The Art of Preparation

Cross-Examining Difficult Experts

By Lyn P. Pruitt
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By following certain strategies, you can devise and deliver an effective cross-examination of even the most difficult expert witness with dispatch.

An expert witness may be difficult for a variety of reasons. The expert may be likeable and persuasive to the jury. The expert may be arrogant and refuse to acknowledge even obvious points. The expert may be openly combative and aggressive. But no matter why the expert is difficult, he or she likely knows more than anyone in the courtroom about a subject relevant to the case. Still, the opposing trial lawyer must examine the expert before the jury. This is a formidable task, even for an experienced trial lawyer who relishes learning and studying each subject a new case presents. But while a trial lawyer may not realistically match the

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expert's knowledge and understanding about the subject at hand, the trial lawyer can become an expert in a universally relevant subject: making complex issues simpler by understanding what to emphasize and what to avoid. Becoming an expert in this subject requires extensively preparing for each cross-examination. And deploying this expertise effectively before the jury requires a combination of confidence and humility. The following tips and strategies provide tools to assist you in crafting and executing an effective cross-examination of even a difficult expert witness.

Types of Experts

It is imperative to understand the type of expert you will cross-examine. Expert witnesses can be classified as one of two types: trial horses or neophytes. *See* F. Lee Bailey & Kenneth J. Fishman, Excellence in Cross-Examination §6:1 (2018). A trial horse may have spent more time in the courtroom than any of the lawyers there, making a living from testifying. With these experts, the cross-examining lawyer must be especially careful to maintain control confidently over the expert and the testimony elicited. Craft your questions narrowly and do not give the expert a chance to clarify what he or she has already explained to the jury on direct. Francis L. Wellman, The Art of Cross Examination 78 (rev. 1923).

A neophyte, on the other hand, may be less familiar with courtroom tactics, but he or she may present as more credible to the jury than a seasoned trial horse. With these experts, the cross-examining lawyer may need to proceed skillfully with humility to avoid offending the jury. *See* George J. Lavin Jr. & Chilton Davis Varner, Silent Advocacy: A Practical Primer for the Trial Attorney 66 (2006).

Preparing to Cross-Examine Experts: Prepare, Prepare, Prepare!

A trial lawyer cannot know what to emphasize and what to avoid without preparing. To be prepared adequately, you must at least consider the type of case, the expert's complete background, and the expert's prior testimony. Considering the type of case requires a pragmatic approach. *See* Bailey & Fishman, *supra*, at note 2. Expert discovery is expensive, and the extent to which experts are used depends on the possible recovery and the parties' ability to pay the fees and costs associated with using experts. *Id.* The slogan "Millions for defense, but not one cent for tribute," attributed to Federalist U.S. Representative Robert Goodloe Harper, may have stirred up patriotic sentiment in favor of a war with France, but your client will likely have a different mentality. The trial lawyer should remain grounded in the reality that sometimes the cost of the defense outweighs the significance of a defense verdict. The cost of experts is a significant component of this reality.

If the client believes the case warrants the cost of expert discovery, it is important to learn about the opposing expert's complete background. This includes the expert's education, published writings, and presentations. Do not merely focus on where the expert was educated and trained, though the reputation of the institution does affect the jury's perception of the expert. Consider these questions as well: Was the expert on a debate or drama team? Which courses that are relevant to the subject matter at issue did the expert take? Who taught those courses? Which textbook was required? *Id.* If the expert has given presentations that are on point, check to see whether there was a question and answer session after the presentation. This could provide insight into how the expert responds to challenges and the expert's ability to speak extemporaneously. *Id.* While researching the expert, look for weaknesses, especially as those weaknesses compare with the expert or experts who you will present on the issue. Juries notice when one expert trained at a premier institution and the other trained on a tropical island. And do not automatically assume that the representations the expert presents through curriculum vitae are accurate. Corroborate each representation because a misrepresentation, however slight, can be valuable impeachment material. *See* Thomas C. O'Brien & David O'Brien, *Effective Strategies for Cross-Examining an Expert Witness*, Litigation, Fall 2017, at 26–28.

A background inquiry is not complete without reviewing the expert's prior testimony, whether provided during a deposition or at trial. Depending on the applicable rules and the judge's standing orders regarding discovery, opposing counsel may or may not be required to provide a list of prior testimony in connection with an expert disclosure. If there is no such requirement, request this information from opposing counsel before the expert's deposition. Review prior testimony for general admissions about concepts that help your case and for opinions that contradict those presented in your case. The more specialized the expert's knowledge, the more likely it is that the expert has testified at least once regarding the same issue raised in your case. F. Lee Bailey and Kenneth J. Fishman explain what can occur when an expert has testified repeatedly on the same subject matter:

> The inclination to furnish up an opinion that satisfies the needs of the lawyer who had the estimable good judgment to approach *this* expert, as against others available, provides its own impetus to please. As a consequence, when an expert has testified more than once as to the same issue, one can fairly expect to find conflicts between the two transcripts.

