International Association of Defense Counsel

Trial Academy

Cross-Examination of an Expert

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Introduction

This memorandum contains professional suggestions for the attorney who will cross-examine an opposing expert in a civil trial.

Who is an õopposing expert?ö The category obviously includes expert witnesses offered by any party, but õexpertsö also can be trial witnesses not formally listed as experts but whose testimony likely will be accorded enough deference by the court that they may be permitted to state conclusions and inferences. These can include treating physicians, accountants, product technicians, coroners, law enforcement officers and fire department personnel. Your preparation may well differ to some extent, depending upon the kind of expert you will cross-examine, but what follows are suggestions generally applicable to all expert cross-examination in the civil case.

Although the focus in direct examination typically is on the witness, the focus in cross-examination is on the lawyer. There are two keys to success in this endeavor, as virtually all experienced trial attorneys will agree. In two words, they can be described as Preparation and Control.

Preparation for cross-examination is the first key to success. With no preparation, merely õwinging itö in the cross-examination of an expert is extremely likely to result in failure, with resulting negative reactions toward you from both judge and jury. After all of your preparatory

work, for each witness you must decide whether you have developed enough information to conduct an effective cross-examination.

The second key to success is control during your cross-examination. Success requires that you establish control at once and maintain it throughout your examination. There are a number of ways to achieve control, and some of them are discussed below.

Preparing for Your Cross-Examination of the Expert

Begin by asking yourself what you want to accomplish with your cross-examination. The generic answer is that you want to get responses favorable to your clientøs position. These responses can be nonverbal (*e.g.,* shifty eyes or other apparently evasive manifestations) as well as verbal. The use of leading questions is perhaps the most effective way for a lawyer to maintain control during the cross-examination of an expert. A leading question must be designed to elicit a predictable response that is favorable to your case. Open-ended questions, on the other hand, afford the opposing expert an opportunity to talk freely, to give a speech. When that happens the lawyer loses control and the juryøs focus moves to the expert who now has the freedom to õimpressö the jury. You need to develop an organized, succinct and coherent outline that allows you to maintain control over the witness and his/her responses. Ask yourself whether your goals seem reasonably achievable. In other words, during your preparation have you developed enough to achieve those goals? If not, you may decide not to cross-examine at all or, if you do, to sharply limit your questions.

Review your outline several times and play out the cross-examination in your mind so that you can continue to refine your approach to get responses favorable to your clientøs position.

Assuming you will examine, create a folder for each expert witness with a checklist or outline of your anticipated cross-examination. This folder should include every significant prior statement given by the expert; depositions; exhibits you may be able to use with this witness; impeachment excerpts from prior testimony; and memoranda with brief outlines prepared in anticipation of any possible evidentiary problems. In addition, the folder should contain all discovery responses in the case related to this expert. All of this will help you get ready for the actual cross-examination. If you find it helpful, place your folders within brightly-colored covers. The jury will notice this and soon get the idea that something interesting is coming when they see you pull out a folder in yet another bright color.

Donøt forget to make and have immediately available several copies of documents to be used with the particular witness. For example, suppose you want to use a past deposition for impeachment. You may need a highlighted copy for your use, an unmarked copy of the deposition for the witness, another for each of your adversaries, another for the judge, in case the judge wants one, and perhaps even one for the judgeøs law clerk.

What exhibits will you use during your cross-examination of the expert? These could include photographs, slides, videos or stills from videos; hardware, models, and exemplars; charts, boards, diagrams, or other documents, including X-rays; and pleadings, interrogatories,

admissions, and other discovery responses in the case. Plan in your outline the ways in which you will use each exhibit.

Consider how the judge has indicated exhibits are to be handled. Analyze exactly what the court seems to have ordered in this regard. It is one thing for a court to require you to list in advance the exhibits you will use in direct examination, during the presentation of your case in chief, but it would be quite another to force you to identify in advance the exhibits you plan to use during your cross-examination of an expert. The latter requirement would severely weaken one of the primary purposes of cross-examination ó the use of the element of surprise to help elicit testimonial truth -- and you should therefore confront and endeavor to avoid any such interpretation of the courtøs orders well before cross-examination.

Where exhibits are to be identified, are they to be marked in advance? Does the judge want a copy of each exhibit? Will you need a book of exhibits to use during your cross-examination, with a bench copy for the judge, a copy for the court reporter, another for each opposing counsel, and another copy for the judgeøs law clerk?

