Don’t Sit On the Bayonet: Cross Examination of Expert Witnesses

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John Wigmore, that well-known authority on evidence, also wrote about getting the evidence. He said “Cross-examination is the greatest legal engine ever invented for the discovery of truth.” Most of us have heard that. But he wrote more about the sharp ends of cross-examination. He also said, “You can do everything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it.” It is those skills that this Paper addresses.

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Some cases and lawyers depend solely on experts. They have been dueling in court for 100s of years. Other cases do not depend so much on the expert, but you have to have one—because the other side has one, and you have to blunt his or her attack on your case. Whether you think experts help, or whether you think as some do, that while they really cannot help you win the case, they might help you not lose it, decide what kind of case you are about to try, and handle the experts accordingly during cross-examination.

Talk to your colleagues. Learn about their experiences, hopefully with this expert. See what they have to say. What worked? What did not work? That’s the whole point of all our professional associations. Join them and use them to your greatest advantage.

Also, it does not hurt to take the time to read and understand some of the better works in this area:


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(accessed July 6, 2015)


(available at http://www.amazon.com/Art-Questioning-Thirty-Examination-
PAPERBACK/dp/1584778636/ref=sr_1_1?s=books&ie=UTF8&qid=1436218710&sr=1-1&keywords=Peter+Brown+The+Art+of+Questioning) (accessed July 6, 2015)

Younger, *The Art of Cross-Examination*, ABA Monograph Series No. 1 (ABA Section on Litigation 1976)

Finally, if you learn more by doing than reading, try as many cases as you can. If your practice does not lend itself to that, and it often does not as so many cases are simply too big to try and usually thus settle, attend practicum seminars and review real case cross-examination. Or, if you are bold enough, associate with lawyers who may not be litigating multi-million dollar cases, but who do go to court all the time. A good domestic relations
lawyer in our jurisdiction, for example, will go to court more times in a week than many of us go
to court in a year. Go cross witnesses, including experts, for them. Get your training where
you can, and often without the benefit of depositions. That will fray your nerves, but it will
surely hone your cross skills.

In any event, there are some well-known tips to be ready to conduct a good and
thorough cross of the opposing expert at trial—although the preparation begins well before
then.

A. Before Trial

1. Lay your foundation in the discovery deposition that you take.

   First, make sure you get all of the expert’s opinions so you know what she is
going to say. Leave no room for added opinions later. Get each opinion. Get all the facts
that support the opinion.

2. You don’t necessarily have to cross the expert in his deposition.

   Second, decide whether you want to do much cross examination in the
deposition or just “get the facts and opinions.” If you cross the expert then, you reveal much
of your cross. If you hammer her too much, moreover, she might be withdrawn and replaced,
and then you lose the effect of hammering the opposing expert witness in front of the jury.
And her replacement may be less vulnerable. How you cross is certainly an early tactical
decision. Of course, be prepared for the expert to add or expand his opinions at trial. If he
goes too far, you might be able to exclude some of them based on what he said at the deposition.

3. **Research the expert.**

Obviously, **know the expert.** Do as much research on the expert as you can. Google is a great place to start. But, be sure to ask your own expert(s) about the opposing witness. Some expert communities are small, and your own witness can be quite helpful. Contact lawyers in your case area and find out if they have anything on the expert. Often, lawyers see the same experts repeatedly, and some develop extensive dossiers on the expert or his firm, if he is part of a stable of experts.

4. **Read the expert’s prior testimony yourself.**

To this end, **read his prior testimony.** Prior testimony, whether cross or trial, is not difficult to get. Contact your colleagues and ask for prior testimony. And, then actually read it. Experts, like all of us, have faults. If you know about it in advance, you can know his faults and use them against him.

5. **Know your case better.**

It is your client’s case. So, obviously, **know your own case better than the opposing expert.** If you know your case better, then you can detect (and exploit) flawed testimony and missteps as soon as the expert makes them. Not every expert prepares thoroughly, and your knowledge of the case will suggest great areas of cross-examination. They are busy too, and if they skimp on fact prep, then you must use it against them.
6. **Know what the expert did, said, and wrote in your case.**

   **Know the expert’s work in the case and his written report,** if he prepared one. Find the errors in his work. Also, find fallacies or misapplied concepts. It is common for some experts’ work to rely on misleading the jury, however subtly, or misapplying existing data or standards or tests. In other words, they often try to compare apples with oranges, when no such comparison is correct or fair. Also, find out how much, if any, of the report the opposing lawyer wrote.

