

PRACTICAL TIPS ON CROSS EXAMINATION OF EXPERT WITNESSES

BY RICARDO G. CEDILLO

Cross-examination of an expert witness is one of the most critical components of a case. How well or poorly counsel performs in examining an opponent's expert often determines who wins and who loses. With that in mind, it is important for the practicing attorney to have an understanding of basic concepts related to cross-examination of experts. While there have been numerous articles written on the subject, this article, in addition to providing some of those guidelines, will attempt to add some more insight into what this author considers when cross-examining expert witnesses.

First, we will look at the law governing the admissibility of expert opinions. Second, a practitioner must be mindful of the rules related to cross-examination of witnesses and professional conduct. Lastly, with the basics in place, this article will provide some practical suggestions for a successful cross-examination.

A. GENERAL LAW GOVERNING THE ADMISSIBILITY OF EXPERT OPINIONS

Recognizing that "professional expert witnesses are available to render an opinion on almost any theory, regardless of merit," judges are directed to act as "gatekeepers" for all expert testimony.¹ A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and reliable.²

Qualification of Experts

Rule 702 of the Texas and Federal Rules of Evidence allow expert testimony in scientific, technical or other specialized areas provided the witness is qualified as an expert by knowledge, skill, experience, training, or education.³ Generally, trial judges have broad discretion in determining whether to allow a witness to offer expert testimony and may limit the scope of that

testimony.⁴ To determine whether an expert is “qualified,” trial courts must make certain that those purporting to be experts actually possess expertise on the subject about which they are offering an opinion.⁵ However, Texas courts have found it difficult to apply definite guidelines for the level of “knowledge, skill, experience, training or education” a person must possess to qualify as an expert on a particular topic.⁶ In fact, there is no “bright-line” test to determine whether a witness is qualified to testify as an expert.⁷ As one Texas Court of Appeals summarized it, in determining whether a particular witness is qualified to testify as an expert:

[s]pecialized knowledge of the specific matter about which his expertise is sought, which qualifies a witness to give an expert opinion, may be derived entirely from a study of technical works, specialized education, practical experience, or varying combinations thereof; what is determinative is that his answers indicate to the trial court that he possesses knowledge that will assist the jury in drawing inferences regarding the fact issues more effectively or reliably than the jury could do unaided.⁸

Thus, for an effective cross-examination of an expert on his qualifications, a witness’ “knowledge, skill experience, training or education” should be examined separately on every area that the opinion is offered.

Relevance

Under Rules 401 and 402, the evidence must be relevant.⁹ In other words, the evidence must “fit” the issues and must be “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.”¹⁰ Thus, any expert testimony that does not relate to any issue in the case is not relevant, and, therefore, will not assist the jury.¹¹

Reliability

The reliability test first enunciated in *Daubert* was codified in the 2000 amendments to Rule 702 of the Federal Rules of Evidence which now require that (i) the expert testimony be based on sufficient facts or data; (ii) the expert’s testimony be the product of reliable principles

and methods; and (iii) the expert apply the principles and methods reliably to the facts of the case.¹² Likewise, the Supreme Court listed four nonexclusive factors in *Daubert* that the trial court may consider in assessing reliability.¹³ The list is not exclusive, and district courts applying *Daubert* have broad discretion to consider a variety of other factors.

The Texas Supreme Court in *Robinson* adopted the four factors in *Daubert* as well as two other factors in assessing reliability: (i) the non-judicial uses that have been made of the theory or technique; and (ii) the extent to which the technique relies upon the subjective interpretation of the expert.¹⁴ Reliability is an admissibility issue for the trial court, not a weight-of-the-evidence issue for the fact finder. In *Helena*, the Texas Supreme Court explained the process as follows:

. . . *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it will have a reliable basis in the knowledge and experience of the discipline. In *Robinson*, we identified six nonexclusive factors to determine whether an expert's testimony is reliable and thus admissible. But in *Gammill* we recognized that the *Robinson* factors may not apply to certain testimony. In those instances, there still must be some basis for the opinion offered to show its reliability, and, ultimately, the trial court must determine how to assess reliability.¹⁵

While it is the court's responsibility to decide whether a particular expert's testimony is admissible, it is the responsibility of counsel opposing such expert testimony to seek out the weakness in that expert's opinions. Thus, in order to properly attack the credibility of any expert witness' testimony, it is important to assess the expert's opinions with those factors set forth in *Daubert*, *Robinson*, and their progenies.

B. RULES OF CROSS EXAMINATION & PROFESSIONAL CONDUCT

Along with the rules governing admissibility of expert opinions, an attorney must be mindful of the cross-examination differences in state and federal courts as well as the rules regarding professional conduct.

Rules of Cross-Examination

Fortunately, in Texas state courts, “[a] witness may be cross examined on any matter relevant to any issue in the case, including credibility.”¹⁶ As the Texas Supreme Court has said, “[c]onsiderable latitude is allowed in cross examination, and it has been said that anything calculated to bias a witness is proper testimony to enable the jury to determine the extent to which his evidence can be relied upon.”¹⁷ When practicing in federal court, however, the Rules regarding cross-examination are more narrow.