Do you want to use an easel, perhaps with newsprint paper and a marker, during your cross-examination of the expert? If so, be sure the judge will permit this. In some courts, a preliminary motion may be necessary. The use of an easel is a technique that can help you maintain control of the cross-examination.

Has the judge imposed time limitations for the trial? In particular, will the time for your cross-examination be limited? If so, in preparing your outline you will want to plan to comply precisely with those limitations.

Will your cross-examination last for more than a single court day? Instead of or in addition to paper deposition and trial transcripts, todayøs technology permits the attorney to get a diskette or CD from the court reporter each day. With it, your team can easily perform word searches on both depositions and daily trial copy. Documents can be previously scanned and available to you right in the courtroom. In trial, itøs even possible with todayøs technology to obtain real-time (õlive feedö) from the court reporter, so you (and also others, even those at remote locations far from the courtroom) can follow testimony as it is being given. But if you want any of this, be sure to make the necessary arrangements early ó not at the last minute. In addition, be sure the technology actually works. If it õcrashes,ö for whatever mysterious technical reason, you may be out of luck unless you have some sort of backup system in place.

Conducting Your Cross-Examination of the Expert

Effective expert witness cross-examination techniques can include some or all of the following five categories.

A. Peripheral. This is cross-examination that does not involve substantive areas of the case. For example, can you show that the expert has bias or prejudice, or is being highly compensated for this testimony? In your preparation, check the witnessø background, publications, and advertisements. Check the witnessø *curriculum vitae* and compare the claims made there with

actual academic achievement, including courses actually completed in college or graduate school. Check prior testimony, in other cases. For example, has the expert claimed expertise in some impossibly broad number of subjects?

Credentials can be misleading: for example, the witnessø doctorate degree might be from a diploma mill. What does the witness really know about the issues in this case? If the witness has a doctorate, has he or she ever performed actual work relevant to the issues in the case? What is the witnessø litigation experience? Does the expert only testify in court cases? What percentage of the witnessø income is derived from litigation work? Has the expert had a difficult time holding a job?

B. Fence. This term contemplates the creation of a fence, or fixed boundary, around an expertøs testimony. You represent the defense, and you are simply trying to learn what it is that you are defending against. Use an easel for this. (There are more modern, high-technology choices, but donøt underestimate the effectiveness of a simple easel with paper and a marker). õLetøs find out what you are saying.ö õWhat is defective about my product? Letøs list everything now.ö Fencing permits the jury to know precisely what the dispute involves. In most jurisdictions, you will have a disclosure or deposition that will allow you to use leading questions during your Fence of the expert. Again, a key to effective cross-examination is maintaining control at all times. Have the expert list each of his or her findings and opinions, in rank order. Make the list with the easel, and then close it off when the expert tells the jury that he or she has no more allegations to make.

Then ask what the expert has done to arrive at each opinion. Ask the expert to describe all data he or she used to arrive at that opinion or conclusion. Ask the expert to describe the source of all these data. This, too, can be effective with the use of an easel. After all this, of course, you can have the expert tell the jury what he or she did *not* do to arrive at each opinion. Perhaps the expert has not even conducted testing. Done effectively, the Fence technique can make the actual issues in the case very clear for the jury. You also can use the sheets you created on the easel at a later time in the trial, such as during your closing argument.

The Fence phase is an excellent time to set up something with the witness. Most expert witnesses try to see where you are heading on cross-examination. If you will have a surprise later, set up the surprise innocuously during the Fence. For example, you may need the witness to agree that a certain formula is correct in order to set up your later surprise. Get the witness to agree to that formula early in the Fence phase and then drop it immediately, going on to something else.

C. Agree. The Agree phase provides one of the best ways for you to maintain control during your cross-examination. Are there answers that the expert must give you, things with which the expert must agree, or look foolish in failing to do so? If these answers will help you in your case, ask questions designed to obtain them. These can include laws of physics, codes, scorecard exhibits, statutes, regulations, and the like.

There is much fertile ground here. In your preparation, learn what this witness has said or written in the past. Are there prior statements contrary to what the witness is saying in this trial?

