Effective Strategies for Cross-Examining an Expert Witness

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More than 400 years ago, English barrister Francis Bacon famously wrote in his meditations on human philosophy that "knowledge is power." This truth underscores one of the most difficult challenges a trial lawyer will face: cross-examination of an expert witness. The expert witness knows far more about his or her subject matter than the attorney seeking to challenge the witness. Experts also typically have extensive experience testifying and may have spent more time in a courtroom than the lawyers tasked with confronting them.

The truth is that most attorneys—even experienced advocates—lose ground when cross-examining an expert. This problem frequently boils down to poor strategy. Too often, lawyers who are prepared and know how to cross-examine fail because they pursue the wrong tack. They delude themselves into believing that they can actually win an argument with an expert on the subject matter of the expert's opinion. This rarely succeeds.

However, there are ways to gain ground without launching a full frontal assault in the expert's field of knowledge. With the right approach, cross-examination of an expert is not only a survivable event but also an opportunity to advance your case and score points with the jury. The following cross-examination strategies present both a low risk of danger and high potential for reward. While none guarantee success, they may significantly increase your odds of confronting an expert witness and living to tell the tale.

The Résumé Attack: Challenging an Expert's Credentials

Perhaps the best way to defuse an expert's apparent superior knowledge is to convince the jury that he or she is really no expert at all, by exposing weaknesses in the witness's credentials. Pay particular attention to experts whose backgrounds show that they spend more time theorizing than doing. A PhD-level neurophysicist who has never maintained a clinical practice and focuses mainly on illustrating medical textbooks, for example, is probably not the best expert on the scope and impact of a traumatic brain injury.

Consider too the relative education, training, and experience of each party's expert. In a battle of talking heads, something as small as a perceived difference in the quality of the experts' respective alma maters can provide a justification for elevating one opinion over the other.

Invest the time and effort to investigate whether the credentials appearing on the expert's résumé are real. If you can establish that an expert lied about his or her qualifications,

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your cross-examination is complete. The expert's opinion, if not stricken by the court, will be discredited by the jury. While such an attack may seem like the equivalent of a Hail Mary pass, it is much more common than most attorneys realize.

A national survey of résumés submitted by 2.6 million job applicants, for example, revealed that 41 percent lied about their work experience, 23 percent fabricated licenses or credentials, and 41 percent lied about their education. Thomas A. Buckhoff, *Preventing Fraud by Conducting Background Checks*, CPA J., Nov. 2003. The Internet is replete with examples of successful professionals who claimed credentials they did not earn.

Expert witnesses are not immune from these excesses. Each year, law enforcement agencies around the country pursue criminal prosecutions of experts who misrepresent their credentials in court. Recently, for example, a witness who served as a computer forensics expert in at least 50 proceedings was prosecuted for falsely claiming, among other things, to have a master's degree in computer science and engineering.

Illustration by Doug Thompson

If you can establish that an expert is willing to pad his or her qualifications, you can argue that the expert is willing to embellish substantive opinions as well. A meaningful challenge to an expert's credentials defuses the power that comes with the knowledge the expert holds by undermining the strength of the foundation on which it is built.

The Flagpole Strategy: Using the Expert to Advance Favorable Facts

Tearing an expert down is not the only way to run a successful cross. Another powerful strategy is to turn the expert into your own witness, to advance favorable facts and opinions that support your case. This is a simple matter of gathering the relevant facts you confirmed in expert discovery that the expert cannot deny, then running those facts up the flagpole by asking the opposing expert to confirm them on cross. The effect of having a hostile witness agree with your talking points in front of the jury is profound, no matter the expert's ultimate opinion.

Consider a standard car accident case in which a plaintiff seeks wage loss benefits from the insurer. The opposing expert may opine that the plaintiff suffered a debilitating back injury as a result of the crash, significantly limiting his strength and range of motion and requiring months of physical therapy and pain management. However, if you established in expert discovery that the expert is basing her opinion on medical records documenting the plaintiff's treatment, you should be able to get her to acknowledge all of the facts in those records that are helpful to your defense. Perhaps the plaintiff did not report back pain to emergency medical personnel who responded to the accident scene; perhaps he did not seek any treatment for the claimed injury until several weeks after the accident took place; perhaps there are no diagnostic tests that show any physical abnormality and the plaintiff made only subjective complaints of pain.

> If only one of the assumptions on which an expert has constructed his analysis is incorrect, the entire opinion can come crashing down.

Whatever facts support your case, you know that the expert should agree with them because you have already laid the groundwork of asking her to admit those facts during her expert deposition. If the expert changes a prior answer and tries to retreat from a fact that she has already acknowledged, impeach her. Either way, you win.