Under Rule 611(b) of the Federal Rules of Evidence, “[c]ross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.”¹⁸ While the federal rule is more stringent, there is an important caveat. The second sentence to Rule 611(b) states that “[t]he court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.”¹⁹ Therefore, the federal rule “allows, but does not require, the district court to permit cross examination that exceeds the scope of direct examination.”²⁰

Rules of Professional Conduct

In addition to the Rules of Evidence, an attorney must adhere to certain ethical standards. Under Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct, “[a] lawyer shall not:

- (1) habitually violate an established rule of procedure or evidence;
- (2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness; . . .
- (4) ask any question intended to degrade a witness or other person except where the

lawyer reasonably believes that the question will lead to relevant and admissible evidence.”²¹

The trial court has inherent power to discipline counsel for improper trial conduct and to refer counsel to the appropriate authorities to answer for unprofessional conduct.²²

C. TIPS ON CROSS-EXAMINATION OF EXPERT WITNESSES

Perhaps the best known tips for cross-examination were prepared by the late Irving Younger in his *The Art of Cross-Examination*.²³ While discussion of each of his “ten commandments” in relation to cross-examination of experts is beyond the scope of this article, several of Younger’s points deserve comment. Further, there are a few additional items one should consider when cross-examining an expert witness.

1. Be Prepared. Advance preparation is essential to a successful cross-examination. In fact, one should be so prepared that he or she can cross-examine an expert witness with nothing more than one 3 x 5 index card.

Attorneys often clutter their table or podium with stacks of notes and boxes of material. When compared to the expert with little or nothing in his or her hands, this gives the jury the impression that the expert knows more than counsel. To remedy that situation, you must be familiar enough with the expert and the subject testimony to be able to refer to a small index card as your only guide for cross-examination. While this may seem like a very difficult task, with a lot of preparation and practice this can be accomplished.

First, before reaching the courtroom, you must investigate the expert’s background. Take time to review prior depositions, reports, affidavits, articles, news pieces and litigation involving the expert. Further, to the extent you are using exhibits or electronic media, practice your examination to make sure everything is in order. Second, while it is important to prepare an outline (and eventually summarize the areas of inquiry on your index card), one of the most

critical elements of preparation takes place immediately before you begin your cross-examination. Remember to listen and take notes on your index card during the direct examination so that you can use that testimony during your cross. Lastly, time permitting, obtain and review a copy of the court transcript before proceeding with your examination. That way you can review the testimony, focus your questioning of the expert and avoid possible rehash of direct testimony.

2. Be Flexible. As important as it is to prepare for the cross-examination, it can be equally as important to adapt to changing circumstances in the courtroom. An attorney should be flexible as the cross evolves and must be ready to discard area and lines of questioning whenever the attorney senses the expert is too well-prepared and knowledgeable.²⁴

3. Be in Control. Control of the expert on cross is paramount. In fact, success of the cross-examination often hinges on the examiner's ability to control the expert witness. Usually expert witnesses have considerably more experience than the average lay witness so they can often be much more difficult to handle. To remedy that problem, most practitioners use leading questions to help with control.²⁵ While leading questions can be helpful, perhaps a more effective approach is to establish ground rules with the opposing side's expert. Consider making a deal with the expert witness that you will allow him or her to say whatever they want as long as they answer your question. When the witness does not answer your question, let them ramble and then ask whether he or she remembers the question.

4. Keep it Short. With few exceptions,²⁶ brevity is best during cross-examination. “[L]engthy cross-examination [of experts] . . . are usually disastrous and should be rarely attempted.”²⁷ There may be critical points that you must develop in a complex case; however, always keep your audience – the jury – in mind throughout the examination. In today's society, it is easy for

jurors to become disinterested so keep it short. After a long examination by your opponent, the jury will welcome a cross-examination that is brief and to the point.²⁸

5. Know the Facts. While the expert may know his area of expertise intimately, you should be even more familiar with the facts of your case. Jurors are less forgiving when an expert makes a mistake, so catching your opponent's expert with an ignorant answer will likely cast doubt on all of his or her opinions. This is particularly useful when the expert witness has done no factual investigation, but instead has relied on the reports of others.

6. Be a Better Expert. Besides knowing the facts of your case, you also need to become proficient in the expert's area of expertise. Considering the importance of the testimony, it may be beneficial for you to review literature on the subject and consult with your own expert to gain a better understanding of the areas at issue. This suggestion goes hand in hand with the preparation discussion above, but the bottom line is that having a working knowledge of the terminology increases your credibility with the jury.

7. Financial Bias Questions. Most attorneys view the possible financial bias of an expert witness as fertile ground for cross-examination. To a great extent, that is correct. However, these questions sometimes backfire as often as they work. If an expert has put in a significant amount of time reviewing the matter, does that indicate thoroughness rather than bias? If the expert has a high hourly rate, does this mean that he or she is a good liar or eminently qualified and in high demand? While counsel can certainly use fee-related questions to their advantage, one must be mindful that a possible downside does exist. Regardless, these questions may be minor compared to the rest of your cross-examination.

