

The Art Of Cross-Examining Expert Witnesses



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Don't use a shotgun when you can use a rifle.

AN EFFECTIVE CROSS-EXAMINATION of an expert witness is not formulated during the expert's direct examination, or even shortly before trial. It requires a well-thought-out plan. Joseph M. White, *Effective Cross-Examination of Expert Witnesses*, 18 Prac. Litig. 17 (Jan. 2007). The planning process should begin after the opposing expert has been identified, and then should be developed during five stages of trial preparation: initial discovery; depositions; pre-trial motions; final trial preparation; and courtroom adjustments. In fact, your plan should be a sub-part of your overall trial plan, which should be calculated to answer one question: how will I open for my client? Everything you do during trial preparation, including dealing with an opposing expert, should be driven by a dogged pursuit to answer that one question.

INITIAL DISCOVERY • Whether the case is pending in state or federal court, competent counsel should propound the obligatory interrogatories and requests for production of documents in accordance with the rules of court. This exercise should yield the standard fare about the opposing expert: the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; rate of compensation; a bio sketch or curriculum vitae; and all documents

received, reviewed and/or relied upon by the expert in formulating his opinions. Good lawyers propound these basic discovery requests as a matter of course in every case. This practice should be followed early on in complex business litigation. If the case is pending in federal court, counsel will be required to exchange expert witness disclosures and reports at a designated time. Typically, this information is more illuminating than responses to stock discovery requests in state court.

But counsel's plan for cross-examination should not begin and end with formal written discovery. Informal discovery is also available in several forms and may be just as valuable. For example, the Internet (e.g., Google) can be a resource for all sorts of information about an opposing expert. Many experts use Web sites to advertise their services, and some even post a list of cases or prior testimony on their Web sites. These Web sites can be goldmines. Also, you should consult your client or your own expert witness about the opposing expert. In many commercial contexts, it is truly a small world. Your client or expert may know the opposing expert, or may know someone who has useful information about the expert's background, prior testimony, and so forth. Experts frequently write or publish on topics in their fields of expertise. This information is publicly available and can be easily located by counsel. It is not uncommon to find an expert who has written extensively in his particular field, yet has published nothing on the subject matter about which he has been identified as an expert witness or is prepared to testify. This can be great fodder for cross-examination.

Counsel should not be bashful about filing a motion to compel discovery when the other side is dilatory in identifying an expert witness or is less than forthcoming in providing the required discovery information. If the motion is well-founded, it should be filed promptly. In many cases, simply filing the motion will prompt a reasonable resolution of the matter without judicial intervention. If not,

it will give you an opportunity to start selling your case to the court.

While you are formulating your discovery, bear in mind that the point of discovery is not to satisfy some intellectual curiosity. Rather, the purpose is twofold. First, you want to determine what the expert is prepared to say, and what he bases it upon. But more importantly, you want to determine the areas in which the expert might be vulnerable to cross-examination at trial. Remember, you are developing a plan of attack.

DEPOSITIONS • As a preliminary matter, counsel should ask whether there is any good reason to depose the expert at all. This is particularly true in federal court, where experts are well paid to prepare elaborate expert witness reports. Even when you have all the information you think you may need about the expert, one reason to take a deposition is to eyeball the expert and get a feel for how he will perform at trial. Frankly, that is as good a reason as any. Once you have decided to depose the expert, always remind yourself that the objective here is not to demonstrate how much you know about the subject matter. It is to find out what the expert has to say and why. Counsel should stick to open-ended questions, like who, what, when, where, and why. Under no circumstances should counsel reveal areas of potential cross-examination.