See Bailey & Fishman, *supra*, at §6:2

These conflicts undermine the jury's confidence in the expert's credibility, but they also give your expert the opportunity to explain the contradictions and why the opposing expert's opinion in your case is contrary to the prevailing view in the field. And of course, consider prior litigation to which the expert was a party. Even if the prior litigation concerned an entirely different subject matter, you can use testimony provided by the opposing expert to study how the expert behaves, understand the expert's personality, and consider how the expert responds when challenged. *Id.*

Show the jury with your questions and attitude that no matter how the expert behaves, you are honestly interested and actively engaged in learning the truth.

The Expert's Personality

The expert's personality sets the tone for the cross-examination. *Id.* §6:3. There are two extremes: those who are imperious, haughty, and pedantic, and those who are genuine, understated, and likeable. *Id.* Most experts will fall somewhere in between these two extremes, and they may even move along the spectrum during the cross-examination, depending on your attitude, comments by the judge, or the expert's own sensitivity. The cross-examining lawyer should maintain awareness of the expert's attitude and react accordingly. It is easy to trudge robotically through an outline without modulating your questions and demeanor. But a good trial lawyer frequently evaluates what is going on around him or her and will treat the opposing expert with whatever combination of kindness, courtesy, or aggression the jury believes befits the expert based on his or her personality. Gerry Spence, Win Your Case 196 (1st ed. 2005). *See* Bailey & Fishman, *supra*, at §6:3. Show the jury with your questions and attitude that no matter how the expert behaves, you are honestly interested and actively engaged in learning the truth. *See* Spence, *supra*, at 197.

Learn the Expert's Dialogue

Learning the expert's dialogue requires a trial lawyer to know not only the terms of art in the expert's field—for example, myocardial infarction versus heart attack—but also to know the rules and principles in the expert's field that apply to the case. *Id.* §6:4. Using these terms of art, rules, and principles comfortably will increase the jury's confidence in you. There are many resources for a trial lawyer willing to take the time to learn. These resources include online, DVD, and audiotape courses. One example is *The Great Courses*, where you can learn about a wide variety of subjects, from quantum physics to master photography. *Id.* Learn from your own testifying expert as well, who will know the details of the case and help focus your efforts on the most important terms of art, rules, and principles. Of course, your client will pay for your expert's time, so use that time efficiently.

Closing Doors

Executed correctly, the deposition of the expert witness will set you up for a successful cross-examination at trial. But correct execution requires forethought and preparation. The goals are to force the expert to define his or her opinions clearly and specifically and then systematically to exclude other variations of those opinions. *Id.* Do not be embarrassed to ask what an expert in the field may characterize as a dumb question, if the expert provides only complex answers that you do not fully understand. Once you have constructed a fence around the opposing expert's opinions, you can prevent the expert from transforming those opinions to complement the plaintiff's theory of the case better as it develops. It is more difficult to fence in a trial horse. These experts will skillfully attempt to keep open the doors that you seek to close. When this happens, it helps to draw subtly on the expected testimony of your own expert or experts. Are there areas of your experts' testimony with which this expert may agree? If so, you may be able to elicit testimony from the opposing expert that corroborates the testimony of your experts and jibes with your theory of the case. While it is tempting during the deposition to launch a full-on assault on a difficult expert's credibility and challenge the expert's more dubious opinions, it is in most instances wiser to lay low in the bushes and save the ammunition for an ambush at trial. Of course, you must always consider how much you must establish in a deposition for your motion practice and consult with your client on what is most important and what is most likely to occur.

Actual Cross-Examination

You cannot effectively cross-examine an expert witness—or any witness—without setting clearly delineated goals and creating a plan for how to accomplish each goal. One plan that should generally be avoided is directly challenging the opposing expert on the substance of his or her own opinions. Gerry Spence explains what happens even when a trial lawyer has extensive knowledge of an expert's field:

> We can argue all day and deep into the night, and despite our superior current academic knowledge he will win the argument, because the argument seems to be, as it is, an argument between a lawyer and a scientific expert. The jury has to decide who is to be believed—the lawyer who is an expert in the law, or the witness who is an expert in his science. The winner is preordained.

See Spence, *supra*, at 230.

More fruitful subjects of questioning include weak aspects of the opposing expert's curriculum vitae, facts favorable to your case, and aberrations in the expert's methodology, highlighting parts of your expert's testimony with which the expert agrees and emphasizing information that the expert does not know or did not know when he or she formed the opinion. *See* O'Brien, at 27–30. For example, did the expert have access to the allegedly defective product but fail to test it? Make sure the jury knows. These peripheral subjects can undermine the expert's opinion, especially if you are able to produce a stronger expert with more solid opinions and methodology.

