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TECHNIQUES FOR CROSS EXAMINING AN EXPERT WITNESS

By Ben Rubinowitz and Evan Torgan

There is little question that the cross examination of an expert can be both challenging and intimidating. Indeed, there are times when an expert witness has far more courtroom experience than the lawyer attempting to cross examine him. The attorney who begins a cross without a clear purpose and without thorough preparation is headed for disaster, but with a solid plan, proper preparation, and the use of appropriate techniques, the cross of an expert can go a long way to supporting a winning summation.

There are certain time-tested trial techniques that can be used by attorneys to cross examine an expert regardless of his field of expertise and regardless of his experience. Three effective techniques every attorney should develop and use when cross examining an expert include: controlling the witness, using the "voice of reason," and asking low risk open-ended questions.

TELL, DON'T ASK

The most fundamental technique an attorney must develop to effectively cross examine an expert is the ability to maintain control of the expert both through the types of questions asked as well as the way in which the questions are asked. Leading questions serve to limit the potential answers to the questions and force the witness to answer the question with one word — "yes" or "no." Technically, a leading question is one that suggests an answer or one that limits the universe of potential answers. An example of a leading question might be:

Q: Did you review the images from the MRI of November 2017?

Questions that begin with words such as Did, Were, Have, Had, Could, and Should all seek to limit the answer. Technically, responsive answers to these questions would require a response of either “Yes” or “No.” However, to maintain control it is often better to tell the witness the answer rather than ask the witness the question. The question: “Did you review the images from the MRI of November 2017 ” can be turned into a statement by telling the witness the answer and simply adding a tail at the end such as “correct,” “right,” “true,” or a similar word seeking affirmation.

Q: You never reviewed the images from the MRI of November 2017, true?

It is critical that when an attorney asks a leading question the attorney ensures the answer is responsive. To the extent the expert is nonresponsive or tries to offer an explanation the lawyer asking the question has three options. First, the lawyer can re-ask the question and change the tone of her voice while questioning.

Q: You never reviewed the images from the MRI of November 2017, true?

A: I reviewed the reports.

Q: My question was specific. You never reviewed the *images* from the MRI of November 2017, true?

By changing the tone in which the original question was asked and re-asking the question with appropriate emphasis on certain words the jury will quickly understand that the expert is being evasive. Second, to the extent the expert continues to evade the question an additional technique can be used. This technique allows the examiner to focus on what was not done to emphasize what was done. If executed properly, matters will only get worse for the expert:

Q: Let me try again, you never reviewed the images from the MRI of November 2017, true?

A: They were never provided to me.

Q: You never asked for the images, true?

Q: You never told defense counsel: I can’t offer an opinion without seeing the images, correct?

Q: Instead, you chose to offer your opinion without ever reviewing the images, true?

To the extent the expert still refuses to answer without explanation a third option is for the questioning attorney to object to the answer as non-responsive. Although the court should rule favorably, this option should only be used as a last resort since the court might, in its discretion, allow the answer to stand or allow the expert to explain.

FULL, FAIR, THOROUGH AND COMPLETE

Once the attorney has mastered the fundamentals for obtaining responsive answers, she can move on to techniques which will both minimize the effectiveness of the expert and serve to discredit him at the same time. To do this the attorney must do her homework before ever stepping foot in the courtroom. Review of background checks, articles written, experience in the field and prior testimony must be carefully studied. The report written for this specific case must not only be studied but it must be dissected. There are two areas of focus that must be carefully considered when dissecting the expert's report and opinion before starting the cross-examination: first, a review of what was done and second, and more importantly, a review of what was not done, not considered and not reviewed by the expert. By pointing out the "negatives" — that which was not done but should have been done, the attorney can take apart the expert's opinion one step at a time.

Imagine the scenario in which a student suffered burn injuries in a chemistry class during a demonstration conducted by his teacher. The plaintiff claimed that the teacher, after conducting the same demonstration moments before, poured methanol (a fuel) from a gallon jug into a dish containing nitrates that had previously been heated with fire. The methanol fumes caught fire, ignited the methanol in the jug and flame jetted outward severely burning the student who was seated in the front row. The plaintiff claimed that the smallest amount of methanol should have been used and at no time should a gallon jug of methanol have been brought into the classroom, let alone poured directly into the dish. An expert was called by the defense who offered his opinion

that there was no evidence that the teacher poured the methanol from the jug. That same expert opined that the teacher was not negligent in the manner in which she conducted the demonstration. Assume there was a police report which stated the teacher told a detective that she "poured methanol from a gallon jug." Needless to say, the police report was not mentioned by the defense expert during direct examination. Too often, in a scenario like this, the cross-examining attorney fails to properly set up the expert. Instead, the attorney goes right for the kill and misses the opportunity to develop the omission for maximum effect:

Q: The police report says the teacher stated she poured methanol from the jug, true?

Q: You never mentioned that, correct?

Although the cross-examining attorney was focused on the right issue, the point was lost. The better approach is for the attorney to take the time to explain why it is important for the expert to conduct a full, fair, thorough and complete investigation before ever rendering an expert opinion to the jury. Moreover, by establishing through the expert that the failure to conduct such an investigation would cast doubt on the integrity of his opinion the attorney can secure admissions that support her client's cause. To effectively make this point the attorney might start by asking "voice of reason" questions. These are questions that are so reasonable that if the witness dares to disagree or to answer with anything other than "yes" he will look foolish:

Q: Would it be fair to say that before coming to court and rendering your opinion you conducted a full evaluation (or investigation or analysis)?

Q: An evaluation that was fair?

Q: Certainly, your evaluation was thorough, true?

Q: And your evaluation was complete?

