that the doctor told them one thing at the meeting and said something different when testifying at trial. A good practice is to take notes and read them back to the doctor to ensure they are correct. Lawyers and doctors speak two different languages, and it is important to understand exactly what the doctor means. After returning to the office, counsel should send the doctor an email thanking the doctor for her time. Counsel should include a copy of the notes and ask the doctor to please inform counsel if anything is written down incorrectly. This can provide great impeachment if the doctor changes her findings while testifying on the witness stand. These notes may be provided to the prosecutor, and thus counsel must be careful not to include notes that reflect the defense theory of the case or anything that could harm the defense.

On the other hand, defense counsel should not be afraid to ask questions. Often the prosecutor may already know the defense theory from the client's statement to police. For example, if the client was charged with homicide and told police that the deceased killed himself by a self-inflicted gunshot wound, the theory

of defense is not going to be a surprise. The defense wants to know why the doctor states she has reached a firm conclusion as to manner of death and how she explains the autopsy findings.

The doctor will testify in court that the findings are to a “reasonable degree of medical certainty.” Defense counsel should ask the doctor what that phrase means. Forensic pathologists and other medical experts have debates about how to define that phrase, which is strictly legal and not medical in nature. Some will say it means over 51 percent, others will say 95 percent, and some will refuse to put a number on it. In any case, it may differ significantly from “beyond a reasonable doubt,” and the answer to that question may provide great fodder for the closing argument.

V. Investigate the doctor’s credentials, publications, and presentations.

In addition to case-related documents, the defense attorney should obtain a copy of the testifying doctor’s curriculum vitae (CV) and review it closely. If concerns arise about its accuracy, have an investigator confirm the doctor’s educational and medical training and board certifications. According to estimates, up to 30 percent of all professionals falsify or puff their résumés.

Some résumé items may raise red flags. For example, if the doctor attended a foreign medical school, the defense must make sure it is a legitimate educational institution. Some schools are “diploma mills” and have been put out of business or had other scandals. Defense counsel can use the Google search engine to discover available information.

Has the doctor been disciplined? Counsel should check with the medical society. Some doctors, after licensing issues, malpractice lawsuits or patient complaints in another medical specialty, switch to pathology to earn a living.

The CV will contain a list of published papers and speeches given by the doctor. The defense team must review these carefully to see if the doctor has published any articles on topics that are relevant to the defendant’s case. If some of the material is relevant, defense counsel must obtain copies of the articles to see if they can be used to impeach the findings in the defendant’s case.

A Google search of the prosecutor’s expert may reveal cases in the news in which the expert offered a questionable opinion. Running the expert’s name in

Lexis and Westlaw may also lead to helpful information, such as revealing if the expert has been involved in civil cases or has been sued.

Criminal defense attorneys in the area may be able to help. They may have tips, stories, or perhaps can just share information about the nuances of the prosecution’s doctor and provide helpful information for the cross-examination.

VI. Research the legal issues concerning forensic pathologist testimony.

When the doctor who performed the autopsy is unavailable at trial, the prosecutor will call a surrogate physician to testify regarding cause of death. This raises Confrontation Clause concerns. Thus far, the courts that have ruled on Confrontation Clause challenges have differed in their analysis of what is permissible. All have permitted the testimony, however, as long as the surrogate has reviewed the old reports and photos, and the surrogate is testifying about her own opinion regarding cause of death based on that review.⁶

Limits exist, however, concerning what is admissible in court. The autopsy protocol itself is inadmissible under the Confrontation Clause. Other documents might also be inadmissible depending on the circumstances. Furthermore, while courts have currently permitted the surrogate doctors to testify, Confrontation Clause litigation is still a hotly contested area, and the U.S. Supreme Court has not ruled on the admissibility of this testimony. An excellent article on this subject is *The Confrontation Clause and Forensic Autopsy Reports — A “Testimonial”* by Marc D. Ginsberg.⁷

