Cross-Examination of Technical Experts

By Tom Branigan

Cross-examination of medical, scientific, and technical experts is often one of the most important and, for some lawyers, most intimidating events in trial. However, with careful and fulsome preparation before trial, cross-examining technical experts can be fun, theatrical, and a means of proving some of your own trial themes. Encyclopedia-sized books have been written about this topic, but the space allowed here does not permit me to cover the matter in great detail. The point of this article is to provide guidance to help you better prepare and to reduce the size of the challenge presented by this stage of trial.

Preparation

Preparing to cross-examine technical experts begins with the disclosure of experts by opposing counsel. Disclosures occur formally (in response to discovery and witness lists) and informally (e.g., because you asked, "Who are your experts?" or information was volunteered to you). Regardless of how disclosure occurs, cross-exam preparation must begin once you learn of the other side's technical experts. Start by gathering as much information about the experts as may be available. This involves formal discovery (witness interrogatories and document requests) and informal investigation.

While formal discovery is important and should not be neglected at this stage of preparation, don't expect to learn too much about the opposing technical experts from formal discovery requests. Most seasoned practitioners will provide the minimum response required by law and not much else. Do not fret. The Internet gives us tools at our fingertips to conduct extensive informal investigations that often yield the greatest amount of useful information about technical experts. Naturally, your informal search should include querying expert databases,[1] collecting curriculum vitae (CV), and lists of prior testimony, but this is just the beginning of the process. If you represent a client facing pattern litigation, your client and your own expert may have additional and more pointed information about an opposing expert. Ask them, and ask others with whom you practice who may have encountered this expert in past cases. Make it your objective to learn as much as possible about the opposing expert's background and prior reports, publications, and testimony on issues relevant to the expert's work in your case.

Cross-exam goals

Your goal is to build a background profile about the expert so you are prepared to thoroughly expose during cross-examination—or challenge outright through a *Daubert*[2]-like motion[3]—a lack of qualification and bias in favor of the retaining party or counsel. You must be thoroughly aware of the requirements of *Daubert* and other applicable law that you will rely on to challenge the expert during cross-examination.[4] Search for and collect prior *Daubert*-like exclusionary or limiting rulings about the expert.[5] Identify puffery and fluff on the expert's CV designed to bolster his or her stature. For example, many professional organizations identified on an expert's CV require only submission of an application and an annual fee for membership. It is also common for many of the expert's professional writings to have no relevance to the opinions being offered in your case. Prepare to prove these things during cross-examination.

In addition to exposing a lack of qualification and bias, you must challenge the expert on the substance of his or her opinions—the expert's conclusions and the factual basis for those opinions. To do this, you must thoroughly understand the facts of your case and the substance of the expert's work. In essence, you must prepare to be on an equal plane with the expert at the time of cross-examination regarding his or her opinions. To be clear, this does not mean you must become an overnight expert in a field completely foreign to you like electrical engineering or accounting.

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"Trial Practice" is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

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However, you must understand the specifics of the substance of the expert's work in your case and the factual assumptions that support the expert's opinions. It is this latter area that most often provides cross-examining counsel the greatest opportunities to attack and score points.

Experts often have big titles and impressive-looking CVs but, at the same time, they are not perfect masters of the facts; because of the press of business or their own lack of preparation, they may make simple mistakes or overstatements about the "facts" they have relied on to support an opinion. Identifying these mistakes takes time and often requires consulting with your own expert to determine errors or overstatements. If your case is in a state court jurisdiction that does not require experts to produce reports, like Michigan, then a deposition of the opposing expert is necessary to obtain a more complete understanding of the expert's opinions, the facts and assumptions that support those opinions, and all the information the expert considered or failed to consider in reaching his or her opinions. You should also rely on your own testifying or consulting expert to help you prepare for the deposition and trial cross-examination—not only to identify failures in the opposing expert's methods, but also to identify the erroneous assumptions and mistakes in analysis and calculations he or she may have made. Do not hesitate to enlist the help of your expert even as you prepare to depose the opposing expert. At a minimum, I typically ask my expert to discuss over the telephone the issues and lines of questions that should be explored during the opposing expert's deposition.

Take time to search for prior reports and publications prepared not just by the opposing expert but also by other experts in the field who may have criticized your opposing expert's opinions or methodology. This information will help you call into question the reliability and accuracy of the work by the opposing expert in your case and its general acceptability in the field.