By the time the opposing expert testifies at trial, you will have fenced in his or her opinions. You must maintain this fence during the trial and preclude the expert

from venturing outside of it while he or she explains the opinions and methodology for arriving at those opinions. This requires control. There are six primary methods for controlling an expert during cross-examination: (1) the expert's own discipline; (2) learned treatises; (3) other expert testimony; (4) facts of the case; (5) bias; and (6) the expert's report. Peter L. Murray, Basic Trial Advocacy 343–52 (1995).

To most experts, achieving a good result in one case is not worth jeopardizing their professional reputation. These experts would prefer to agree with others in their field and learned treatises on issues clearly at odds, or at least inconsistent with, the plaintiff's theory of the case. If the expert authoritatively and convincingly espouses a theory or opinion with which you anticipate your expert providing more convincing testimony, you may use your expert to "neutralize" the opposing expert's testimony. *Id*. 346. Force the opposing expert to acknowledge that your expert is esteemed in the field and has done more work in the subject area. Of course, this only works if your expert truly is the superior authority on the issue.

The facts of the case, bias, and the expert report are consistent bases for controlling the opposing expert and undermining his or her own testimony. You should know the facts better than the expert, which will allow you to check the expert if he or she attempts to provide opinions inconsistent with the facts. Bias is an obvious manner of controlling a paid expert. This is especially true when the expert is paid an exorbitant amount and the jury is mostly blue collar. *See* O'Brien, at 29. Use the expert's report against him or her. Cull qualifying statements from the report and use those statements to craft strong leading questions, highlighting any uncertain variables. *See* Murray, *supra*, at 350. Focus on any favorable facts included in the report and emphasize those facts.

Finally, do not let your emotions—anger, frustration, and resentment or even glee and satisfaction—get in the way. The jury will not know everything that you know about the expert and will perceive him or her differently. Be mindful. Losing your cool, even with an expert who acts like a bully, will likely hurt your client more than the opposing party.

How to Handle Specific Characteristics of Expert Witnesses

Experts are difficult in different ways. Some may refuse to answer the question asked directly and instead drone on, filibustering to avoid answering. Others may give a new opinion while testifying at trial, and the judge may allow it. You must be prepared for these contingencies, but you must also listen closely to the answers an expert provides, even if you think you know what he or she will say and how he or she will act. An expert may behave differently at trial than during the deposition.

If an expert is evasive, it is important to emphasize this characteristic to the jury. These questions and statements, excerpted from *Silent Advocacy*, can be helpful:

- This is one of those simple questions.
- Then your answer to my question is [yes] [no]?
- Is that another way of saying yes?
- Does your answer mean yes?
- Are you having trouble understanding my questions?
- Didn't that question call for a "yes" or "no" answer?
- That does not answer my question. Let me try again.
- I appreciate your answer, but that was not my question.
- I understand all that, but can you answer my question?

See Lavin *supra*, at 67–68.

The tone of these questions will depend on how clear it is that the witness is dodging your questions. If it is obvious the expert is arrogant, and the evasive answering has continued for several questions, then you likely will have permission from the jury to question the expert sharply. *Id.* 66. But if the expert is likeable, and the evasive answering has been only intermittent, you may not have permission to reprimand the witness. In this case, it may be better to say: "I don't think that answers my question. Let me try one more time." This will focus the jury on the nature of the expert's answers and provides a basis for sharpness if the expert witness continues avoiding your questions.

If an expert provides a new opinion at trial, and the judge allows it, do not show surprise. Neither should you fume about the unfairness of the judge's decision. This will get in the way of addressing the new opinion. Most new opinions are provided in response to, or arise out of, opinions provided by opposing experts. Sit down with your expert and discuss what the opposing expert could possibly say in response. Then, prepare for the opposing expert to provide that opinion at trial. If the expert provides a new opinion for which you are unprepared, point out to the jury that this is a new opinion. Find out why, if this opinion is relevant to the case, this opinion was not provided at an earlier date. Was there something that the expert did not know when he or she formed the original opinions? If so, can we trust the original opinions? If not, what is the basis for the new opinion? Show the jury that the new opinion is self-serving and unreliable.

The first step in successfully cross-examining an expert at trial is one taken at the outset of the case, when the trial lawyer humbly acknowledges that there is more to learn.

Conclusion

If adequately prepared, the trial lawyer can use the opposing expert to highlight the trial lawyer's own skill. But if inadequately prepared, the opposing expert will eviscerate even an experienced trial lawyer and tarnish his or her credibility before the jury. Cross-examining an expert witness well requires making an ongoing commitment to learning. It is difficult for some trial lawyers to adhere to such a commitment because it implies that there are things that they do not know. Avoid this pitfall. The first step in successfully cross-examining an expert at trial is one taken at the outset of the case, when the trial lawyer humbly acknowledges that there is more to learn. FD