There may also be cases in which the testifying doctor cannot have an opinion other than what is in a nontestifier’s lab report. For example, in a “Len Bias” homicide, the diagnosis may be that the cause of death is a drug overdose. That is not a physical finding in an autopsy report; the doctor must also rely on the testing done by a forensic toxicologist. Many times the prosecutor will not call this person as a witness. Defense counsel should move to exclude the forensic pathologist’s testimony on confrontation grounds and argue it violated the U.S. Supreme Court holdings in *Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico*.⁸

Other legal issues arise in cases when the doctor’s opinion regarding cause or manner of death is based on nonmedical facts. For example, in abu-

sive head trauma (AHT) cases, the doctor is called up to determine whether a child died from a fall or from being physically abused. The medical evidence can be ambiguous because either mechanism could have caused the child’s death. The doctor — told by police that the client confessed to abusing the child — concludes the trauma was caused by physical abuse and opines the manner of death is homicide.

Expert testimony is admissible under Rule 702 because an expert has unique qualifications that enable him to render an opinion that is outside the knowledge and experience of the average juror. In the case of forensic pathology, the doctor’s medical training and the medical findings at autopsy allow the doctor to draw conclusions regarding cause of death. But basing an opinion on a confession or police interviews with witnesses does not call for specialized medical training. Defense counsel should move to suppress any opinion testimony that is based on nonmedical facts because it invades the province of the jury. *State v. Tyler* and *State v. Sosnowicz*⁹ have followed this approach.

VII. Use cross-examination to show the opinion of the prosecution’s expert supports the defense theory of the case.

Often the forensic pathologist called by the state can give testimony that is helpful because it is consistent with the defense theory of the case. In these situations, defense counsel probably does not need her own expert to testify because she can accomplish the same objective through cross-examination.

Consider the following example: The client (defendant) is charged with first-degree murder for shooting the deceased in the head. The autopsy shows that the deceased was shot in the left occipital region of his head just behind the left ear, and that the bullet travelled through the skull and exited out the right parietal side of the head. The client tells defense counsel he was selling marijuana and drove to meet the buyer, who sat in the back seat to make the purchase. The purchase turned out to be a robbery, and the deceased pulled a gun on defendant. The client was able to disarm the deceased by grabbing the gun from the deceased’s hand. The deceased had the car door open when the gun fired; he fell out of the car onto the curb and died instantly. The defense theory of

the case is that the defendant disarmed the deceased and fired the gun instinctively in self-defense.

The prosecutor thinks he has a great case and tells the jury that the deceased was shot “in the back of the head.” Defense counsel’s cross-examination can establish that the shooting happened exactly the way the defendant (who will later testify about what happened) says it did, and defense counsel will use this in her argument to bolster the client’s credibility.

Q: The prosecutor asked you where the entry wound was on Mr. Deceased?

A: Yes.

Q: The entry was in what is called the occipital region of the head?

A: Yes.

Q: (Counsel using her own head as a model). So the bullet went in right here, where I’m pointing, on the side of the head?

A: Yes.

Q: And then exited on the other side of the head, right here (using own head as a model), so the bullet traveled on an even plane, going from left to right?

A: Yes.

Q: So the bullet went from the left side of the head just behind the ear to the front on the opposite side of the head?

A: Yes.

Q: The bullet traveled pretty evenly, at just a very slight upward angle?

A: Yes.

Q: This angle would be consistent with two people of about equal height, both being seated in a car at the time the shot was fired?

A: Yes, it is consistent with that.

Q: And it’s also consistent with someone in the front driver seat of the car shooting at a person in the back seat of the car?

A: Yes.

Q: Now if the person who fired the gun had just gotten the gun in his hand and the gun went off immediately toward someone who was turned side-

ways to him, that would be consistent with your findings, wouldn’t it?

A: Yes, that would be consistent.

Q: So if my client says that he disarmed the deceased just as the deceased was getting out of the car, that is consistent with your findings?