7. **Lean on your own expert to prepare.**

   Use your own expert to help you get ready. Again, unless you are well versed in some “expert” field, do not hesitate to call on your own expert to educate you and specifically help with developing good cross material.

8. **Have the hot and supporting documents ready.**

   Have all your cross documents ordered and ready to go. Another obvious point. But we have seen lawyer after lawyer fumble with documents and appear strewn in his presentation and effectiveness. Unless that’s your goal (and some do want to appear more Colombo than Matlock), make sure that you are organized to perform a surgical-strike cross, and not a time-consuming sledgehammer one.

9. **Prepare your “first cross.”**

   Outline your “first cross.” Because there are two crosses: the one you prepare and the one that emerges at trial. Your actual cross will likely be a hybrid of your prepared
and your impromptu “second” cross. Of course, you can also prepare some anticipated key points as well. You should include in your prepared cross all points that hammer the expert.

B. At Trial

1. Listen.

Listen to the expert on direct. You can bolster your prepared cross. And you can create the impromptu cross from any errors, missteps, or hyperbole that the expert tries to foist on the jury.

2. To cross or not to cross?

Consider whether you should cross at all. Most of us are not that brave. But, while it is not likely, if an opposing expert does not hurt your case in the least, do not waste the jury’s time or the Court’s or your own with an unnecessary cross. If your only cross is to minor points, consider skipping them as well. Do not allow an expert to use your time merely to repeat and reinforce.

3. Expect contact with the enemy and be flexible.

Be flexible. Do not be surprised if the expert does not answer as you expected. As the old Prussian General said, always remember that “no plan survives contact with the enemy.” Or as Mike Tyson put it, “everyone has a plan—until they get punched in the face.” So, if you get punched in the face, and you know it hurts, do not let it show. First, rein him back in. Second, be calm and collected. Be flexible and get back into your cross and continue

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discrediting the witness. Indeed, expect the expert to score points here and there, or else wonder why the other side even called him.

4. **Short and sharp.**

   Keep your cross crisp and short. Your job is to discredit the expert’s testimony. It is not to give her a platform to shine and teach the jury her theory. Our rule of thumb is to cross for no more than one hour, and to keep tight rein over what the expert talks about. If you do too much more, you risk losing the jury—especially if the subject matter is more dry than exciting. Some recommend you focus on only three or four key points.\(^5\) However many you decide to use, make them tight and as irrefutable as possible.

5. **Make all of your critical points.**

   Be sure to make all of your “must make points.” Do not leave any out, especially if you need them for your closing. Here, a checklist is helpful and do not rest your examination until you are sure you have checked off each box. Enlist a paralegal or associate on this point.

6. **Drop your nuke if you have it.**

   Use your nuclear cross bomb if you have it. Rarely, but sometimes, you will discover a fact or scenario so damaging that maybe it is all you should use for cross—and then sit down.

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Example (with a helicopter “expert”):
Atty: So you are an expert helicopter pilot?
Expert: Yes, I am.
Atty: Ever crash?
Expert: Yes.
Atty: And that was because you ran out of gas?
Expert: Yes.
Atty: No more questions for this expert.

Example (for an “expert” police officer when credibility is the only issue):
Atty: Where did you work from 2001 to 2008?
Officer: Smith County Police Department.
Atty: You don’t work there anymore.
Expert: Yes.
Atty: Why’d you leave?
Expert: I was fired.
Atty: In fact, you were fired for committing perjury on the witness stand.
Expert (after some hem hawing): Yes.

If you do have the good and rare fortune to nuke an expert, then sit down. Do not let the explosion be lost in trivial and far less “nuke-like” questions. You really can only destroy him once.

7. Unless you have nuked him, make him your witness where you can.

Co-opt as many of the expert’s opinions as you can for use in your case. Where he agrees with your expert, point it out. In closing, it leads to “Even Defendant’s expert agrees with . . . .”
Example: You found the coefficient of friction to the same as Mr. Jones, our expert. And you found the yaw distance to be 27 feet, also the same number Mr. Jones found.