Deposition vs. trial

The deposition of the opposing technical expert is a *sine qua non* to complete your preparation for cross-examining the expert in trial. Having the expert's report and some prior testimony is not enough. A deposition is your best opportunity to learn all you can about the entireties of the expert's opinions, the basis for those opinions, information considered or not considered, assumptions made and the basis for those assumptions, and information that will allow you to attack the expert's qualifications or show bias during cross-exam at trial. Depositions are usually low-risk events when it comes to the questions you may ask. In other words, there are no dumb questions in a deposition; the only dumb question is the one you failed to ask. Thus, creating a question or issue outline is obviously part of good preparation as it minimizes the chances of failing to ask important questions during the deposition. But do not wed yourself to your outline. Use it as a reminder or guide, but listen carefully for new issues raised by the answers to your questions and follow up on them during the deposition.

The primary differences between cross-examining the opposing technical expert during a deposition and at trial are the mode of questioning and the overall scope of the examination. My deposition-questioning mode is usually open-ended and direct rather than a leading-question style. In depositions of opposing experts, I want to hear the expert talk as much as possible, and I freely ask, "Why?" Contrast this with trial, where 99 percent of my questions during cross-examination are in a leading-style mode. By the time trial cross-examination starts, most of the learning and preparation should be done. In trial, I am there to expose flaws, teach the jury, and prove my points through the opposing expert. The key to successful cross-examination at trial is witness control, which is best achieved through leading questions. I rarely ask the opposing expert, "Why?" or allow lengthy explanations. I also seldom request that an opposing expert be permitted to leave the witness stand to discuss exhibits or evidence near the jury box or in the well of the court because it cedes control to the witness.

Save some things for trial

To avoid providing the technical expert with an opportunity to perfect an answer between the deposition and trial, I like to save a number of topics for trial cross-examination. For example, during trial cross-examination, I try to get the opposing technical witness to criticize his own party's conduct in select areas. When there is strong evidence proving the plaintiff's comparative fault, the opposing expert will either have to agree that the plaintiff was at fault to some degree or resist and appear either unreasonable or like too much of an advocate to many jurors.

Another area to hold for trial cross-examination relates to work the expert failed to do. For example, I try to prove that a number of tests or demonstrations could or should have been performed but the opposing expert failed to perform them. This is particularly effective when your own expert has been more thorough; it allows you to present a clear contrast between the work of your expert and the opposing expert. But approach this with caution and the understanding that cross-examination is a two-way street. Questions you ask in cross-examination are often used later in cross-examination of your experts.

Many seasoned trial lawyers recite the well-worn mantra, "Never ask a question

on cross to which you do not know the answer." While I generally agree with this mantra, I do not cling to it rigidly. I frequently ask technical experts questions during cross-examination in trial without knowing exactly how the expert will respond. There is an art to—and purpose for—this style of question on cross. The art involves phrasing a question so that even though you may not know exactly how the expert will respond, the nature and style of the question can lead to only one reasonable answer. If that answer is not given, the expert looks extreme or just plain wrong.

Whereas a deposition should be exhaustive and broad ranging, the scope and length of cross-examination of opposing experts during trial should be limited to your best points—points that will resonate and cause the most damage or clearly prove a fact for your case. Cross-examination during trial does not mean boring the jury into submission by covering every point raised on direct questioning or frequently revisiting verbatim what the expert said. It is also not the time for you to demonstrate your knowledge of minutiae. Be brief and crisp. Learn to recognize when the jury is tiring or losing focus, and move on or stop. Always start and finish strong.

Conclusion

Careful and expansive preparation will lead to successful cross-examination of the opposing technical expert during trial. It will also allow you to turn what some may consider one of the more daunting parts of trial into an enjoyable and occasionally dramatic event. ■

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ENDNOTES

1. See, e.g., DRI, *Expert Witness Profiler* <http://www.dri.org/Experts/Profiler>; Thomson Reuters, *Expert Materials on WestlawNext* (a directory of expert witnesses with links to related jury verdict summaries, expert testimony, and Westlaw journals) <http://legalsolutions.thomsonreuters.com/law-products/westlaw-legal-research/litigator/expert-materials>. All websites cited in this article were accessed April 14, 2015.
2. *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
3. Motions in limine and other tactics for exclusion or limitation of testimony by technical experts are beyond the scope of this article, but for additional information about these issues, see Branigan & Georgieva, *Amended FRCP 26: Not a Carte Blanche to "OverDaubert,"* Law Journal Newsletters (March 2012); and Branigan, *Scope of* Daubert *Review at Class Certification Stage Still in Flux* (May 22, 2013) <http://www.daubertuncensored.com/2013/05/22/scope-of-daubert-review-at-class-certification-stage-still-in-flux/>. See also Longhofer, *Michigan Adopts* Daubert *Principles and Evidence-Based Expert Testimony: Revised MRE 702 and 703*, 83 Mich B J 34 (October 2004) <http://www.michbar.org/journal/pdf/pdf4article759.pdf>.
4. Also consider MRE 702 and MRE 703.
5. Exclusionary or limiting rulings about experts can be found through a number of sources including those sources identified in note 1.