This strategy also applies to expert opinions. It is not realistic to expect an opposing expert to concede the ultimate question in the case in your favor. However, the expert may hold some intermediate opinions that advance your theory of the case. In these circumstances, you may gain more ground by highlighting those intermediate opinions and allowing your own expert to challenge the opposing expert's ultimate conclusion, than by trying to undermine his or her credibility.

Calling upon an opposing expert to admit facts and opinions favorable to your case allows you to reinforce those points for the jury and increases the likelihood that they will be remembered during deliberations.

The Procedural Challenge: Identifying Departures from Established Protocol

Showing that an expert did not follow the customary steps required in his or her field to render an informed opinion can also be fruitful on cross. You will need to develop a list of the things the expert did not do, but should have done, to analyze the issue. Most disciplines have a recognized protocol for evaluating a problem and reaching a conclusion. In criminal law, for example, there are concrete and recognized procedures for sexual assault forensic examinations, arson investigations, and a host of other topics. The National Fire Prevention Association's Standard 921 has become the definitive guide for investigation of fire incidents. For medical cases, the U.S. Department of Health and Human Services publishes guidelines for evaluating, diagnosing, and treating nearly every type of malady, in specialty areas ranging from cardiology to surgery.

No matter what your situation, the information is likely out there. It is simply a matter of identifying the protocol relevant to the opposing expert's discipline and then confronting that expert with the ways it was not followed. Your own expert can assist you in developing that list.

This strategy is not limited to omissions. The affirmative conduct of the opposing expert can also be fertile ground. Perhaps the expert embarked on a course of action that deviates from the established protocol. The expert may have destroyed evidence, contaminated a crime scene, or taken unorthodox steps in evaluating a case. Whatever the mistake may be, the goal is to measure the expert's conduct against the established procedure and

show that the expert departed from it. This line of attack plays nicely into a closing argument that the expert started with the conclusion the expert wanted to reach, then worked backward to construct an analysis to make the evidence fit that conclusion. It allows you to make this argument without directly attacking the substance of the expert's opinion.

The Knowledge Test: Highlighting an Expert's Lack of Information

The ultimate goal of discovery is to pin the expert witness down under oath on every fact known or opinion held regarding the universe of relevant information. During a deposition or evidentiary hearing, go back over long, rambling answers, and break them down into small points:

Q: Dr. Johnson, let me see if I understood your answer correctly. The operation began at 6:30 a.m.
A: Yes.
Q: And you arrived at the hospital that morning an hour early.
A: Yes.
Q: And had only slept 3 hours in the past 24 hours?
A: That's right.

Figuratively put the expert's feet in cement with short, tight, leading questions so there is no wiggle room. Inevitably, the expert will claim lack of knowledge about certain pieces of information.

An effective cross can be built by marshaling these admissions and developing a sequence of questions highlighting all of the facts the expert does not know. These missing pieces may resonate with the jury because serial gaps in an expert's knowledge of the facts of the case undercut her ability to apply that expertise reliably, even if she is the leading authority in her field of study.

In situations where the expert is well versed in the specific facts of the case, this type of challenge can also be based on the uncertain state of the discipline in which the expert operates. Take the field of medicine as an example. David M. Eddy, MD, PhD, is a renowned physician who has done seminal work in mathematical modeling of diseases, clinical practice guidelines, and evidence-based medicine. He said it best:

> Uncertainty creeps into medical practice through every pore. Whether a physician is defining a disease, making a diagnosis, selecting a procedure, observing outcomes, assessing probabilities, assigning preferences, or putting it all together, he is walking on very slippery terrain. It is difficult for nonphysicians, and for many physicians, to appreciate how complex these tasks are, how poorly we understand them, and how easy it is for honest people to come to different conclusions.

David M. Eddy, *Variations in Physician Practice: The Role of Uncertainty,* Health Aff., Fall 1984, at 75.

In physics, uncertainty has actually been elevated into the "uncertainty principle." Most experts, regardless of their area of specialty, will acknowledge that humans have not learned all there is to know or can be known in a field.

This approach, however, can be a double-edged sword. It works best when you do not have an expert of your own in that discipline or when your expert's opinion is based on uncertainty in the field.

The Hired Gun Attack: Showing Bias, Interest, or Prejudice

It is no secret that there are some experts who spend most of their professional time testifying, predominantly for one side. They may advertise in publications marketed to plaintiff or defense lawyers, or attend professional meetings of those groups. These facts, coupled with a history of testifying for a particular lawyer or law firm, can be marshaled to undermine an expert's credibility. The "hired gun" approach is always a legitimate avenue of cross-examination. Before you embark on this line of questioning, however, be sure that your own expert is not subject to the same criticism.

