

## Cross-examination of expert witnesses

By: F. Dennis Saylor IV and Daniel I. Small ◉ August 30, 2018

Cross-examining an expert witness can be quite challenging. By definition, the person you are examining knows a great deal more about the subject than you do. There are landmines everywhere.

Still, if you pick your spots carefully, you may land hard blows. But your cross must be carefully thought out and well prepared. Remember that, most of the time, no one can better help you prepare for cross-examination of an expert than your own expert.

Here are some typical areas of expert cross-examination:

- Lack of qualifications (for example, a physician who is not board-certified in a particular specialty);
- Lack of experience (an expert may have an impressive CV, but little real experience in the specific issue in the case);
- Bias (for example, the expert always testifies for medical malpractice plaintiffs or defendants or for the other side's law firm);
- Financial interest (for example, the expert advertises his or her services for a fee);
- Faulty data/lack of data;
- Incorrect assumptions of fact;
- Faulty reasoning;
- Prior inconsistent statements;
- Opinions that are contrary to statements in well-regarded treatises.



*Once you have made your points — whether triumphantly or not — sit down.*

As a matter of self-preservation, if nothing else, you should remember the following rules:

1. Never attack an expert witness in his or her area of expertise unless:

(a) you have no other choice, and you are appropriately prepared, or

(b) you are confident you can score points.

2. Side-stepping an expert's opinion by attacking its factual premises is usually preferable to hitting the opinion head-on.

*So, Mr. Expert, your opinion is based on assumption X, correct? And if it turns out that X is not true, then your opinion would no longer be valid, right?*

3. Don't attack everything, unless you have no other option. There may be parts of the opposing expert's report or opinion that you can live with, or that you can even turn to your advantage.

4. Sit down and shut up. Once you have made your points — whether triumphantly or not — sit down. Don't keep going in the hope of finding the magic bullet. The more time you give an expert to talk, the more he will expand, explain and bolster his original testimony. One of the cardinal rules of cross-examination is to avoid repeating and reinforcing the direct examination; that rule applies, in spades, with experts.

5. Most of the time, you'll have an expert, too. You do not have to "destroy" your opponent's expert on cross, and it is rare that you can do so. Just score the points you can, and give your expert room to make her points when her turn comes.
6. Remember the first rule of cross-examination: "First, do no harm." It may be more important to avoid making your case worse than to achieve anything positive.

*Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.*

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