PRE-TRIAL MOTIONS • Counsel should consider the propriety of filing a motion challenging the relevance and reliability of the expert witness under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), Fed. R. Evid. 702, or the equivalent state court rule or precedent. However, the issues in complex business cases normally do not invoke *Daubert* and *Kumho*. That does not mean that the expert witness is not susceptible to a pre-trial challenge. Counsel also should consider challenging the expert's credentials and qualifications, as well

as the relevance of or need for his opinions. Frequently, an expert may be qualified in his particular field, or his expertise may be implicated in the case generally, but the expert may not have the requisite competency to render the particular opinion in the case at hand. Likewise, an expert who is otherwise qualified and competent to render opinions may be stretched into areas where he lacks core competency (the so-called “prostituting” of one’s own expert). Further, it is not uncommon for counsel to try to “gild the lily” by proffering a qualified expert to render an opinion that goes directly to the ultimate issue in the case.

In such instances, counsel should not be shy about filing a motion to exclude or limit the expert’s testimony or opinions. Bear in mind that the motion might not be successful for its stated purpose (i.e., to exclude or limit expert testimony), but the motion might be effective indeed in pointing out a serious weakness in the other side’s theory of liability or proof of damages. Although the court may deny the motion at the time, the seed can be planted and later harvested with a motion for summary judgment, motion in limine, or a renewed motion at trial when the merits of the motion become clearer to the trial court.

PRE-TRIAL PREPARATION • This brings us to the “plotting and scheming” phase—the part that all good trial lawyers relish. Generally speaking, expert witnesses are subject to attack in three basic areas: the expert’s credentials and qualifications; the manner by which the expert arrived at his opinions; and his conclusions or opinions themselves. Counsel might be tempted to flail away in all three areas. This is usually ill-advised. J. White, *supra*. In fact, it evinces the lack of a plan. Rarely is an expert weak in all three areas. Besides, why go hunting with a shotgun when you could use a rifle? Accordingly, counsel should identify, and then home in on, the expert’s most vulnerable spot.

Another cautionary point is appropriate here. Cross-examining a seasoned expert can be akin to dancing with a bear in open court. Most lawyers do not do either well. Unless you have a death wish, try to avoid this. Like a prizefighter, get off a few good punches and avoid at all costs a body blow, or worse yet, getting body slammed. Also, remember that jurors are instinctively skeptical of expert witnesses. Jeffrey T. Frederick, *The Survivor’s Guide to Expert Witnesses: From Selection Through Trial*, VA CLE (2007); Sanja Kytinjak Ivkovic and Valerie P. Hans, *Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 Law and Social Inquiry 441 (2003). Let that proven fact work in your favor. Hence, the thought of destroying an opposing expert should be forgotten. In most cases, merely neutralizing the expert on cross-examination is more than adequate—a lesson we will return to momentarily.

Working then in descending order of difficulty, it is easy to see why attacking an expert’s opinions or conclusions is the most difficult approach. It should be avoided if at all possible. When it is unavoidable, however, you should consider assigning a specific lawyer to the task. Either way, once you have decided upon a frontal assault, hitch up your britches and let the fur fly!

Next on the scale of difficulty is challenging an expert’s methodology or manner in arriving at his stated opinions. To pull this off effectively, counsel still must have a thorough understanding of the subject matter and the expert’s field of expertise. The task will be easier if you limit your cross-examination to areas in which the expert should agree with you. For example, oftentimes an expert will make certain assumptions in reaching his opinions. If you get the expert to agree that certain basic assumptions are variable in some respect, his ultimate opinions then become challengeable. The danger here, of course, is that the same seasoned expert might, and frequently will, use this opportunity to repeat all of his opinions, thus sabotaging your

cross-examination. This usually happens when counsel is too ambitious. Keep in mind that you have your own fact witnesses and probably a competing expert who can set the jury straight on these assumptions or the opinions derived from them. Accordingly, counsel should avoid trying to do too much at the risk of losing the entire exercise.

Of the three areas of potential cross-examination, the expert's credentials and qualifications are the easiest targets. The expert's weakness in this area can be shown objectively with the least amount of risk. His bio sketch and experience speak for themselves. Always consider this line of attack first. Only if the expert's core competency is unassailable should counsel venture into the choppy waters of the expert's methodology and ultimate opinions.

