

Cross-examining the Expert Witness
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Few advocacy challenges appear more daunting than having to rise to cross examine an expert witness. The playing field seems uneven: the expert may be highly qualified in her area and may have testified countless times and in the process she has been through the experience of being cross examined by experienced counsel. On the other hand, this may be your first detailed exposure to the complicated technology at issue and you are trying to come to terms with its workings let alone knowing enough to ask intelligent questions in the hopes of destroying the adverse expert witness.

Your client will be well-represented in this circumstance by proper preparation and a familiarity with helpful guidelines. This approach frees you to be comfortable with things that can be controlled and leaves you to concentrate less on what questions to ask and more on how to phrase your questions to get the answers you want from the witness.

1. Retain your own Expert

Proper preparation starts with understanding the technology at issue. For a patent case you should be working with a patent agent and your own expert as early as possible. By the time of trial, you will be familiar with the jargon, you will have read the major works in the area and should understand at least enough about the area that questions are occurring to you and that you can take up with your expert for discussion.

Your expert should be able to assist you by commenting on the bent of the adverse expert. Is she known for holding unorthodox or unconventional views or theories? Is her testimony in your case outside of her usual area of expertise?

As the case develops, your expert should have access to all of the relevant documents and will be responsible for briefing you on them. She should work with you in preparing your cross examination and ultimately, will be present to offer advice at trial or, at a minimum, present for those fact witnesses who will form part of the foundation for your

expert's opinion and for the evidence of the adverse expert.

It should be apparent from the above that your expert consultant, if employed properly, will become part of your strategy team. In this circumstance, subject to the size of the case, it is advisable to have an expert consultant who is different from your expert witness who will take the stand. This division of labour helps avoid exposing your expert witness who takes the stand from any charge of bias.

2. Mining the Expert's Report

Both the Federal and Ontario Courts allow you to see in advance what should be your adverse expert witness' evidence in chief. By virtue of Federal Rules 279(b) and 281 and Ontario Rule 53.03, a party who intends to call expert evidence must file that expert's report. The other party may then file a responding report (and, in Ontario, either party may then file a supplementary report). These reports are due on a "60/30" day timeline and a "90/60/30" day timeline before trial in the Federal and Ontario Courts, respectively.

You must have reserved sufficient time immediately before trial to fully absorb the adverse expert's report and to provide a responding report if required. If the report is not complete or otherwise doesn't adequately set out the proposed testimony, you should be prepared to move for a more complete report.

Oftentimes, an expert's c.v. appears as part of the report. Obtain all articles or other writings listed in the c.v. as authored by the expert. Sometimes, these writings will provide you with ammunition for cross examination - for example, the theory being advanced in the report may not have always been held by the expert. Your own expert consultant will be able to assist you with this task. She will also be able to assist you in locating points of weakness in the report itself.

The expert's c.v. should also list the past cases in which she has participated. Transcripts of the testimony should be obtained as part of your quest for ammunition for cross examination.

In a case that turns out to be a battle of expert witnesses, your success may turn on the

failure of your opposing counsel to be as diligent as you in screening his expert witness for potential skeletons in the closet.

3. Approaching the Cross Examination

Rarely will you have the good fortune on cross examination to destroy your adverse expert witness. Your job will be well done if you introduce an element of uncertainty or doubt into the testimony to open the door for the Judge to accept a competing view.

While it is trite to say that everyone has their own style of advocacy, and that you should follow one that best suits your abilities, there are, nevertheless, some common sense tactics and approaches that you should adopt when embarking on your cross examination.

Regardless of the technique that you use, you must always control the witness. A witness will be less prone to take liberties if she knows that your expert is on hand to provide you with advice throughout the cross examination. Similarly, it helps to demonstrate your mastery of the facts with the witness. You will want to establish that you know the dates, articles, people and a myriad of other details relevant to the matter at hand by correcting the witness or by being able to quickly point her to exhibits and passages that are relevant to that point in the cross examination.

You should make a habit of asking questions that call for a "yes" or "no" answer and you should be prepared to remind the witness that this is what you are looking for (in a manner that best suits that particular juncture of the cross examination). Use ordinary language and ask simple questions without resort to jargon.

Be mindful that the Judge will at least start out viewing the expert witness as a neutral non-party who is offering assistance to the Court in coming to grips with a field of technology that may be foreign to the Judge. It would be imprudent, therefore, to start your cross examination by an all out attack on the expert. The early part of the cross examination should be reserved for eliciting helpful admissions rather than pursuing credibility challenges.