A: Yes.

When using the forensic pathologist to demonstrate that the theory of defense is consistent with the physical facts, the defense lawyer must remember to use the phrase “consistent with” as she lays out the facts supporting her view of the case. A doctor will never be able to testify as to how events such as a shooting unfolded and will remind the jury that the autopsy is done when the body is in the anatomic position (lying face up on the autopsy table). In order to show the jury that she knows what she is talking about, the defense lawyer should bring this out before she asks the questions above:

Q: When you perform an autopsy, the body is in what’s called the anatomic position?

A: Yes.

Q: This means the body is face up on the autopsy table?

A: Yes.

Q: That is the position in which you measure the bullet entry, exit, and angles of the bullet path?

A: Yes.

Q: And of course, from examining the bullet path, it would be impossible to tell what position the shooter and the deceased were in relative to each other?

A: Correct.

Q: But what you can say is whether or not a particular set of facts as to how the people and gun were positioned is consistent or not with your findings?

A: Yes.

In order to prepare this type of cross, defense counsel should act out the scenario and make sure it fits the defense theory of what occurred. Defense counsel should try out several scenarios to get a feel of what the prosecutor might also try to do so that she

will be prepared for re-direct as well. The prosecutor may not even go into this area: chances are the prosecution has a theory of the case and will doggedly stick with it, returning to using the phrase “back of the head.” Defense re-cross can be very brief and to the point:

Q: Doctor, let’s go back to using my head as an example. Can you please again show the jurors where the bullet entered?

A: (Doctor demonstrates).

Q: This is what many people call the side of the head, right?

A: Yes.

Q: And while it’s true that some people might refer to this as the back of the head, it’s a different location than back here (counsel places her finger in center rear of head)?

A: Yes.

Q: Certainly no one would call this the side of the head?

A: Yes.

VIII. Does the defense need to hire its own expert?

If defense counsel is concerned that the prosecution doctor’s cause or manner of death determination or the details of the prosecution doctor’s analysis contradict the theory of defense, she should hire her own expert to review the case. She must be sure that all of the information gathered is provided to the defense expert to review. Also, counsel should send the defense expert additional information, such as crime scene photos, witness statements, recorded interrogations, or other items that will bear on the expert’s analysis.

Defense counsel must carefully choose the expert. It is a good idea to talk to colleagues in the field about which expert will suit the defendant’s case. If the issue is gunshot wounds, the defense should hire someone who is proficient in that area; if the issue is AHT, it is essential to talk to lawyers who have handled AHT cases and know which experts are suitable for those cases. In some cases the defendant may need more than one expert; in AHT cases the defense often brings multiple experts into the case.

Defense counsel must research the defense expert as carefully as she would research the prosecution expert. Counsel must vet the expert’s qualifi-

cations. Defense counsel wants to know how the expert performs during cross-examination. The defense team must use the Google search engine as well as research the expert through Lexis or Westlaw to see if something negative can be found in case law.

It is important to review prosecutor manuals or canned cross-examinations circulated in prosecutor organizations regarding crossing the expert on a particular area or specific cross or avenues of attack on particular experts.¹⁰ If defense counsel thinks the canned prosecution cross-examination is effective against her expert, she may want to retain a different person to review the case.

After reviewing the defense doctor's findings, it is time to decide whether the doctor will be called as an expert witness at trial. If the jurisdiction requires counsel to file a report by the expert, discuss the content of the report with the doctor and review it before it is in final form and provided to the state. Be prepared for the prosecutor to challenge the admissibility of the testimony and to argue its admissibility under *Daubert*¹¹ or *Frye*.¹² Even though evidence such as opinion regarding cause and manner of death may seem straightforward enough, prosecutors will often file *Daubert* challenges just to have the opportunity to conduct a pretrial discovery hearing. Counsel must be sure the defense expert understands what occurs at a *Daubert/Frye* hearing and is prepared to testify that her findings and conclusions are legally admissible under the prevailing standard.

