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Expert Cross-Examination: Creating Maximum Mileage From an Expert's Mistakes

By Ben B. Rubinowitz and Evan Torgan | August 20, 2024

Cross-examining an expert witness presents one of the most significant challenges an attorney faces at trial. Experts often come to court with years of specialized experience and substantial time in the courtroom—sometimes even more than the examining attorney. Despite this, the attorney usually invests significantly more time scrutinizing the case than the expert does. This thorough preparation provides the attorney with a crucial advantage: the ability to identify and exploit flaws in the expert's analysis or report. When leveraged effectively, even minor mistakes can become powerful tools to undermine the expert's credibility and reveal shortcomings in the expert's diligence and thoroughness in rendering an opinion.

Consider the following scenario: A train collides with a car at a grade crossing. The car's driver, diverted from a major highway due to an accident, finds herself on an unfamiliar, dark road. She stops near the railroad tracks and only realizes her position once the crossbuck arm descends onto her car. As a train approaches, the engineer, familiar with his route, spots a reflection at the crossing from about 1200 feet away. Though he suspects it might be a car, he does not immediately apply the brakes. The driver exits her vehicle, touches the crossbuck arm, re-enters her car, and attempts to pull forward. The car and train collide, resulting in the driver's death, the death of five train passengers, and injuries to numerous others. During the trial, the plaintiffs argue that the train engineer was negligent for failing to slow down, while the defense blames the driver's lack of caution.

The defense calls to the stand Foster Peterson, a renowned train expert who exclusively testifies on behalf of railroads. Peterson's expert report contains two errors. First, an illustration in the report states that the train traveled 228 feet in one second, implying an implausible speed of 155 mph. Second, the report incorrectly lists the train's speed at impact as 59 mph, whereas the event data recorder (black box) recorded it as 54 mph, and the report itself later lists it as 55 mph. Although a 5 mph discrepancy might seem minor, it highlights the engineer's failure to timely apply the brakes.

An ineffective cross-examination might address Peterson's errors head-on without first establishing their significance. For example:

Q: You prepared this illustration in your report, didn't you? (Showing the illustration)

A: Yes.

Q: You stated the train traveled 228 feet in one second, correct?

A: Yes, but that was a mistake.

Q: That would mean the train was traveling at 155 MPH, correct?

A: I made a mistake, but it doesn't change my opinion.

Q: But you wrote that in your report, didn't you?

A: Yes, and I admit the mistake.

This approach fails to effectively emphasize the significance of the error, diminishing the impact on the jury. A more effective approach involves first establishing why accuracy is crucial in an expert report. This can be accomplished by getting the witness to agree to “voice of reason” questions on the fundamental importance of precision in their report and analysis:

Q: Before coming to court you prepared a report, correct?

Q: You thoroughly reviewed the underlying facts before preparing your report, right?

Q: The underlying facts of this case are the basis of your opinion, true?

Q: You agree accuracy is critical when preparing your report, right?

Q: That’s why you took the time to proofread your report, true?

Q: And you ensured all the details were correct, right?

Q: The care you took in preparing your report is how we know what’s written in it is reliable, right?

Next, use “negative” questions to reinforce the importance of accuracy:

Q: To the extent you didn’t check your report for accuracy that would be improper, true?

Q: Overlooking important details would not be appropriate, right?

Q: Neglecting to proofread your report would not be in keeping with your own standards as an expert, true?

With this foundation laid, the examining attorney should then emphasize the significance of the error in the illustration:

Q: You testified to dedicating 49 hours of time to fully evaluate this case and write the report, true?

Q: You even prepared illustrations to support your report, correct?

Q: These illustrations are meant to support your opinion, correct?

Q: You did not exaggerate in the illustrations, right?

Q: All your illustrations are reliable, true?

Q: You stand by the accuracy of your illustrations, right?

Once the expert has acknowledged the importance of the illustrations, focus on how the error undermines the reliability of the expert’s report and opinion:

Q: You told the jury that the train engineer acted appropriately, true?

Q: One factor you considered in reaching your opinion was the speed of the train, true?

Q: You testified that the engineer was driving at a reasonable speed, right?

Q: You even illustrated the train’s speed in your report, true?

Q: That illustration was meant to help the jury understand what happened, correct?

Q: The illustration is based on factual information, true?

Q: That’s why you can assure the jury that the illustration is accurate, right?

Q: And that’s why you can assure the jury they can rely on it, correct?

Now, amplify the error and show how it undermines the expert's credibility:

Q: You have experience converting feet per second to miles per hour, correct?

Q: A train traveling at 60 mph would convert to roughly 90 feet per second, right?

Q: So, a train moving at 150 feet per second would be traveling at about 100 mph, right?

Q: That did not occur in this case, correct?

Q: If an expert claimed such a speed, their opinion would be flawed, right?

Q: You agree such an opinion would lack honesty, true?

Finally, confront the expert with the erroneous illustration:

Q: Let's take a look at Figure 12. This is the illustration you prepared, true?

Q: It shows the train traveling 228 feet in one second, right?

Q: This implies the train was moving at 155 mph, correct?

Q: Earlier, you confirmed reviewing your report for accuracy, didn't you?

A: I made a mistake.

Q: You also stated the jury could rely on your report and the illustrations, correct?

Q: Can we agree that your report is not as accurate as you initially represented?

A: I made one error.

At this point, the cross-examiner can leverage the expert's second mistake by setting up the witness once more:

Q: You just told us that you made "one" mistake, correct?

Q: Are you willing to state under oath that there were no other errors?

A: Not that I know of.

Q: This assurance is based on the thorough analysis you claim to have conducted, correct?

Q: If there were more errors it would indicate less accuracy than you've led us to believe, true?

Q: More errors would suggest that your opinion is less reliable than you've indicated, true?

The cross-examiner should then address the specific discrepancies and lock the expert into his assertions:

Q: I would like you to turn to the fourth page of your report. You listed the speed at impact as 59 MPH, true?

Q: You are representing to our jury that the speed at impact was 59 mph, right?

Q: You determined that speed after carefully reviewing the black box data, true?

A: Yes.

Q: You studied the data carefully to come up with that number, true?

Q: And the black box data supports this figure?

A: Yes.

Q: You are confident of that, correct?

Finally, confront the witness with the conflicting data and information:

Q: Let's take a look at the actual black box data. It says the speed at impact was 54 mph, doesn't it?

Q: Let's also look at your page 26 of your report. There you wrote 55 mph, didn't you?

Q: The truth is you did not take the time to carefully proofread your report, true?

Q: Your report conflicts with the black box data, true?

Q: Your report contains internal inconsistencies, right?

Q: Earlier, you assured the jury that they could rely on your report, true?

Q: In reality, you presented inaccurate statements to the jury, true?

Effectively cross-examining an expert witness requires more than just identifying errors—it requires a strategic approach designed to magnify the significance of the flaws in the expert's analysis and testimony. By carefully laying the groundwork, emphasizing the critical importance of accuracy, and systematically addressing discrepancies, an attorney can dismantle the expert's credibility and cast doubt on their opinions. The goal is not just to highlight mistakes but to illustrate how these errors compromise the reliability of the expert's entire report and conclusions. In doing so, the attorney can effectively challenge the expert's authority and significantly weaken the expert's impact on the case, ultimately steering the jury towards a more informed and just verdict.

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