COURTROOM ADJUSTMENTS • Now, you have outlined your most effective cross-examination of the expert witness, and you are ready for the courtroom. Remember, though, that your outline is not static. Always be prepared to make mid-course adjustments based upon how the case is going, what the expert is permitted to say at trial, and any pertinent rulings along the way. Paying attention is important!

In an appropriate case, consider seeking leave to voir dire the expert when his credentials and qualifications are the weakest part of his testimony. If done correctly, the jury might be inclined to pay little attention to the expert's ultimate opinions or how he got there. Again, jurors are naturally suspicious of experts to start with. *Id.* Let that bias work to your advantage.

Also, do not be a "potted plant" in the courtroom. You should object as soon as the expert starts wandering off the reservation, or hazards opinions that have never been expressed before, or starts to opine about the ultimate issue in the case. If the objections are well taken, the jury will get the drift irrespective of the ruling.

You are now at the threshold. But before asking the expert a single question, always ask yourself whether there is any point to be gained here. If you were successful on voir dire, or you received favorable rulings to objections, or the expert's testimony was not as effective as you anticipated, consider saying, "Your Honor, I have no questions." For example, if the expert's main weakness is his core competency, and you were able to discredit him during voir dire, what good will come from cross-examining him about his opinions? Rarely does anyone win a case because of an expert witness, although you can easily lose the case because of an expert. Do not overestimate the impact of an opposing expert. Next, ask yourself whether your outline should be altered, or jettisoned altogether. Mid-course adjustments can be more important with experts than fact witnesses.

CONCLUSION • Finally, you are ready to execute an effective cross-examination of the expert witness. If you can, go after the expert's soft underbelly. Stay away from his strengths; they will only seem stronger when he is pounding you with them. Like that prizefighter mentioned before, get in and get out as quickly as you can; deliver a blow here and there; avoid getting hurt; and then sit down. If the expert has been vanquished, great. But that is not necessary. Your goal is to be competent. That is better than trying to be good.

Good luck!

PRACTICE CHECKLIST FOR The Art Of Cross-Examining Expert Witnesses

Effective cross-examination of an expert witness begins well in advance of trial and requires a well-thought-out plan to be developed during five stages of trial preparation: initial discovery; depositions; pre-trial motions; final trial preparation; and courtroom adjustments.

- At the initial discovery phase: propound the obligatory interrogatories and requests for production of documents to learn the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; rate of compensation; a bio sketch or curriculum vitae; and all documents received, reviewed and/or relied upon by the expert in formulating his opinions. Also engage in informal discovery, such as by performing Internet searches about the expert and consulting your client or your own expert witness about the opposing expert. File motions to compel discovery when needed.
- Even if you have a very thorough report from the expert (which is particularly likely to be the case in federal court), consider taking the expert's deposition anyway. This will give you a good opportunity to size up how the witness will behave on the stand. But be careful not to give away any clues about your anticipated cross-examination.
- Always consider the propriety of filing a motion challenging the relevance and reliability of the expert witness under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), Fed. R. Evid. 702, or the equivalent state court rule or precedent. Also consider challenging the expert's credentials and qualifications, as well as the relevance of or need for his opinions. Consider filing a motion to exclude or limit the expert's testimony or opinions if there is a firm factual basis for asserting deficiencies in qualifications or credentials.
- In pre-trial preparation, plan to attack in three basic areas: the expert's credentials and qualifications; the manner by which the expert arrived at his opinions; and his conclusions or opinions themselves. Try to confine the attack to just one area, since experts are seldom weak in all three and a cross-examination that doesn't go well will make the expert look stronger.
- Adjust your plan to the realities of the courtroom. Always be prepared to make mid-course adjustments based upon how the case is going, what the expert is permitted to say at trial, and any pertinent rulings along the way. Paying attention is important!