Testimony by the defense expert needs careful preparation. Counsel should go over the questions she will ask her witness and listen to the way the witness answers. Counsel should review all of the exhibits that will be submitted and discuss how they will be used. It is essential that defense experts know how to translate "medicalese" into English so that the judge and jurors will understand the testimony. The defense lawyer must not forget to think of the questions the prosecutor will ask and listen to the way the defense expert will respond to them on cross. If defense counsel thinks a particular answer is problematic, she should not hesitate to discuss it with the expert. She may decide to preempt the line of attack by asking it during direct examination, or to let the prosecutor ask a fruitless questions on cross. For example, prosecutors will often cross-examine defense doctors

about their fee. The defense doctor will of course acknowledge that she is being paid for her work. There is nothing wrong with helping the expert develop a more complete answer, such as responding to the district attorney by saying that she is paid for her time just as every other person in the courtroom (or like the prosecutor's expert).

IX. Study the fundamentals in gunshot wound cases.

Gunshot wounds are one of the most common causes of death in homicide cases. It is important to be familiar with some of the fundamentals in gunshot wound cases, such as the following:

1. Distinguishing an entry wound from an exit wound.
 - ❖ Frequently the police cannot tell the difference between an entry and an exit wound, and they conclude a person was shot more times than they actually were. This can lead to false witness statements and false confessions coached by police. It is really difficult to determine this in scenes where there is blood all over the place and poor lighting. A marginal abrasion is a general marker of an entrance wound. Many forensic pathologists will encourage their investigators to withhold judgment on this issue.
2. Determining the entrance point and bullet track/path through the body, and understanding what it means for defendant's case.
 - ❖ Bullet path, as illustrated above, may support or not support a witness's version of events.
3. The significance of stippling and the presence of soot.
 - ❖ When a firearm is discharged close to an object, it will leave soot on that object. Soot is the residue left behind from unburnt gun powder when a bullet is fired. The soot is actually the residue from the combustion of the gunpowder, just like soot from other fires. Burned and unburned gunpowder particles can also be left on skin and in tissue along the wound pathway. It

also leaves stippling, i.e., pinpoint abrasion marks left on the skin's surface when unburnt gunpowder particles strike the surface of the skin.

4. How doctors determine if a wound is a contact, near contact, or intermediary wound, or a wound of indeterminate range.

- ❖ Contact wounds will be surrounded by a muzzle imprint, which is an injury left on the surface of the skin by the barrel of a gun when it makes contact. It can take the form of either abrasions (scrapes) or contusions (bruising). Often it has the shape of the end of the gun. It is not always present, but if it is then defense counsel knows it is a contact range gunshot wound.

Contact or near contact wounds usually have an irregular shape of radiating marginal lacerations due to the fact that gas goes under the skin and blows up from there. This is often referred to as a stellate-shaped wound. These kinds of wounds are most commonly on heads and far less often on other body parts. Soot or searing is visible around a contact wound.

Intermediate range wounds are defined by the presence of stippling. There may be soot observed in some of them, but this is not essential. Intervening objects, such as clothing or hair, will absorb the soot. Intermediate and more remote wounds will have a circular abrasion with an abrasion ring surrounding the entry point. However, contact and close-range gunshot wounds can also have marginal abrasions. Marginal abrasions are often easier to identify in more remote wounds.

Sometimes a noncontact wound to the head can have the appearance of a contact wound, particularly in the case of keyhole entries (where the injury looks similar to an old-fashioned keyhole). In these cases, the bullet enters the skull at a shallow angle and a stellate-shaped wound ensues.

Indeterminate range means that no characteristics around the wound permit the doctor to draw any conclusions as to how far the gun barrel was from the target at the time of the shooting.

