

Quick Expert Cross-Examination

By Brian J. Laliberte

1. Start with the expert's deposition – if you have one. Sometimes, you just are not going to have it. If you do, dissect it. Commit it to memory. Use it to identify and challenge the expert's assumptions. Design your cross-examination to draw those out for the jury. Identify all the things the expert did not consider. Identify incorrect assumptions. Establish that opposing counsel misinformed his expert or worse. Even the inference that the expert prepared a "made as ordered" opinion will diminish her credibility with the jury.

2. Mine the expert's report – if you have one – for easy points of contention. As with a deposition, an expert report allows you to conduct research about the sources of information upon which the expert relied in forming her opinions. Using the report and the underlying data as a basis for cross-examination gives you a fighting chance to challenge the expert's assumptions. Again, an expert can be impeached effectively by having her identify all the data she failed to consider or did not receive from opposing counsel.

3. Assess the exhibits associated with the expert for accuracy and reliability. Experts tend to rely on "stock" data that they have handy. Find more recent data and confront the expert with it. Make the inquiry about the things the expert did not do in preparing her opinion. The jury might find that the lack of attention to detail requires it to give the expert's opinion little if any weight.

4. Identify exhibits that may impeach the expert. Confront the expert with a more current version of the data set upon which she relied in forming her opinion. For example, there may be a more recent edition of a treatise upon which the expert should have relied. There may be a document produced in discovery, but not identified in the expert's report, that undermines the expert's assumptions. Or, there may be a narrower set of data that is more relevant to your case than the data the expert used to arrive at her opinion.

5. Determine whether the expert or her work is at all controversial within his or her profession. The expert's CV can be a gold mine. Assess the acceptance of the expert's work within an academic peer group or profession. Determine if the expert has attained tenure in the academic context. If an expert is not affiliated with a college or university, perhaps there is a reason. Find out whether the expert has any professional skeletons in their closet, and use them to your advantage.

6. Search traditional and social media for useful information. Social media can be a rich source of potentially embarrassing information on the expert's "real" views. Don't hesitate to explore the expert's public Internet presence. Has the expert commented publicly concerning issues that resonate in your case? Has the expert made statements that reflect a bias or prejudice relevant to your case? Has the expert commented on your specific case publicly prior to trial?

7. Quantify the expert's time spent on the matter in terms of money. At first, innocuous open-ended questions can help build rapport with the expert. For example, ask some version of the following series of questions: Are you charging the plaintiff/defendant for your time here today in court? How do you calculate your fee? Hourly? What is your hourly rate? (Assume \$500.00.) How much time did it take for you to drive here? And how long did you take to prepare for your testimony here

today? Of the ten hours you spent preparing for your testimony, how much of that time was spent with opposing counsel?

Once the expert commits to her fee schedule, switch to classic leading cross examination. For instance: If we multiply your hourly rate of \$500.00 by the number of hours you spent driving here (e.g., 3 hours), that amount is \$1,500.00. If we multiply your hourly rate of \$500.00 by the number of hours you spent with counsel (e.g., 10), that is \$5,000.00.) You would agree that \$1,500.00 plus \$5,000.00 is \$6,500.00? So, before you ever answered opposing counsel's first question, you earned \$6,500.00?

Keep a running "tab" and quantify the expert's time spent on the case in terms of money. Using a whiteboard and calculator to do this in front of the jury drives the point home. The amount the expert earned before testifying at trial adds up quickly when you explore the time taken to investigate an issue, prepare for deposition testimony, and consult with counsel. It can be astronomical. This gives the jury a sense that the opposing expert truly is a hired gun paid for her testimony.

8. Limit cross-examination to a few critical points. Do not keep the expert on the stand any longer than necessary. An experienced expert will use the time to reiterate her opinion, if you aren't careful, and will do so at your client's expense.

9. Don't try to out-nerd the nerd. It rarely is a good idea to take an expert on cross-examination on her own subject of expertise - unless you have a Ph.D in the same subject matter. Even then, it is very easy to lose the jury. Don't risk juror backlash by engaging in a technical argument when you can destroy the expert's credibility by executing a limited and artful cross-examination.

10. Prepare a closing question that the jury will remember and the expert cannot contest.

Here are two examples.

Lawyer Smith: "Dr. Bob, have you ever heard the saying: 'There are lies, damned lies, and statistics.'"

Dr. Bob (an economist), chuckling: "Yes."

Lawyer Smith: "Thank you, Dr. Bob. No further questions."

Another derivation of this type of question, which is harsher and may draw an objection, is:

Lawyer Jones: "Dr. Eve, have you ever heard the saying: 'Figures don't lie, but liars do figure?'"

Dr. Eve: "Yes."

Lawyer Jones: "Thank you, no further questions."

The answer matters less than the question and grabs the jury's attention.



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