Clearly, these questions must be answered in the affirmative. Anything less would make the expert look silly:

Q: Are you telling this jury your evaluation was less than thorough?

Q: Are you suggesting that your review of this case was less than complete?

Once the original four questions are answered in the affirmative the attorney must go further with the set up and focus on the "negative" to enhance the line of attack:

Q: To the extent you failed to conduct a full evaluation before rendering your opinion, we can agree that would be improper, true?

Q: To the extent your evaluation was less than thorough that wouldn't be fair, correct?

Q: That wouldn't be in keeping with your own personal standards, true?

Q: To the extent you didn't conduct a complete evaluation that would be wrong, true?

Once these admissions are secured the attorney can continue the line of attack by focusing first on the importance of a thorough review and then pointing out what was not done but should have been done if the expert truly meant what he said in response to the set up questions:

Q: Before offering your opinion, you studied the record carefully, true?

Q: You reviewed all the reports?

Q: You reviewed the depositions?

Q: You reviewed the file in its entirety?

Q: To the extent you did not conduct a thorough and complete examination of the reports and depositions, you would agree your opinion might not be as valid as you would like, true?

Next, the jury must be reminded of the significant assertion offered by the expert in support of his opinion. But in asking this question the attorney should suggest, through her tone, that this point might be in doubt.

Q: During direct you testified to this jury that there was "no evidence" that the teacher poured methanol from the jug, true?

Q: That opinion was made after your thorough review of the depositions, correct?

Q: After your complete review of the reports, true?

Q: You would never make such a statement unless you believed it to be true, correct?

To emphasize the crucial point in the cross, emphasis must be placed on the document that was never reviewed.

Q: You are aware that the police conducted an investigation into the happening of this incident, true?

Q: You realize that the police immediately responded to the scene?

Q: You know that the police spoke to witnesses shortly after the event?

Q: At a time when memories were fresh?

Q: But you didn't review all the police reports, correct?

A: I thought I did.

Q: Would you agree that if you didn't review all of the police reports you might be willing to change your opinion depending upon the content of the report?

At this point the expert should be confronted with the report (which has already been marked for identification):

Q: Let's take a look at the report together. You never saw this report, did you?

Q: You never knew what it said?

Q: You never knew that the teacher admitted pouring methanol from the jug, right?

Q: Would you have liked to have that information before rendering your opinion to this jury? (offer the report in evidence).

Q: Taking a look at this report, read for the jury the highlighted portion.

A: "Teacher advised the undersigned detective that she poured methanol from a gallon jug."

The final point on this line of attack can be made in many ways:

Q: Can we agree you did not have all the information necessary to form your opinion?

Q: Are you now willing to change your opinion based on this report you never knew existed?

Q: Would you agree that report directly contradicts your opinion?

Q: Can we agree your review was less than thorough?

Q: Can we agree your opinion was not supported by all of the evidence?

By taking the time to explore whether the expert truly considered all relevant information and by focusing on what was not done, the attorney's questioning can go a long way to exposing an incomplete opinion and discrediting the opposing expert.

LOW RISK OPEN-ENDED QUESTIONS

It has long been taught and emphasized that an attorney should never ask an open-ended question while cross-examining a witness, let alone an expert witness. After all, one of the keys to success in cross-examining a witness is the ability to control that witness and limit the universe of answers he or she can give. There are times, however, when an examining attorney can get substantial mileage from asking a low risk open-ended question. These questions, as the name suggests, are open-ended questions where the examiner knows the answer and cannot be hurt.

Consider our example involving the expert who testified in connection with the chemistry demonstration that resulted in the student being severely burned. The trial has been proceeding for two weeks and the expert is called to offer his opinion that the teacher was not negligent. During cross, the examining attorney secures agreement from the expert that he conducted a full, fair, thorough and complete evaluation of the incident and to the extent he did anything less, it would be improper. Prior to the expert taking the stand, several witnesses testified about the happening of the incident and about the school's policies and procedures with respect to conducting demonstrations with chemicals. As the questioning proceeds it becomes apparent to the examining attorney that the expert is not fully familiar with the trial testimony that the jury has just heard. The examining attorney begins her questioning with low-risk open ended questions about the witnesses who have just testified:

Q: Who is John Katcher?

A: I don't know.

Q: Who is Raul Garcia?

A: I don't know.

Q: How about Gina Robinson?

A: I don't know.

While these questions make the point to the jury that the expert's review was not as complete as he claimed, the attorney can go further to drive the point home by working important testimony into the questions to further show the expert did not have a sound basis on which to ground his opinion. Assume John Katcher was a student in the classroom who was a witness to the event and saw the teacher pour the methanol from the jug:

Q: Before offering your opinion to this jury, would you want to know what the people who were actually in the classroom said happened?

Q: And the reason you say of course is because it would provide you with additional information with which to form your opinion.

Q: Who is John Katcher?

A: I don't know.

Q: Is he a teacher? A student?

Q: Do you have any idea what he would say about what happened in the classroom?

Q: I want you to assume Mr. Katcher testified that the teacher picked up a jug of methanol from under the counter, opened the lid and poured the methanol from the jug into the dish. Assuming this testimony to be true, is this information you would want to know before offering your opinion that the teacher acted appropriately?

Q: Why?

Q. And you certainly would have wanted to read that testimony, am I right?

The cross of an expert at first blush can be daunting even to the more experienced trial attorney. Many of the regular experts who are called to the stand have spent more time in court than most attorneys. Nevertheless, by mastering and utilizing these techniques to cross examine

experts, attorneys questioning an expert are well on their way to neutralizing the expert's testimony, rejecting it or, even better, forcing the expert to change his opinion.

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