This hypothetical illustrates the importance of these issues: Police officers are called to a shooting. The caller is a hysterical male who says his wife just shot herself. When police arrive they see a female lying on a bedroom floor with a gunshot wound to the rear of the head in the occipital region, just behind the right ear. The police are suspicious of the husband because he is behaving in what they decide is an unusual manner. They think he is lying. They think he killed her. The ME's investigator talks to police, who inform him that they believe the death is a homicide. The doctor who performs the autopsy concludes the cause of death is skull fracture and exsanguination from the gunshot wound, and the manner of death is homicide. He concludes that the death is a homicide because (1) he does not observe soot or stippling, (2) the wound is in the indeterminate range, and (3) due to the wound location and angle, the deceased could not have shot herself.

Based on the doctor's opinion, the prosecutor charges the husband with first-degree homicide. The husband's defense is that the wife committed suicide.

Consultation with defense experts is critical in this case; the prosecution experts will change their conclusions.

The doctors retained by the defense disagreed with the conclusion regarding range of fire and believed the wound was a contact/near contact wound. They examined the autopsy photos, reports, radiographs, scene photos, and other collateral materials and made the following conclusions:

- ❖ The scene photos taken by the police before the body was cleaned show soot in the wound. The doctors also saw soot in the wound in the photos taken after the body was cleaned. They were able to find photographs of other contact/near wounds with a similar appearance in cases in which no dispute existed about the range of fire.
- ❖ There were visible bullet fragments in the radiographs that were not recovered or noted in the autopsy protocol.
- ❖ The wound is a stellate shape and is not a keyhole wound. This is

significant because contact and near contact entry wounds over bone frequently have a stellate shape.

- ❖ The deceased has a semicircle shaped abrasion on her right temple, the same side of her face as the gunshot wound, which is consistent with a gun muzzle.
- ❖ The deceased had very thick hair, which can absorb soot that is invisible to the naked eye. The ME's office disposed of the hair and therefore it was not available for microscopic inspection.
- ❖ The husband's version of what occurred is consistent with how the wife could have died if she shot herself.
- ❖ The doctors cannot determine whether the death was a homicide or suicide.

One possibility is to cross-examine with the theory that even if the forensic pathologist who performed the autopsy made accurate observations, the wound angle, although unusual, is possible. Thus, this could have been a self-inflicted gunshot wound. Defense counsel should demonstrate a position that works with the facts and get the doctor to acknowledge that angle is possible.

If the defense is presenting its own experts, cross-examination is crucial to show that their opinion is accurate and the ME's office made mistakes. Here are some sample cross-examination chapters that can be used to cross-examine the state's forensic pathologist. While some of these chapters are unique to this set of facts, many are chapters that will be useful in many cases in which cause or manner of death is disputed.

1. The examining doctor did not have sufficient facts. Defense counsel should point out that forensic pathology is a type of medical diagnosis, and a proper diagnosis often requires not just observation of symptoms but having access to a thorough medical history. If information is available in a possible suicide case that the person has previously attempted suicide or that the person is not taking prescribed antidepressant medications, this can be important to reaching a diagnosis. Counsel should point out

that the doctor did not have access to this information prior to making the diagnosis.

2. People who commit suicide rarely leave a note or tell others of their plans. A common stereotype jurors may believe is that suicidal persons leave notes, but statistics show that about 75 percent do not. The prosecutor may also call in bereaved family members to testify about how happy the deceased was, how the deceased had so much to live for, and they did not see any signs of depression. While courts should not admit this useless testimony, many will, and doctors will acknowledge that families frequently have a hard time accepting that a person committed suicide.
3. Medicine is an art as well as a science, and doctors can disagree. This is important because the state will elicit testimony from its expert and argue that its doctor has an advantage because she performed the autopsy and saw things with her own eyes. This can be expanded to talk about the importance of getting a second opinion. Probably every juror has heard that a person diagnosed with a serious illness should get a second opinion before having surgery or other invasive treatment. This line of questioning will resonate with the jurors.
4. There is no deadline by which the doctor must come to a final conclusion. Final protocols can wait for a thorough investigation of all medical and relevant collateral facts.
5. Preserving evidence, taking photos, and providing documentation are important so that the case can be reviewed by others. The defense attorney can use classic texts and get the doctor to agree with the texts when she asks questions on this topic. Point out that their office uses high quality digital photography. If the doctor ever does private consulting, discuss how he has reviewed reports and photos to come to his own independent conclusions in other cases.
6. Being thorough and recovering relevant evidence are essential. One suggestion is that the defense lawyer set up the doctor and get him to acknowledge the importance of

