

CROSS-EXAMINING EXPERT WITNESSES

The Ultimate Guide



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INTRODUCTION

Cross-examining experts can be a daunting task. Due to the technical subject matter, it can feel as though the cross-examiner is walking into a college classroom and telling the professor how to teach the class.

If a cross-examination of an expert is not well-prepared and planned, a cross-examiner can find themselves wandering into the weeds in a technical area in which the expert witness's knowledge on the topic is far superior to the cross-examiner's. It's not exactly a level playing field. However, ***a well-prepared cross-examination of opposing counsel's expert witness can be debilitating to the opposition.***

The following tips are by no means an exhaustive list, but provide a few suggestions and best practices for performing an expert examination of an expert witness.

BE PREPARED

It is critical to **research** the expert's qualifications, community standing in the expert's own field and prior testifying experience. Perhaps the most important place to look for useful information is in the expert's prior testimony. Finding a similar case in which the expert gave conflicting expert

testimony is effective ammunition for cross-examination. It is also important to **identify** and **read** the expert's prior writings. Many experts maintain their own webpages and draft a number of articles that can be used during cross-examination.



DISMANTLE CREDIBILITY

The following is an example of how a prior conflicting article was used to dismantle an expert witness who was called to the stand to opine that the plaintiff’s T-cell lymphoma cancer was caused by the defendant’s product:

.....

Q. You are on staff at M.D. Anderson Cancer Hospital?

A. Yes.

Q. Isn’t it true that M.D. Anderson Cancer Hospital has a web page?

A. Yes.

Q. Have you ever had any articles published on the M.D. Anderson web page?

A. A few.

Q. Do you remember one of your articles that appeared on the web page three months ago?

A. I think so.

Q. In that article, you talked about T-cell lymphoma, the very type of cancer involved in this case?

A. I believe so.

Q. Let’s be sure. Is this the article that was published on the web page?

A. Yes, that’s my article; it has my name on it.

Q. I assume you knew that physicians and others might read this article?

A. Yes, I assume so.

Q. And, therefore, you wanted to be as accurate as possible?

A. Of course.

Q. Turn to page four of the article.

A. Okay.

Q. In this article, which you published on the web page just three months ago, you talk about what is known regarding the cause of T-cell lymphoma, isn’t that right?

A. Yes.

Q. Isn’t it true that you said the following: “No one knows what causes T-cell lymphoma.” Is that what you wrote just three months ago?

A. That’s what it says.



CASE IN POINT

Ultimately, this cross-examination not only lost the credibility of the expert witness in front of the jury, it caused the trial judge to conclude that the expert ***lacked reliable scientific support*** for her opinions and, shortly thereafter, judgment was entered for the defendant.



BOX IN THE EXPERT AT THE DEPOSITION

The framework for the effective cross-examination happens long before trial during the expert's deposition. As stated by the American Bar Association, it is absolutely critical that the cross-examiner "box in" the expert at the deposition. This includes asking the expert during the deposition the exact opinions that he/she intends to give at trial, the basis for those opinions and the assumptions made in connection with that opinion.

BOX IN THE EXPERT AT THE DEPOSITION

It is also helpful to sum up the deposition with catch-all questions such as “other than the opinions you have already expressed today, are there any other opinions that you intend to give at trial?” This allows the cross-examiner to **exploit any changes** from the deposition testimony and also to explore any new or nuanced opinions that the expert did not disclose at the deposition.

Also, once the deposition is over, it is important to master the deposition testimony because it is important to highlight any differences between the deposition testimony and the testimony given at trial.





TRAWL THE EXPERT REPORT

As required by Federal Rule of Civil Procedure 26(a)(2)(B)(i)-(vi), Federal Criminal Rule of Procedure 16(a)(1)(G), (b)(1)(C) and individual State statutes, the expert is required to submit an expert report outlining the opinions the expert intends to give and the basis for those opinions, as well as other useful information. It also outlines the expert's qualifications.