8. Don’t try to outpunch Mike Tyson in a head-to-head brawl.

Don’t play too much in his bailiwick. Unless you are trained in the same field as the expert, and that’s rarely the case, consider the wisdom of going toe-to-toe with the witness on the hardcore substance of his chosen field. You just might not win that tussle. Many lawyers prefer to chip away more obliquely, unless of course you have a blatant subject matter error.

9. Exploit professional and character weaknesses.

Exploit the expert’s known weaknesses. For some, that is arrogance. We have learned over the years that juries hate arrogant witnesses. If the witness is arrogant, lead him down that path. Let him show the jury just how arrogant. For others it might be a penchant for long-windedness. Let him ramble. A bit. Then cut him off.

10. Be professional and humble as you work.

Don’t you be arrogant. Be professional. Be courteous. Be extremely confident. Jurors like professionalism. They like prepared lawyers. They want to see the lawyer they would hire if the need arose. Be that lawyer.

11. Let the witness lie, if he must.

There is an old trial saying: “I’ll trade you my two eye witnesses for your one liar.” Juries know. They don’t like it. If you have the good fortune to have a lying expert, or at least
one who is not so skilled and artful at it as his peers, then let him lie. It will set up your redirect quite nicely.

12. **Control the flow of all his testimony.**

**Tell the expert “why.”** Do not let the expert spend any time at all telling you “why.” That defeats many of the points of cross. Much of this goes to form and format of your cross technique. Be skilled, especially with a practiced expert, at shutting down the runaway or overly talkative expert. Many general texts on examination and cross discuss how to rein in a witness who won’t answer the question or won’t shut up. Study them in your venue, and be prepared to use them with your opposing expert.

13. **Control the question and the response.**

**Control all the questions and all of the answers** that you know are true and you must have out of this witness. On cross, you are the master of the words. Get the answer you want by using the words you want. Do not let the expert frame the question or the answer on cross. Do not ask for narratives and do not ask open-ended questions.

14. **Do not let an expert self-rehabilitate.**

**Do not let the expert ever rehabilitate herself.** If you have flayed the witness, do not let her un-flay later. Experts are trained to correct their missteps. Take charge in the cross and do not let her do that. If she does, use the cross to point out that the correction was to undo the hurt her prior testimony just did.
15. **Keep the expert in cross.**

Do not let the expert attack your expert during your cross. Do not let the expert witness advocate. Do not let her teach. Do not let her attack your witnesses. Do not let her do the things you want your expert to do in direct or on cross.

16. **Bolster your own expert if you can.**

But, don’t be afraid, if you can get away with it, to bolster your own witness during the cross. That does not make you a hypocrite in connection with the preceding Tip No. 15; rather, it makes you creative.

*Example (in case with dueling wreck reconstructionists):*

Attorney: *Mr. Smith, you said our expert’s math and numbers were off by XXX feet and XXXX seconds?*

Expert: *Yes, I did.*

Attorney: *Now, Mr. Smith, you graduated from Podunk University, by way of Johnsonville Community College first?*

Expert: *Yes, I have degrees in math and physics.*

Attorney: *But, now you are here in court, saying that Dr. Sam Bryan, our expert, who graduated with honors from Georgia Tech, would have *failed* math and physics had he gone to Podunk University?*

Expert: *Uh . . . .*
17. **Avoid new and untested hypotheticals.**

Generally, **avoid new hypotheticals** that you did not carefully construct and test thoroughly during the discovery deposition. Most hypotheticals are the bread and butter of a good and slippery expert. It’s their moment to shine, so do not give them that moment.

18. **Humor can work, but do it carefully.**

Some **humor** might work. Some hyperbole. But do not ever be unprofessional or discourteous.

*Example (where jury was in economically distressed area):*

Atty: You and your wife, Mrs. Johnson, are disclosed as experts in this case?

Expert: Yes, we both are.

Atty: Both of you went to the scene on April 10 to inspect where the SUV rolled?

Expert: Yes we did.

Atty: How long were you there?

Expert: Most of the day, so about 8 or 9 hours.

Atty: And your billing rate for that day was $600 per hour.

Expert: Yes.

Atty: And your wife’s billing rate?

Expert: I think it was about $500 or so.