being thorough, complete and accurate in his procedure, report, and conclusions. Another suggestion is to go through the importance of evidence recovery — particularly bullets and fragments — and documenting everything in the protocol. This is crucial when important facts are omitted from the report.

7. Point out objective facts that are not noted in the autopsy report or evidence that was not recovered. Sometimes doctors will not recover all the bullet fragments or will testify concerning details that they fail to note in their reports. Using the hypothetical mentioned earlier, the radiographs showed bullet fragments in the hair of the deceased, but these fragments were not recovered or mentioned in the autopsy protocol. It is always good to point out when someone does a less than thorough and competent job. This can also include a failure by the doctor to review the scene photos or learn collateral information from witnesses prior to reaching his conclusions as to cause and manner of death.
8. Confirmation bias. The medical examiner was at the scene, the doctor reviews his report before performing the autopsy, and the report notes that homicide is the suggested manner of death. Thus, it has already been concluded by someone else that this is a homicide before the doctor even touched the autopsy table.
9. Other findings consistent with client's version. Assume that the client states he saw the deceased hold a gun to her head and then shoot herself. If there are abrasions to the face that look fairly fresh and the shape is consistent with a gun muzzle, counsel should point out that if a person was holding a gun to her temple and suddenly turned her head, the abrasion to the skin would be consistent with that action. Defense counsel should do this while demonstrating with her own finger and turning her head, or she can use a model or exhibit of some type.
10. Soot deposits on intervening objects. An intervening object between the muzzle of a gun and an entry wound can collect the

soot and prevent stippling. Point out how small soot can be and that it is much more visible through a microscope. The doctor did not use magnifying glasses or examine the body or the hair through a microscope — despite one being available at the ME's office.

11. Impeach the doctor who claims only her opinion is accurate because she performed the autopsy. When the doctor says she had the best vantage point because she performed the autopsy, impeach that assertion from the autopsy protocol. The protocol will note the wound measurements. If the wound is small, give the doctor a ruler and have her draw the wound length to scale as mentioned in the autopsy protocol. Point out how small the wound is, for example .25 of an inch x .25 of an inch. Thus, defense counsel can demonstrate that the soot deposited in the region of the wound would be smaller and can point out to the jury that it is not visible to the naked eye. Bring out that the doctor did not look at it using a microscope or other method of enlargement. The digital photograph the defense expert reviewed, on the other hand, is greatly enlarged, and it is easier to see smaller details.
12. Failure to preserve evidence for testing. The doctor knows that the hair could be preserved and examined microscopically by a lab or another forensic pathologist, but he failed to preserve it. The doctor may claim that he is unaware of any lab that does a particular type of testing. The doctor should admit on cross-examination that he is not familiar with the practices of every forensic laboratory in the country. Another challenge is pointing out that there are always changes in science, and when evidence is not preserved, it cannot be tested later. Use DNA as a parallel example; innocent people were convicted before DNA testing, but preserved evidence has led to many exonerations.

Defense counsel may impeach a doctor when his conclusions differ from something written in a well-known treatise, such as DiMaio's *Gunshot Wounds*. Lawyers should not expect doctors to be compliant wit-

nesses who answer "yes" and "no" to even the most reasonable questions. Counsel should be prepared for them to give lengthy explanations to show off their superior knowledge; the lesson they are trying to impart as the defense challenges them is that they are the experts and can outdo defense counsel at every turn. The defense lawyer should not interrupt or argue with them because the defense will simply seem rude.