The amount paid to the expert can also be an effective way to establish bias. No expert is cheap, and the Federal Rules provide only limited restriction on their compensation, stating that experts are entitled to charge and receive a "reasonable fee." A seasoned expert will almost always be able to make a case as to why his fee is reasonable. But if your opponent's expert is being paid well beyond the prevailing rate, that is a worthy topic of cross. If the expert tries to explain why he is deserving of a rate substantially higher than others in the field, he may betray an arrogance that could put off the jury. Alternatively, if the expert is unable to justify the excessive fee, that gives you the opening to argue to the jury that he is being compensated not for his time but to give a specific opinion.

Even reasonable expert fees can be successfully attacked. Jurors in a rural blue-collar county, for example, may not be favorably impressed with an expert who flies in from another part of the state (or country) charging more per hour than they may earn in a day. State law may also provide a foothold for a fee-based cross. A little-known Michigan statute, for example, prohibits any expert witness testifying to matters of opinion from receiving, directly or indirectly, an amount greater than the ordinary witness fees of $12 per day without leave of the court. Mich. Comp. Laws § 600.2164. Although this rule is routinely

breached by many experts and attorneys, it is a contempt of court to violate it. The exploration of such a violation at the outset of a cross can put the expert on the defensive and plant a seed of doubt with the jury about the integrity of the expert's testimony.

The House of Cards Strategy: Undermining an Expert's Key Assumptions

Human behavior is built on assumptions. When you get up and drive to work in the morning, you are assuming that your office was not shut down by a water main break in the middle of the night. When you go back to your favorite restaurant for a meal, you are assuming that the quality of the food will remain constant. We all have beliefs about the existence of facts we cannot prove, and we act on those beliefs every day without a second thought.

For the price of a couple textbooks, you can put the best experts in the world on your side.

In the arena of expert testimony, assumptions can provide a fertile line of cross, and the consequences can be much more significant than a wasted commute or a bad meal. Frequently, if only one of the assumptions on which an expert has constructed his analysis is incorrect, the entire opinion can come crashing down like a house of cards.

Many assumptions are foundational in nature and flow from the type of opinion that the expert has been asked to provide. A financial expert testifying about the lost profits occasioned by a breach of contract, for example, will typically base his opinion on the assumption that the breach did, in fact, occur without examining the truth of that proposition. There is nothing inherently wrong with such an assumption. Proof of the breach is an independent and necessary element of the plaintiff's claim. Nevertheless, it can be advantageous to use the opposing expert to remind the jury that, if the contract was properly performed, his multimillion-dollar damage calculation goes down to zero.

Other assumptions are case-specific and require a detailed review of the factual record relied on by the expert in formulating his or her opinion. Perhaps the medical records of a plaintiff injured in a workplace accident, for example, demonstrate the he was unconscious for more than an hour following the incident, not 20 minutes as the defense expert had assumed. Or perhaps there is a gap in the chain of custody of a DNA sample that calls into doubt whether it was recovered from the scene of a home invasion as the expert matching that sample to the defendant had assumed. Errors in factual assumptions lead to mistaken opinions. And even if you can't prove that the expert's assumptions are false, the more assumptions you are able to undermine, the more doubt you can sow with the jury as to the of validity of the expert's testimony.

The Go-for-Broke Strategy: Mounting a Direct Attack

The final strategy for tackling an expert witness is one of last resort—directly challenging the substance of the opinion itself. Only the virtuoso should attempt to confront this, and even then the examiner must proceed with extreme caution. The expert has likely spent a lifetime studying and working within the field in which she is offering testimony. Most trial lawyers, by comparison, have spent at most a few years working up their case. No matter how much preparation you put into your cross, it is incredibly difficult to overcome that gap.

If you do choose to battle an expert within the expert's field of expertise, your weapon of choice should be the learned treatise. The Federal Rules of Evidence make it one of the most powerful instruments available to a lawyer at trial. Not only can a learned treatise be used for impeachment purposes, but—once established as reliable authority by the expert you are cross-examining, another expert of your choosing, or judicial notice—statements in the treatise come in for the truth of the matter asserted. Fed. R. Evid. 803(18). The results are extraordinary. Once the treatise is established as authoritative and called to the expert's attention, you can literally read, sentence by sentence, every point that supports your theory of the case and ask the expert to acknowledge after each point that you read it correctly. This broad exception to the hearsay rule is underutilized by trial lawyers. For the price of a couple textbooks, you can put the best experts in the world on your side.

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This brings us back to Francis Bacon's centuries-old observation that "knowledge is power." So, too, is wisdom. Few trial lawyers are able to outplay an expert witness by demonstrating superior knowledge in the field. Every trial lawyer, however, can exercise the wisdom to strategically devise his or her cross-examination strategies. With proper preparation and practice, these techniques can help neutralize even the most powerful experts and put you on the path to a winning verdict. ■