Chapter 14 Cross-Examination

14.1 Introduction

Cross-examination is one of the aspects of being an expert witness that experts most worry about. In fact, cross-examination should usually be easier for an expert to excel at than direct examination. This may seem counterintuitive, but during cross-examination the expert is usually kept on a short leash by opposing counsel by asking leading questions. The expert's job then is fairly simple—truthfully answer the "yes" or "no" leading questions propounded by opposing counsel. Direct examination, on the other hand, requires explaining topics that may be arcane, boring, and complex to a jury of lay people. To do this well can be exceptionally challenging.

Counsel for the opposition will read and study the entire case file and prepare for hours or days for his cross-examination of an expert. To perform well under cross-examination, an expert witness needs to understand cross-examination from the opposing attorney's standpoint, follow the golden rules of testifying under cross-examination, and anticipate the likely areas of inquiry.

14.2 Cross-Examination: Opposing Counsel's Goals and Techniques

Generally speaking, opposing counsel will have two major goals during his cross-examination of an expert witness. These are:

- To lessen the credibility of the witness and
- To use the witness, where possible, to bolster his own case.

All trials ultimately boil down to one issue and one issue only. That issue is *credibility*. An expert's opinion is only as strong as her credibility. Opposing counsel will use cross-examination as a vehicle to attack and lessen the expert's credibility. This is most commonly done by attacking an expert's qualifications and expertise, exposing her bias, impeaching her with prior statements or writings, and by challenging her opinions, methodology, facts, and data.

Example 14.1: Qualifications
Q. You're not a registered professional engineer, are you?

Example 14.2: Bias
Q. Isn't it a fact, Ms. Jones, that you've testified for this defendant as an expert in twelve cases in the last four years?

Example 14.3: Inconsistency
Q. That's not what you testified to at deposition, is it? Were you lying then or are you lying now?

Example 14.4: Shoddy investigation
Q. You never took samples from the accident scene, did you?

Example 14.5: Factual assumption
Q. You assumed that everything your client told you was true, didn't you?

Sometimes it may be difficult for opposing counsel to successfully undermine an expert's credibility. Opposing counsel may also feel that attacking an expert witness would not be a good strategic move or may not sit well with the jury. As such, counsel may seek to use the witness's expertise to support his own theory of the case. The most common way this is done is by pointing out the areas in which the witness agrees with the opposing experts in the case. In many cases, there is quite a large area of agreement. When using this technique, counsel is using the expert to bolster his own case.

Example 14.6: Using opposing expert to bolster attorney's case
Q. And you agree, do you not, that the plaintiff will never be able to walk again?

Example 14.7: Getting expert to concede qualifications of other side's expert
Q. Even you would agree, would you not, that Dr. Smith is well qualified?

Counsel may also use hypothetical questions. Experts should always remember that their opinions are only as good as the factual assumptions upon which they are based. During cross-examination, counsel may present an alternate set of assumptions and ask if this would change the expert's opinion. It often does. If counsel can then prove the existence of the alternate set of assumptions, he has successfully used the witness to bolster his case.

Example 14.8: Asking expert to give opinion based on new factual assumptions
Q. Let's assume for a moment that the velocity data provided to you were false. If the true velocity was 45 mph, would that change your opinion?

It is very important to understand that from the opposing attorney's standpoint, cross-examination is all about control. Controlling the cross-examination allows the attorney to control the information the jury hears. Control is obtained in two main ways.

- The attorney only asks questions to which he already knows the answer (usually from the discovery process). If the expert gives a surprise answer, he may be impeached with his prior deposition testimony, report, or other material.
- The attorney only asks carefully phrased leading questions to which the expert can only answer "yes" or "no" and never asks for or permits an explanation.

Attorneys are also taught that the best cross-examinations:

- Start strong,
- Finish strong, and
- Are relatively short.

From one trial lawyer's perspective, the ideal cross-examination is one:

1. That to an extent was entertaining, which can be a method of controlling the momentum and maintaining the jury's interest;
2. That to an extent impugned the credibility and/or exposed the adverse witness's true bias or attitude while he/she was on the witness stand;
3. That to an extent destroyed or weakened the adverse witness's observations or the force of his/her harmful testimony, and particularly the opinions or conclusions, of an expert;

4. That to an extent obtained beneficial information or admissions as a predicate for cross-examination of other adverse witnesses and/or supported your theory of the case and/or one of your witnesses (lay or expert) and/or was important for your summation.[1]

14.3 The 21 Golden Rules of Testifying on Cross-Examination

The authors suggest the following while testifying on cross-examination.