Atty (with properly emphasized inflection): Well, Dr. Johnson, April 10 was **darn sure a nice day** for the Johnson family.
19. **Avoid being petty.**

Of course, **avoid being petty.** A great tale is told by Frances Wellman about a superior, witty, and colorful advocate of his day, John Philpot Curran,⁶ who used a bit of silence to emphasize a point in a cross. But, even the very best can go one quip too far, and Curran said sharply to the witness: “There is no use asking you questions, for I see the villain in your face.” The witness, even sharper, replied, “Do you Sir? I never knew before that my face was a looking-glass.”⁷ It is that one question too far that often blows up.

20. **Money:** “**Grab that cash with both hands and make a stash.**”⁸

Let’s talk about **money.** The jury is out on whether the amount of money or the billing rate of an expert helps or hurts her. We know lawyers who swear by the former. The Johnson example, above, surely helped—as the Johnsons made about half in one day that the average juror in the community made in one year. And, no expert is that good. But, other studies say other things. A study we heard about in an ABA meeting many years so said many jurors think if the expert is highly paid it is because he is just that smart. But, again, there is a limit to that. We also show, for example, that one expert and firm we know has been paid over $50 million over the years to appear for one company. The number goes way up when you add

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in all the other peer companies for whom he has testified, and for whom it might be said he has an industrial bias. So, use money carefully on bias. It might work. Or it might convince the jury that the expert is really good.

21. **Do not forget your best Daubert points.**

Okay, so you lost your Daubert motion. But, you made great points in the Motion. And the judge denied it, most likely thinking most of the points are for cross. We call those judges “let’r inners.” So, do not forget your good Daubert points. The jury has not heard them yet. They will still be new and fresh to them. But, remember, the expert knows your thoughts on those points too, having been thoroughly insulted by your Daubert brief. And will have a “canned” response, maybe. So corral the expert and rein him in as needed. On that note, you can likely get your own expert to educate you about the potential “canned” come backs, and have your own response ready to go.

22. **Expert Qualifications.**

In this day and age, it is rare to see a facially unqualified expert disclosed by one side or the other. Both usually have great resumes. With all the right boxes and associations and experiences set out nicely in all the right fonts. But do check the resume and ask about for well-known flaws in that resume. And, applying this whole Daubert “fit” idea, look even deeper. Find the flaws or the lack of fit between the expert and the case. We worked on a case recently in which the disclosed security expert had one of the most stellar resumes we had ever seen. At first glance, she looked unstoppable. She had even helped protect the President of the United States. It is hard to beat the words “Secret Service” on the resume. But, we felt
that the fit was not right. Our case involved a pub in a Mall. The Secret Service can lock down buildings when the President appears, it can shut doors, it can restrict people flow and traffic, and it can shut down the entire area. A pub, however, has it much harder. It has to secure its patrons with nothing shut down, all the doors are meant to be open, all traffic is allowed in and out, and strangers are expected (and wanted) to come and go at will. The cross on this expert was devastating. In fact, we did it in a Daubert motion and they settled. It would have worked just as well at trial. Fit in qualifications, as fit in methodology, is equally important.

23. Incompleteness: Don’t bother me with the facts.

Surprisingly, either through hurry or sometimes by design, some experts are simply incomplete. They omit key facts. Or they brush off key facts. Or they mislead on key facts. We are finding more and more that some experts really do not want to be bothered with eyewitness testimony, for example. Or, they do that apples equal oranges thing. And so on. Watch for that, and stick them in the eye with it. It is one thing to explain away a fact, it is another altogether to ignore it completely.

Example (product disparagement case):

Attorney: So the gist of your opinion is that media reports greatly influence verdicts against car makers?

Expert: Yes, that is what I am saying.

Attorney: And you rely on the $106 million GM fuel tank verdict as one case in point to show that year old media stories on Dateline influenced the jury?

Expert: Yes, indeed.
Atty: Did you talk to any of the lawyers on either side in that case?

Expert: No.

Atty: Did you read the trial and pretrial transcripts?

Expert: No.

Atty: Did you know the jurors were selected over weeks through individual sequestered voir dire?

Expert: No.

Atty: Did you know that any potential juror who had even heard the word “Dateline” was struck for cause?

Expert: No.