The cross-examiner should review this report in painstaking detail and try to uncover every error, large and small. However, when cross-examining, be careful to not just use the expert report as a roadmap. This can run the risk of letting the expert essentially repeat his direct testimony. Instead the cross-examiner should be leading the expert to **reveal the errors and weaknesses** in the report.

DEVELOP A THEORY

There must be a theory for the cross-examination. It is not enough to simply poke holes in the expert's testimony or report. An effective cross-examination *tells the jury a story* and explains to them why the expert's opinion is not credible and should not be believed. Once the cross-examiner has identified the goal, it is critical to focus the cross-examination on building on this central theme.



THE QUESTIONS TO ANSWER ARE . . .

- 1. What am I trying to tell the jury with this cross-examination?*
- 2. Is the expert honest but mistaken?*
- 3. Is the expert purposely exaggerating or shading their testimony?*
- 4. Is the expert relying on a faulty factual assumption?*

YES OR NO QUESTIONS

Experts are smart. Really smart. And, with few exceptions, the expert will be far more experienced in the subject matter than the attorney asking the questions. It may seem rudimentary, but it is critical that the attorney cabin the possible responses to the questions to be “yes” or “no” questions.

Allowing the expert to opine with open-ended questions can result in the expert displaying to the jury his/her expertise and credibility on the subject.





ATTACK POTENTIAL BIASES

One way to build upon the cross-examiner's theory is through the use of cross-examination by a collateral attack, focusing less on the case at hand, and more on the expert and their potential biases.

The experts' *financial bias* is a common ground for a collateral attack. The expert is, after all, providing his opinion on behalf of a party for a fee. This financial bias can also be shown by the number of cases in which the expert has testified, the number of Courts in which he or she has testified and also the areas of expertise which he or she has claimed to be an expert. At bottom, this line of questioning is to show that the expert is not an objective expert simply teaching the jury the subject matter as if he is a professor in a classroom, but rather a hired gun for opposing counsel to mislead the jury.

STICK TO A FEW POINTS

Some expert testimony can be meticulous, highly technical and, to some jurors, downright boring. In fact, there are a number of reported cases where jurors have even fallen asleep during expert testimony. That is why it is crucial to pick the three or four best cross-examination points and stick to them. An overly long and confusing cross-examination runs the risk of boring the judge and the jury and, perhaps most critically, could end up hiding the most important points of cross-examination.



ATTACK THE EXPERT'S QUALIFICATIONS

A key point to discredit expert witnesses is to attack their qualifications. If the cross-examiner can establish exaggerations in the expert's qualifications not only will that expert's credibility quickly fade, but the attorney who called that witness to the stand will likely lose credibility with the jury as well.

One way to do this is to **find the number of relevant certifications that the expert does not have** in a given field and the training and testing required for such certifications. It can display to the jury that experts in the field do in fact exist, however, the expert testifying in Court is not one of those experts.

Relatedly, expert witnesses often hold themselves out to be experts in many different areas. Exploring and identifying the other fields in which the expert claims he is an expert in can show the jury that the expert cannot possibly be an expert in all of these fields, but rather he is just an expert in getting hired to testify.

CALL OUT ASSUMPTIONS

Experts typically do not have personal knowledge of the facts of the case. Rather they are relying on facts that are provided by the hiring attorney and the experts generally are basing their opinions on the assumption that those facts are true. Since many experts are qualified in their field, and, at least have knowledge far superior to the cross-examining attorney, it may be easier to **attack the facts** that the expert is assuming to be true, rather than a deep analysis into his area of

expertise. This is particularly true if the expert's track record and qualifications are beyond reproach. Also, if the particular expert is very qualified and likeable, it points the finger at the opposing counsel and his client for feeding the expert facts that are inaccurate. Ultimately, if the expert is shown to have relied on facts that are not true, their opinions may no longer be credible or reliable.



CONCLUSION

Cross-examining expert witnesses is no easy task. The cross-examining attorney can find himself or herself wading into technical areas in which the expert's knowledge is far superior. That is why it is critical to prepare and plan the attack long before stepping into the courtroom. Following the tips in this article is by no means exhaustive, but they are a good start to performing expert cross-examinations of expert witnesses.



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