Before embarking at all, consider whether cross examination is necessary. Does the

expert testimony relate only to matters not in issue? Is the testimony relevant to the issue? Even if the answer is yes, was the testimony persuasive? If a critical issue has not been directly dealt with by the expert, consider no cross examination or simply a brief cross examination on a minor point.

Usually, however, cross examination is appropriate and you should be covering several routine areas in your cross examination.

4. Challenging the Expert's Qualifications

Two challenges may be made to the expert's qualifications. First, you may assert that the witness is not qualified to opine on the subject matter at issue. You may do so on the basis that her expertise has not been established. This challenge is an admissibility challenge and must be made after the other side has called the witness and at the point where the Court is asked to accept her as an expert and prior to any opinion being expressed. At this point, you will be permitted to cross examine the expert on her qualifications and the Court will then hear argument on the issue. It is unusual to argue that the expert is not qualified at all. More commonly, the argument is that the expert has expertise in one area but not in the very specific area in issue. You must choose this tack with care; if your objection is unfounded, it is not exactly a momentum building move.

Next, you may object that the expert's experience is limited. This is a challenge that goes to the weight of the expert's opinion. It is made during your cross examination. Your point is that while the expert is entitled to give an opinion, it should be given little weight.

5. Obtaining Admissions

You may seek to obtain important admissions on cross examination. You should have ready useful passages in documents, authorities and even in documents authored by the witness.

Before the reference is read out, you must get the witness to acknowledge that the textbook or article is authoritative, after which it is admissible. If the witness refuses to recognize it as authoritative, you may still discredit the witness by having your own

witness acknowledge the source as one which is almost universally recognized.

6. Challenging the Opinion's Underlying Premise(s)

The expert's report should reveal the facts or premises that the expert adopted in order to express her opinion. A cross examination directed at displacing or discrediting some of these facts or premises will obviously undermine the opinion itself. In this instance, your theory of the case is that there is insufficient or unreliable evidence to establish the facts or premises. On cross examination, you will seek to have the expert identify the sources from which she assumed the underlying facts or premises. Don't forget that you need not destroy the expert in order to succeed on this point. You need only raise doubt as the manner in which the expert assumed the facts or premises. By doing so you will have set the stage to lead subsequent evidence to rebut the facts or premises.

It is proper to put hypotheticals to the expert. Consider asking a line of questions where you have the expert assume that the fact(s) or premise(s) does not exist and whether, in that context, her opinion would still be the same.

In cases where the facts may not be challenged, consider whether the expert's conclusion

drawn from those facts is the only conclusion that can be reached. If the expert is not prepared to agree with such a proposition, you may still score points by showing that she is being inflexible in her stated position.

7. Bias

Apart from having the witness appear inflexible as suggested above, you should attempt to expose any real or apparent bias of the expert. It is sometimes worth exploring fees charged and testimony given in other cases.

8. Capitalise on Uncertainty or Ambivalence

These straightforward points will go a long way in balancing what first appeared to be an uneven playing field of counsel just versed in the technology at issue versus the adverse expert witness who may have made a career out of providing technical evidence. As you become comfortable in determining what you should explore and how to do it, you will find that you are better tuned into the witness' answers and better

able to spot and capitalize on any uncertainty or ambivalence in her testimony. Your cross examination will move from simply shooting questions in the dark to confidently taking on the spotlight in what is a most challenging part of advocacy.

If you are interested in becoming a student of the art of cross examination of the expert witness, I commend the following to you:

Henderson, Gordon F. "The Expert Witness Particularly from the Standpoint of the Federal Court of Canada " (1976), 22 C.P.R. (2d) 85

Millar, W.A.D., "Expert Witnesses", The Winning Edge: Tactics for Success in Civil Litigation, CBA Ontario February 4, 1984, Annual Institute

Rock, Allan M., "Dealing with Adverse Expert Evidence", Evidentiary Problems in Civil Litigation, CBA Ontario, February 8, 1986 Annual Institute

Henderson, Gordon F., "The Growing Importance of the Expert Witness in Proving Your Case" (1986), 10 C.P.R. (3d) 321

Blue, Ian A., "Cross-Examining the Expert", (1987) Advocacy Quarterly 13

Macklin, G. Alexander, "Expert Witnesses - Solution, Preparation, Cross-Examination Techniques" in "Intellectual Property Litigation - Practice, Evidence, Advocacy", CBA, March 1989

Kokonis, James D. , et al, "Expert Witnesses in Patent Litigation" in Patent Litigation: Effective Management of a Patent Trial from Beginning to End", The Canadian Institute, June 22, 1993

Donald J. Wright, Q.C., "Effectively Using Expert Witnesses in Patent Litigation - Their Selection, Preparation, Examination and Cross-Examination, The Canadian Institute, October 5, 1995