It only got worse from there. The expert (and he was an eminent expert in his field), simply did not know the facts and had not factored them into his opinion.

24. **Assumptions made, or wrong, or both.**

Experts who make too many assumptions are vulnerable. Remember the old joke about two economists stranded on a desert island? The first one says, “What do we do?” The second one pipes in, “First, we assume. . . .” Of course, economists often assume, and they may be right to do so. Other experts, however, can get into trouble if they take their assumptions too far. Or if they are just plain wrong. Or if those assumptions rest on other facts or testimony that are wrong. It is a cascade of error when that happens.
25. **Bias or, I can be objective even if the company pays me $50M a year.**

Bias, of course, is one of the fundamental areas you cross on, if you have it. It can be, again, about the money. We know some experts who have made 100s of millions of dollars off one industry. They might be biased. Or they just might be really good. Depends on your viewpoint. We know experts who regularly play golf with their hiring attorneys. That might be par for the course in the real world, but it looks funny to the juror. We knew one expert who was godfather to the son of the General Counsel of a major company for whom he regularly appeared in court. That too looked funny. We saw another case where the wife of the expert witness was part of the defense team putting the expert witness up on the stand? We thought that looked funny and unwise. Bias can come in many forms. Dig it out and use it if you have to, especially when it is an expert you can’t go toe-to-toe with in some arcane field.

27. **The fit of the methodology.**

Most of our *Daubert* cases end up being about methodology and the fit of the work to the opinions given. As we noted earlier, most experts in good cases have decent qualifications. And if you spend too much time on them, you heap credit on the witness. And, most of those experts (but not all) do the actual work (or most of it) to get the job done. Where they are failing is in the fit of the work done to the opinions given. That part of the job that requires them to add the work up and reach the conclusion. That is what can get the most renowned expert *Daubert*-ed out, or flayed on cross at trial. Why? Several reasons come to mind. First, they go too far. Even the most prominent brain surgeon cannot opine well on OB surgeries. That again is a “qualifications fit” error. But even within the expert’s area, there
are opinions that are beyond him or the precise work he did on the case. The work has to lead straight and inexorably to the stated conclusion. If it is too circuitous, then he might have a “fit” problem. Second, he might have done the work, but it was not really the right work or was misleading. Third, his methodology just does not let you take A and B and make it equal C. This, we find, is where most courts are Daubert-ing experts. And, if he is not Daubert-ed out, then that too is an area you need to use to attack his testimony. You do, of course, have to be clear and concise so the jury “gets it.” And they usually do, as they look for common sense pros and common sense cons to any spate of testimony.

28. **Impeach with authoritative treatises.**

It is an oldie, but always a goody. Use authoritative treatises to impeach the expert, if there are any. If the expert would not admit any were authoritative, point that out. That he might not recognize any authority other than his own might well play into the other tip about arrogance.

29. **Primacy and permanency.**

Everyone knows about primacy. You always want to start sharp and crisp. But, if possible, you also want to **end on powerful note.** Avoid a lackluster or trivial closing to your examination, if you can avoid it. If you have kept your cross short and succinct, a strong final set of questions will be well remembered.
30. **Re-Cross.**

It should not be routine. And it should be as careful and as reasoned as the decision to cross in the first place. Only re-cross you if you can truly deliver some solid blows to the expert. Oblique or weak points will be lost on the tired jury. And move to the re-cross quickly, literally brushing the elbow of your opposing counsel as she sits down. Get up, attack briefly but powerfully, and sit down.

31. **The Master of None.**

If the expert is just too well read, too broad, and too overly an expert in everything, point that out. Remind the jury of the old not-so-flattering adage: “Jack of all trades, but master of none.” And experts are supposed to be masters. If the other expert can testify about too many areas of expertise, then you can get the jury to question just how much of a master he really is.

Finally, do not end up in the online list of cross-examination bloopers:

**Q:** Doctor, before you performed the autopsy, did you check for a pulse?
**A:** No.
**Q:** Did you check for blood pressure?
**A:** No.
**Q:** Did you check for breathing?
**A:** No.
**Q:** So, then it is possible that the patient was alive when you began the autopsy?
**A:** No.
**Q:** How can you be so sure, Doctor?
**A:** Because his brain was sitting on my desk in a jar.