

The fundamentals of expert witness cross-examination

The first of a two-part column.

By Peter B. McGlynn



"A lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it."

— John Henry Wigmore

Professor Wigmore's oft-quoted observation is a cautionary note on the hazards of heedless cross-examination (see John Henry Wigmore, "Evidence in Trials at Common Law," §1367, at 32 (James H. Chadbourn ed., Little Brown, 1974)).

Without question, the ability to conduct skillful cross-examinations is a potent arrow in the trial attorney's quiver. However, experience in conducting the cross-examinations of lay witnesses may be inadequate when confronted with a well-prepared witness testifying on a subject he has spent years, even decades, studying. An effective cross of such an expert requires different skills and strategies.

In this column, we will examine the first three of six steps to creating a cross worthy of such a witness.

Step 1: Begin at the beginning

Learn everything you can about the opposing expert. Search the Internet for cases in which he has been cited. Did any court find him not credible? Was he ever found to be unqualified? Did he take a position in a prior case contrary to the one he is taking in yours? Is the expert legally licensed or professionally certified, thereby making it less likely he will put his career at risk by stretching the truth or by being more of an

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advocate than an expert?

Download the expert's affidavits or reports in prior cases and thoroughly check his academic credentials, professional licenses and certifications. Cross-examining an expert who has embellished or lied about his credentials can be effectively devastating to opposing counsel.

Finally, download the expert's articles, seminar materials and books. Accomplished experts are usually prolific writers, and they may have previously written about the subject matter in your case. Place all of this data in your files. Cross-reference and double-check it with the information disclosed in the expert's written report.

Step 2: Become an expert on the expert's report

Whether you learn about the expert's opinions from his report or his answers to interrogatories, there is no substitute for mastering them. This will set the stage for and inform your cross-examination plan.

Are any of the expert's opinions equivocal? Is the expert qualified to render such opinions? Do the opinions contain

legal conclusions?

The answers to those and similar questions will be critical to challenges under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2nd 469 (1993), and will help frame your objections to the expert's direct testimony.

Finally, share the opposing expert's report with your expert, who will likely be of assistance in helping you to formulate the more technical aspects of your cross-examination.

Step 3: To depose or not to depose

Usually, the knee-jerk answer to this question is to depose the opposing expert, if you are permitted to do so. In jurisdictions like Massachusetts, expert depositions are not permitted absent court approval (see, e.g., Mass. R. Civ. P. 26(b)(4)(A)(ii) ("Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions ... as the court may deem appropriate")).

Deciding on whether or not to take an expert's deposition requires the consideration of several factors. How comprehensive are the expert's interrogatory answers or his report? Is the subject matter of the expert's testimony complex? Is the expert a seasoned veteran who is a deft improvisator on the stand?

The savvy trial lawyer also will consider whether the deposition will elicit helpful information beyond the information contained in the expert's report or in his interrogatory answers, and weigh that against the probability that his deposition questions will telegraph his cross-examination strategy to the opposing expert and counsel.

Thus, if the interrogatory answers (or the report) are sufficiently detailed and your court rules preclude any material variance at trial of opinions contained in the expert report, it may be prudent not to depose the opposing expert after all (after consultation with your client, of course).

Such a course of action may be especially appropriate if you have evidence that the expert has embellished his credentials or if there is a fatal flaw in his opinion, either of which he might be able to cure prior to trial. **MLW**

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The second of two parts.

By Peter B. McGlynn

In last week's column, I reviewed the first three steps to building an effective expert-witness cross examination. Now let's look at the final three.

Step 4: Is there a need to cross-examine the opposing expert?

As professor John Henry Wigmore recognized, cross-examination is like a double-edged sword: One edge can be used to eviscerate the opposing expert on cross-examination, while the other can impale the cross-examiner.

Thus, you should consider whether the expert has inflicted any damage on direct and/or if there is a risk that the expert will use your cross-examination to reaffirm his opinions.

Also, consider whether your expert will be able to mount an effective rebuttal to the expert's opinions. In such circumstances, it may be best to simply state, "No questions, your honor."

Step 5: Plan of attack

There are numerous avenues for cross-examining an expert witness, but not all need to or should be taken in every case. If, for example, the opposing expert's credentials are well regarded, it may not be productive to attack them. If, on the other hand, the opposing expert has previously testified on subjects as numerous and varied as a Las Vegas buffet, or possesses little or no expertise concerning the subject of his opinion, or lacks relevant licenses or certifications, then attacking the expert witness's qualifications will likely be effective.

If, however, the opposing expert is not well prepared or hasn't grasped all of the underlying facts, exposing such shortcomings on cross-examination may yield fertile results. And even if a *Daubert* challenge to the expert's opinions is unsuccessful, cross-examination should focus on getting the expert witness to admit that his opinions are not universally recognized.



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It is the rare case in which an expert's trial testimony will vary from his deposition testimony or his report. When it happens, pointing out prior inconsistencies may be extremely powerful. However, avoid the temptation to cross-examine on non-material inconsistencies. Focus only on those that demonstrate that the expert has altered his opinions because they were flawed or incomplete.

You also may be able to get the expert to agree with your expert's subsidiary findings or opinions even if he disagrees with your expert's ultimate findings. And you may get the expert to acknowledge that your expert is highly qualified. Most professional experts will concede obvious points rather than risk being branded as an advocate, or worse.

How much money the opposing expert is being paid ranks near the bottom of the cross-examination scope hierarchy. Most juries expect that testifying experts will be compensated for their time; therefore, asking the expert witness how much he is being compensated probably will be unproductive (especially if your expert's hourly rate is higher).

What may be more productive is asking the expert how much business he has received from his client or attorney, and/or what percentage of his business volume is derived from them. Questioning the witness on the percentage of his income received as a testifying expert also may form the basis of a challenge to his impartiality.

Similarly, if the expert is testifying on a subject he has never been involved with other than as a testifying expert, or hasn't been involved with it for some time (e.g., an expert

who testifies on audit practices and procedures but who has never performed audit work, or hasn't for many years), such a lack of current experience could serve to undermine the expert's credibility.

Step 6: Final preparation for cross-examination

Many trial lawyers prepare an outline of the topics they wish to cover on cross-examination; others create manila folders containing documents and notes on topics to be covered. Still others write out the questions to be propounded to the expert witness.

Some lawyers (this one included) employ a hybrid method. Basic cross-examination points such as background information and credentials can usually be covered in an outline. Key cross-examination documents, with attorney notes, can be placed in separate folders arranged in their planned order of introduction, but clearly indexed and arranged so that they can be pulled out of order or bypassed if necessary.

I use questions when I need to pinpoint prior deposition testimony references or portions of an expert report. To expedite things, I also place copies of the relevant transcript and report sections in front of the witness and provide copies to the court before beginning my cross.

Depending on the courtroom technology, I also have key passages and documents enlarged and matted or electronically projected onto a screen utilizing one of several excellent (and relatively low-cost) courtroom presentation/document management programs currently available. **MLW**

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