The Agree phase can be an excellent place to conduct a tutorial for the jury, especially if your opponent has not taken the time to do it. After all, there are certain things the jury must understand in order to reach an intelligent verdict. Jurors know this, and they both want and appreciate the lawyersø help in presenting such information. For example, in an automotive crashworthiness case, you might say to the expert, õLetøs start with the simple stuff. What is the First Law of Motion?ö Or, you might write a basic formula on the board and ask the expert what that formula means. Lead the expert through an explanation for the jury. (Of course, if the expert in such a case doesnøt know the answers, you will be able to make something of that!). If yours is a medical case, have the expert explain the basic anatomical principles the jury will need to know.

Also, in the Agree phase, you can carefully plan in advance, and then use, leading questions that õtell your storyö to the jury. Develop and ask questions to which the expert should reply simply õyesö or õnoö. The expert who seeks to avoid doing so may demonstrate evasiveness for the jury to see.

D. Attack. The Attack technique is used to narrow and refine the issues in the case. No witness will ever literally surrender before you, but attack if you are able to do so effectively. Be imaginative in how you do this, because there are many ways to present facts. Try to get the jury interested as you do it.

However, you must have õpermissionö ó that is, the juryøs, and the courtøs, implicit authorization -- before you become aggressive with any witness, but especially a witness hostile to your client. Before you attack, *always* ask yourself whether you have this õpermission.ö It may be that the permission bar is somewhat lower in the case of an opposing expert than for a fact witness, such as a mere bystander, but it certainly exists.

The point will become clear when you consider this extreme example: suppose an expert witness at least appears to be highly qualified, and at least seems to be listening carefully to your questions, and trying earnestly and honestly to respond fully and fairly to them. Suppose further that this expert is a local person of some standing, such as a respected professor at a local university. If you were suddenly to attack under these conditions, you would very likely stir up resentment and anger from both judge and jury and lose much of your credibility in the process.

On the other hand, to the extent that an expert seems of dubious qualification and evasive, õpermissionö to attack may be readily granted to you by the jury. Finally, remember that the conduct of an expert as your cross-examination proceeds may cause permission to attack to be granted.

In the Attack phase, you might ask the expert just what would have õsolved the problem.ö For example, in a product liability case, would an alternative design have eliminated the risk that allegedly manifested itself in injury to the plaintiff? Exactly how would the alternative have done this? What other problems or risks would the alternative design have introduced into the product? Can you show the expertøs õsolutionö to be nonsense, or at least completely

impractical? For example, can you show that it actually would have been unlawful for a manufacturer to offer the expertøs proposed alternative design for sale because it would have violated applicable government regulations? Or, can you show the alternative impractical or undesirable because it would have violated established industry standards or practices?

You also can attack testing the expert did or claims to have done. Did it show õreal worldö validation of the expertøs proposed alternative design or formulation?

In an appendix at the end of this paper, you will find a number of rather classic examples of questions you can use during the Attack phase for the witness who will not respond directly to your questions.

E. The Home Run. We all know that the Perry Mason-like õgotchaö moment during cross-examination, the so-called Home Run, is rarely seen in real trials, because the opportunity rarely presents itself. However, it will never present itself in the absence of careful preparation. If in your preparatory work you do see an opportunity for a Home Run, set up the expert witness for it during the Fence phase of your cross-examination.

APPENDIX: ATTACK PHASE QUESTIONS

1. True or false?

2. This is one of those simple questions.

3. Then your answer to my question is [yes] [no]?

4. Is that another way of saying yes?

5. Does that answer mean yes?

6. Are you having trouble understanding my questions?

7. Didnøt that question call for a õyesö or õnoö?

8. Mr[.] Court Reporter, would you kindly read that question to the witness; maybe he doesnøt understand me.

9. I didnøt ask you why you didnøt do it; I asked you whether you did it.

10. Do you understand the difference between õwhyö and õwhetherö?

11. Are you refusing to answer my question?

12. [Before you begin your cross-examination, set up õground rulesö with the expert witness. But be careful: the judge may not like it]

13. That does not answer my question. Let me try it again.

14. [You make the õtraffic copö signal while saying,] I move to strike everything after yes [no] as non-responsive.

15. Thatøs a long way of saying õyesö?

16. So the answer to my question is yes.

17. I understand what youøre saying, but I would prefer that you answer my question.

18. With all due respect, you have not answered my question. Will you please answer my question.

19. I appreciate your opinion, but that wasnøt my question.

20. I understand that, sir, but all I was asking you was [í .]

21. [Dr. í .], I appreciate your answer butí ..

22. I understand all that, but can you answer my question?