1. Tell the truth and make concessions where these are called for.

Telling the truth is a legal and ethical duty. Experts should not be evasive. If a witness appears evasive, he will lose credibility with the jury. A good trial lawyer will be persistent and eventually get at the information she seeks. Evasiveness will only serve to highlight this information to the jury. Remember that it's the lawyer's case, not yours. Don't act like you have a dog in the hunt. Make concessions where called for.

Example 14.9: Being truthful and non-evasive
Q. Isn't it true that you earned in excess of $35,000 as an expert witness this year?
A. Yes.

Comment: The above response is very effective in that it forces counsel to move on and shows that the expert has nothing to hide. An evasive response of, "Well, my accountant keeps those records—I'd have to check with him," would only have prolonged the cross-examination on this point. Also, it would have telegraphed to the jury that the expert had something to hide and that this must be an important point.

2. Stay within his true area of expertise.

The further a witness strays "out of his sandbox," the more vulnerable he becomes to cross-examination and to successful attacks on his credibility. Early in the case, an expert should tell retaining counsel which areas he will offer his expert opinion on. Questions by counsel for either side that attempt to push an expert beyond the area in which he feels comfortable can and should be answered, "I can't answer that question. It is beyond my area of expertise."

Example 14.10: Just say "no"
Q. With this level of impairment, she's going to be permanently and totally disabled, isn't she?
A. I can't answer that question. It is beyond my area of expertise.

Comment: Just because an expert is qualified to testify does not mean that the expert is an expert in all areas. The best experts refuse to be drawn beyond their true areas of expertise.

3. If you don't know an answer, the appropriate answer is, "I don't know."

There is nothing wrong with this response. Even the most educated people in the world do not know the answer to everything. An expert witness should not let her ego get in the way of giving this response. She should not be tricked by counsel who asks a series of questions that the expert is forced to answer, "I don't know." Counsel is just trying to rattle the expert or trying to force her to make a mistake.

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[1] Bob Gibbins, Advanced Evidence and Discovery Law Course, Chapter K: "Arts and Science of Impeaching Witnesses on Cross-Examination" (Nov. 1995). State Bar of Texas: State Bar of Texas Professional Development CLE Online, Austin: 1997, Section III.

Example 14.11: "I don't know"
Q. What was the time of death?
A. I don't know.

Comment: The wise expert answers "I don't know" when she doesn't know an answer. Always tell the truth. If the truth is that you don't know, then that is your answer.

4. Prepare meticulously for cross-examination.
This includes studying the file in detail, a mock cross-examination with retaining counsel, and preparing in advance answers to the most likely questions the expert will be asked during cross-examination. The expert can also consider one-on-one preparation by an outside consultant.[2] Preparation is a crucial key to effectiveness while testifying. For more on preparation, please see Chapter 12.

5. Do not argue with counsel.
Arguing with counsel will detract from an expert's credibility because she will no longer appear to be impartial. However, when appropriate, one can and should disagree with counsel.

Example 14.12: Expert is not baited into arguing
Q. Do you agree that the cause of the accident was excessive speed?
A. No, I do not.

6. Do not be arrogant, hostile, or condescending.
Such behavior can and will destroy rapport with the fact finder or jury. It will thus lessen the expert's persuasiveness.

Example 14.13: Expert appears hostile
Q. Did you examine the accident scene?
A. Counsel, you know very well I was out to the accident scene three times. Why would you even ask a stupid question like that?

Comment: The best experts do not lose their cool.[3]

7. Pause before responding to a question.
This gives the expert time to consider the question carefully. It also gives the witness's retaining attorney an opportunity to object if she chooses to do so. Even so, an expert witness should not overdo this because it can be a distraction and it may affect one's credibility.

Example 14.14: Overdoing the pauses
Q. Did you graduate from Boston College, sir?
A. Well, (pause) yes.

