There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called experts.

—Keegan v. Minneapolis & St. Louis R.R., 78 N.W. 965, 966 (Minn. 1899), quoted in Chaulk by Murphy v. Volkswagen of America, Inc., 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting)


In my former career as a full-time trial attorney, plus the additional cases I have been fortunate enough to try since leaving full-time practice for academia, I have been involved in hundreds of cases, including several dozen trials, in which expert witnesses played key roles. In addition, during almost two decades of teaching, researching, and writing about the law, I have focused my “scholarship” (as we law professors like to call it) on expert witnesses. Put another way, expert witnesses have dominated my professional life. I have developed strong views about them.

From my perspective, it has become far too commonplace for experts to shape their testimony to please the attorneys who retain them. The opportunity to earn substantial fees, but only as long as the expert’s opinions match those needed by the retaining attorney, is a force that exerts substantial influence—even on the experts who try to remain true to their disciplines and their oaths as witnesses. In many instances, the opinions of experts are, to put it bluntly, wrong and therefore not only unworthy of respect, but also potentially very dangerous in a system designed to be a search for the truth.

Of course, there are many cases where opposing experts reach opinions that are at least arguably reasonable. Sometimes this occurs because the question that the opposing experts are asked to address is one that does not have only one correct answer or is stated in terms imprecise enough to allow for differing, but still reasonable, answers. In a condemnation case, what is the market value of the condemned property? In a personal injury case, how long can we expect the plaintiff to live, and what will be the extent of her lost wages and medical expenses over that period of time? In a torts case, were the defendant’s actions “reasonable”?

Under those circumstances, where opposing experts reach different, but both sensible, opinions, each side’s expert (with the help of the attorney who retained him) will try to convince the jury that his opinion is more sensible than the one propounded by the opposing expert. In such disputes, the degree to which a lawyer can effectively undermine the opposing expert’s opinion will be
limited, and the techniques you can use for that purpose will be relatively moderate. Nonetheless, this book will help you mount the strongest challenge you should pursue.

But there is another type of dispute between opposing experts, where this book will be of even greater use. In this type of dispute, the critical question addressed by the experts has only one correct answer. A simple example: In a traffic accident case, the plaintiff calls an accident reconstruction expert who swears that the head-on crash occurred on the plaintiff’s side of the road. Then the defendant calls an expert who swears that the accident occurred on the defendant’s side of the road.

In this second situation, it is impossible for both experts to be right. The cars crashed on the plaintiff’s side of the road or the defendant’s side of the road. One of the experts is right. The other is wrong. It is just that simple. And the jury’s verdict will often turn on its determination of which expert is right and which is, therefore, wrong. If there are good grounds to prove that the adverse expert testifying for your opponent is wrong, it is part of your job as a lawyer to convince a jury that this is so. That is a daunting, and critical, assignment. After all, even when the adverse expert is wrong, he is still knowledgeable about his field, articulate, and, often, cunning in his ability to fend off attacks. It is no small matter for a lawyer to destroy the credibility of such a witness, even where the witness is wrong. But it can be done.

This book, *Opposing the Adverse Expert*, will give you the strongest guidance you can find for both types of case. It will take you step-by-step through the process in great detail, while explaining your opportunities and limits under both under the federal discovery rules and varying state rules.

First, you need to reach a thorough understanding of the adverse expert and his analysis, before you can decide the most realistic and effective way to challenge it. So Phase I of your work is to gather as much relevant information as you possibly can about the adverse witness and his possible testimony in preparation for taking his deposition. Chapters 2 through 7 of this book will advise you in detail on what you need to learn and the best ways to accomplish this—through the formal discovery system and outside it.

In Phase II, you will take the bull by the horns and depose the adverse witness. Chapter 8 will help you put together everything you know so far about the witness and the case in preparing for this critical step. Chapter 9 gives you advice on how to capture
what you need on the deposition battlefield. By reviewing the sample expert deposition in Chapter 10, you can see these techniques in action. In Chapter 11, you will learn how to decide your post-deposition attack strategy based on all the information you have obtained.

One of the decisions you may need to make is whether the adverse expert’s opinion is so flawed that it warrants a pretrial motion to disqualify the expert. The main chapter of Phase III, Chapter 12, contains a series of questions you should ask about the adverse expert, to determine whether to file such a motion. It then explains how to file such motions. Chapter 13 deals with motions to exclude or limit an adverse expert’s testimony on procedural grounds (disclosure or discovery rule violations).

In Phase IV, we will shift the focus to the trial. Chapter 14 will help you select the most receptive jurors for your attack. In Chapter 15, you will learn how to undermine the adverse expert in your opening statement. Chapter 16 covers attacking their expert in your case-in-chief (and rebuttal).

Phase V is devoted to your cross-examination of the adverse expert. Chapter 17 addresses the basics of preparation for a successful cross. Chapter 18 discusses how to attack the adverse expert’s analysis. In Chapter 19, you will find a wealth of ideas on how to undermine the adverse expert’s credibility (including competence). You will modulate the type and degree of attack according to the egregiousness (or lack thereof) of the adverse expert’s opinion, so these chapters offer guidance that covers the range of possibilities.

In Chapter 20, you will learn how to proceed in the relatively rare event that mid-trial expert discovery turns out to be needed. By contrast, you will call upon the teaching of Chapter 21 every time you cross-examine an adverse expert, because it applies Irving Younger’s famous “Ten Commandments” to the topic. Chapter 22 closes Phase V with a sample cross of an adverse expert.

Phase VI takes you to the end of this book. Chapter 23 discusses arguing against the adverse expert in closing. Chapter 24 contains advice on appeals regarding expert witnesses. Chapter 25 offers my final thoughts.

Doing battle with an adverse expert is tough work. To do it effectively, you need to devote substantial time and energy to the endeavor, and you need to have guts enough to take risks—carefully measured risks, to be sure, but risks nonetheless. At the
same time, this challenge offers the chance for you to advance your client’s case and pursue justice. If it is not effectively attacked, expert testimony that is flawed, misleading, or just plain bogus might very well lead to an incorrect, unjust verdict. If you effectively attack it, the jury is much more likely to reach the correct verdict. Thus, an adverse expert presents you with the opportunity to make a difference. Go get ’em!