

JANUARY 2008

How experts can survive and thrive during cross-examination

Practical techniques can guide experts in answering the tough questions

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An expert may testify with confidence during direct, but fall apart on cross-examination. Weak testimony from a star witness can destroy a case. Here are guidelines to ensure that your expert shines on the stand.

Preparation is essential. An expert's previous courtroom experience does not insure good testimony in your case. Do not assume an expert will do well because of a good resume. You must verify the skill level of your witness, especially under cross-examination. Begin by recording a session in which you role-play a brief series of cross-examination-type questions with your expert. Review the session. Unless your expert sails through with flying colors, here are suggestions to improve the most common miscues.

Remain confident

Expert witnesses are often either intimidated or insulted by the cross-examination process. Those who are intimidated tend to fall apart under cross. They become confused by opposing counsel's rapid-fire questioning or long-winded, twisted questions. These experts quickly lose their sense of competency. Experts who are insulted become defensive or arrogant and lose credibility with the jurors.

- **Expert witnesses must take their time on the stand**

This is the single most valuable tool to give any witness. Remind your witnesses that there are no rules that say they must immediately respond to a question. Witnesses are frequently reluctant to take time before answering a question, fearing they will look evasive to the jurors. In fact, taking time to think before answering usually looks like "Oh, the witness is taking this question seriously," to jurors. A pause may feel like an eternity to an expert witnesses, but it is usually only a few seconds and works to the advantage of the expert.

Taking a brief moment to think through the question and mentally formulate an answer before responding is key to good testimony. Role-play with your witness until satisfied that enough time passes between the question asked and the answer given.

- **Maintain good eye contact**

Most expert witnesses feel comfortable looking at counsel during direct examination, then spontaneously looking at the jurors during the major part of their response. Once engaged in cross-examination, however, too many experts become locked in an eye-to-eye duel with opposing counsel. By focusing only on opposing counsel, the witness excludes the jurors from the process and changes the nature of the questioning.

Your experts should treat cross no differently than direct examination – they are still educating and informing jurors. Maintaining good eye contact with opposing counsel during the question is important, but spontaneously looking at the jurors when responding continues the self-confident, informative pattern the expert established during direct. It lets jurors know that the expert is still an expert and is still in the role of informing.

- **Use opposing counsel's name**

Feeling confident is easier when you are on equal footing with those you are communicating with. A witness frequently feels less than equal when facing cross-examination. The witness must only answer the questions asked and must remain seated while opposing counsel is generally standing. One way to restore the balance of power is deceptively simple: encourage your experts, whenever they feel insecure, to use opposing counsel's name. For example, opposing counsel asks, "Dr. Smith, isn't it true that you know much less about X than we have been led to believe?"

Your expert might answer, "No, Mr. Jones, I believe the nature of my expertise has been accurately described." This simple technique can quickly and easily

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bolster an expert's waning self-confidence.

Do not get defensive

Experts who believe opposing counsel's questioning is insulting them or their expertise often get defensive. This can be disastrous to an otherwise top-notch delivery of testimony on direct. Two techniques can help experts answer constructively rather than defensively.

• Go *with*, instead of *against*, the questioning

Your experts will do much better in cross-examination if they do not consider it an attack, but rather an opportunity to further clarify and educate. The expert will not feel tempted to negate or fight everything opposing counsel says. On the contrary, listening attentively to a question may help your expert answer in ways that will surprise opposing counsel and help your expert maintain a positive footing. For example, opposing counsel asks, "Isn't it true that the validity of the tests given is a serious problem in psychological testing?"

Instead of answering defensively,"I personally examined the validity scales of the tests I gave"; a more constructive answer might be, "Certainly, validity is always a primary concern, as are reliability, standardization and other such issues." The expert used the question to clarify an issue, and in the process sidetracked opposing counsel (who was undoubtedly expecting the defensive response).

Here is another example of the type of question which tends to put experts on the defensive, "Isn't it true that Drs. X, Y and Z have written that the test you used to come to your conclusions is subjective and unreliable?"

Experts who get angry and defensive in response to this line of questioning do not score points with jurors. Encourage your expert to concede what is indefensible, and support that which is, "Oh, yes. These doctors say that in certain circumstances this test is of no value."

Opposing counsel is now obliged to ask your expert about those "certain circumstances" (or if not, you can on redirect), and your expert can reiterate how this test has value in this particular circumstance.

• Master the gentle art of the conditional clause

Placed artfully in the beginning of a response, the conditional clause allows your expert to elucidate rather than defend a position. Returning to the previous example, when asked: "Isn't it true that the validity of the tests given is a serious problem in psychological testing?", the expert could have answered with the use of a conditional clause: "In certain circumstances, yes." Using the conditional clause would compel opposing counsel to request clarification, or would allow you to open the subject on redirect.

Maintain a juror-sympathetic attitude – avoid jargon

Some experts are tempted to use technical language when answering opposing counsel, often in an attempt to reestablish a sense of security. Remind your experts that their security lies in their ability to relate to jurors, and that is where their focus should remain. The more your experts stay in the role of sharing with and educating jurors, the greater their credibility and acceptance by the jurors. Experts must continue to speak in "juror-friendly" terms.

The success of your experts rests on three key factors: they must truly be experts in their field, they must be prepared to answer questions regarding the facts in the case at hand, and they must not only shine in the safety of direct examination, but also excel, during the often hostile and unpredictable world of cross. It is your job to make sure your experts have the necessary knowledge about the case and are well-equipped to face even the most aggressive and intimidating opposing counsel during cross-examination.

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