[2] See www.testifyingtraining.com.
[3] Consider the confirmation hearings for Supreme Court Justice Samuel Alito in January 2006. At those hearings, the judge was repeatedly accused of being a bigot, unethical, and a lap dog. Alito never lost his cool and the questioning boomeranged on the senators who were trying to stop his confirmation.

Comment: The best experts appear natural and honest answering questions. It does not appear honest or natural to need to pause and think before answering a question as to whether or not you graduated from a particular school.

8. Do not exaggerate, speculate, or guess.
This type of testimony is objectionable and will invite additional cross-examination.

Example 14.15: Guessing during cross-examination
Q. How far was the car from the intersection when it started to brake?
A. I would guess about 110 feet.
Q. When you say "guess" and "about" . . .

Comment: There is no place for guessing in expert testimony. Experts should not allow the jury to gain an impression that the expert is a guesser because this could adversely impact the expert's credibility.

9. Remain cool, calm, and collected.
If a witness loses his cool, he is likely to blurt out a response that has not been considered carefully.

Example 14.16: Expert keeps cool
Q. How long have you been going to Alcoholics Anonymous?
A. Twenty years, and I've kept sober the whole time, I am proud to say.

Comment: The best experts understand that certain questions are designed to get them to lose their cool. They don't take the bait.

10. Actively listen to the question.
The majority of the battle in cross-examination involves hearing exactly what was asked, understanding what wasn't asked, and appreciating the subtext of what was asked. The witness should answer the question he was asked, not the question he anticipated or that he should have been asked.

Example 14.17: Not listening carefully
Q. Do you have an opinion as to causation?
A. It's causally related.
Q. Do you have an opinion?
A. Yes.

Comment: The expert's inability to carefully listen to the precise question being asked led him to answer the wrong question. It also made his testimony appear rehearsed.

11. Get all facts and data straight before taking the stand.
Unprepared witnesses lose credibility because they look like they don't have their act together. Also, a thorough knowledge of the facts can be used to point out the fallacy in the lawyer's questions. The facts should be your ally if you are testifying honestly and correctly. Know them and use them.

Example 14.18: Unprepared expert
Q. What was the terminal velocity?
A. Ah . . . Ummm . . . Let me look in my report . . . Ummm . . . It's here somewhere . . .

Comment: A well-prepared expert will perform much better on the stand than an unprepared expert.

Example 14.19: Expert uses facts to parry question
Q. Because of Mr. Smith's bradycardia, Dr. Jones never should have prescribed a beta blocker, isn't that right?
A. That's not what happened in this case, Counselor. Bradycardia is a pulse less than 60. On the date in question Mr. Smith's pulse was 64 and he therefore didn't have bradycardia.

Comment: The facts can be a powerful ally if you know them and are prepared to deploy them when needed.

12. Use accepted methodology.
If an expert's methodology is suspect, her credibility can be challenged. Opposing counsel may even be able to have her opinion excluded from evidence in its entirety. (For further information, please refer to Chapter 9.)

Example 14.20: Peer-reviewed studies
Q. Can you please cite the peer-reviewed studies that support your opinion?
A. I can't think of any.

Comment: Employing a reliable methodology denies opposing counsel ammunition to use against the expert.

13. If interrupted, finish your answers.
Expert witnesses should assert themselves and not let counsel cut off their answers.

Example 14.21: Insisting on finishing an answer
Q. There were no objective findings of impairment, were there?
A. Actually—
Q. Doctor, how much are you being paid for your testimony here today?
A. You didn't let me answer your previous question. Actually, there were many objective findings of impairment. These included . . .

Comment: Opposing counsel will often try to cut off the expert's answer if that answer is not favorable. The best experts don't let this happen. This expert did a very good job of making sure that he finished his answer.

14. If questioned about a document, ask to see it.
An expert witness should never comment on a document without asking to see it. Counsel may very well be mischaracterizing what the document states. Experienced experts take the time necessary to read documents carefully before commenting on them.

Example 14.22: Questioning about a document
Q. The 8/1/14 EPA report concluded that the contamination began in 1999. Are you saying that the EPA is wrong and you're right?
A. Could I please review the report you are referring to?

15. An expert witness should not use slang.
This detracts from one's expertise and one's credibility.