In this situation defense counsel should conduct a cross-examination that will lead jurors to conclude that the state's doctor has an overly high opinion of himself, thinks of himself as right at every turn, and is so egotistical that he cannot acknowledge he made a mistake. Counsel can lay this foundation by building up the author of the learned treatise. One way to do this is to point out that the book is on the shelf at the ME's office and that the doctor and other forensic pathologists on staff often rely on it or quote it.

Let the jurors know that the text is found in ME offices all over the country. Get the doctor to admit that the author is considered prestigious and greatly experienced. Find out if the doctor wrote any articles in which he quoted the treatise, and point out if he did. After doing this, impeach the doctor's opinion with the text. If the doctor still disagrees or states that the text is outdated or irrelevant, there are probably some jurors who will conclude that he has an overly high opinion of himself and will doubt his word.

Finally, if the defendant or defense counsel's office has the funds, counsel should hire as many experts as the budget permits. When an opinion is challenged, the state may be able to call more than one physician from a ME's office if the head of the office reviews the assistant's work. It is always better to have more experts or the last word, and it may very well be the thing that wins the case for the defense.

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Notes

1. Doctors dictate as they perform an autopsy, and generally they destroy the tapes after they write the report. If a defense attorney is in the case early enough, he should obtain a court order to preserve the recording.

2. The defense must find out if tissue samples, slides, and bodily fluids exist. If so, they should be reviewed by the defense expert.

3. SAMUEL HODGE & JACK HUBBARD, CLINICAL ANATOMY FOR LAWYERS (2012).

4. Go to www.innerbody.com.

5. SPITZ AND FISHER'S MEDICOLEGAL INVESTIGATION OF DEATH (Werner Spitz ed., 4th ed. 2005) (table of contents and preface found at <http://www.washingtondecoded.com/files/spitz.pdf>); VINCENT DIMAIO, GUNSHOT WOUNDS (2d ed. 1998).

6. See, e.g., *People v. Dungo*, 286 P.3d 442 (Cal. 2012); *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014); *State v. Navarette*, 294 P.3d 435 (N.M. 2013).

7. Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports — A Testimonial*, 74 LA. L. REV. 117 (2013).

8. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *State v. Van Dyke*, 2015 Wis. App. LEXIS 189 (March 2015, recommended for publication); *State v. Lui*, 315 P.3d 493 (Wash. 2014).

9. Courts followed this approach in *State v. Tyler*, 852 N.W.2d 522 (Iowa Ct. App. 2014) and *State v. Sosnowicz*, 270 P.3d 917 (Ariz. Ct. App. 2012), substituted opinion at *State v. Sosnowicz*, 2012 Ariz. App. LEXIS 133 (2012), modified by *State v. Sosnowicz*, 2012 Ariz. App. LEXIS 118 (July 2012).

10. See, e.g., DERMOT GARRETT, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, OVERCOMING DEFENSE EXPERT TESTIMONY IN ABUSIVE HEAD TRAUMA CASES (2013), [http://www.ndaa.org/pdf/Abusive%20Head Trauma_NDAA.pdf](http://www.ndaa.org/pdf/Abusive%20Head%20Trauma_NDAA.pdf). This is a guide to cross-examining defense experts in AHT cases, which includes specifics regarding some well-known physicians who have testified for the defense in these cases.

11. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

12. *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). ■

About the Author

Deja Vishny, a member of the NACDL



Board of Directors, is a criminal defense lawyer who has practiced with the Office of the Wisconsin State Public Defender since 1980, where she heads the

Homicide Practice Group.

Deja Vishny

Wisconsin State Public Defender Office
819 N. 6th St., Ninth Floor
Milwaukee, WI 53203
414-227-4130

E-MAIL vishnyd@opd.wi.gov