8. Know the Rules of Evidence. A carefully planned cross-examination will be worthless if you do not have a grasp of the Rules of Evidence. For key exhibits, anticipate possible

objections and responses to those objections and plan your responses ahead of time.²⁹ Prepare trial briefs or motions in limine and raise the problems in advance so that your cross-examination runs as smoothly as possible.

9. Plan to Attack. Challenging an expert and questioning his expertise is one of the only ways a judge or jury can decide whom to trust. As stated previously, the difference between winning and losing often comes down to an effective cross-examination.³⁰ Therefore, while you must be respectful of the judge and jury by adhering to the rules of procedure, evidence, and professional conduct, the jury does not expect you to lay down on your opponent's theory of the case. Within the proper confines, there is nothing wrong with showing compassion for your side.

10. Proper Use of Language. While jurors come from all walks of life, one item they do have in common is that none of them care for pompous witnesses or attorneys. Therefore, use plain English and the simplest words possible. For example, when cross-examining a doctor, say something like "those contusions, abrasions and ecchymoses you talked about on direct examination [. . .] those words mean bruises, scrapes and black-and-blue marks, don't they?"³¹ While some on your panel might understand certain technical terms or phrases, it is best to communicate with the least educated juror. If you are successful with him or her, you will be successful with the others. Just remember, if you are not relating to the jury, chances are you will lose the case.

11. Saying "No." Rarely is the direct examination such an abysmal failure that adversary counsel will forego cross-examination. However, if the testimony has not hurt your case, there may be no need to cross-examine. Keep in mind though that the jury expects that you will cross-examine an expert witness. If you choose not to, make sure the jurors understand your reasoning during later argument. Further, an attorney should consider whether it makes sense to put his or

her own expert on the witness stand. What opposing counsel was not able to accomplish on direct examination through their witness, might be accomplished through your own expert witness. Sometimes the most effective way to represent your client is to not subject your own expert to cross-examination when it is not necessary.

12. Know the Judge. Not all judges are alike. If possible, consider observing your judge during another jury trial. Talk to attorneys who are familiar with your judge and gain insight from them on the way he or she operates their courtroom. Having familiarity with the basics will increase the likelihood that you are able to focus intently on the cross-examination.

13. Know When to Quit. If the expert has been discredited or has made important concessions, consider ending the cross-examination on a high note. Further, if the expert is doing well, you should know when to cut your losses. Asking that extra question can sometimes lead to disastrous results.

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¹ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 & 556-57 (Tex. 1995).

² *Helena Chemical Company v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001) (citing *Robinson*, 923 S.W.2d at 556); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741-42 (3d Cir. 1994).

³ FED. R. EVID. 702.

⁴ *United Blood Services v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997).

⁵ *Helena Chemical*, 47 S.W.3d at 499; *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998).

⁶ *James v. Hudgins*, 876 S.W.2d 418, 421 (Tex. App.—El Paso 1994, writ denied).

⁷ *Helena Chem. Co. v. Wilkins*, 18 S.W.3d 744, 752-53 (Tex. App.—San Antonio 2000), *aff'd*, 47 S.W.3d 486 (Tex. 2001).

⁸ *Agbogun v. State*, 756 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1988, writ ref'd).

⁹ FED R. EVID. 401 & 402.

¹⁰ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

¹¹ 3 Weinstein & Berger, WEINSTEIN'S EVIDENCE ¶ 702[02] at 702-18.

¹² FED. R. EVID. 702.

¹³ These factors include: (1) whether the opinion at issue is susceptible to testing and has been subjected to such testing; (2) whether the opinion has been subjected to peer review; (3) whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the technique's operation; and (4) whether the theory has been accepted in the scientific community. *Daubert.*, 509 U.S. at 592-94.

¹⁴ *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

¹⁵ *Helena Chemical*, 47 S.W.3d at 499.

¹⁶ TEX. R. EVID. 611(b); *Caron v. State*, 162 S.W.3d 614, 617 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).

¹⁷ *Texas Turnpike Authority v. McCraw*, 458 S.W.2d 911, 913 (Tex. 1970); *see also Davidson v. Great Nat. Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987).

¹⁸ FED. R. EVID. 611(b).

¹⁹ FED. R. EVID. 611(b).

²⁰ *U.S. v. Tomblin*, 46 F.3d 1369, 1386 (5th Cir. 1995).

²¹ TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04.

²² *Remington Arms Co., Inc. v. Caldwell*, 850 S.W.2d 167, 172 (Tex. 1993).

²³ Irving Younger, *The Art of Cross-Examination*, ABA Monograph Series No. 1 (ABA Section on Litigation 1976).

²⁴ In some instances, counsel might consider the possibility of calling the opponent's expert witness where the testimony would be favorable. *See, e.g., Potter v. Anthony Crane Rental of Texas, Inc.*, 896 S.W.2d 845, 851-52 (Tex. App.—Beaumont 1995, writ denied) (plaintiffs designated an expert, but chose not to use him at trial; defendants then designated him as their expert and called him to testify).

²⁵ Edward E. Rundell & Sam N. Poole, Jr., *Cross-Examination of Plaintiff's Expert: The Art of War*, 48 La. B.J. 104, 107 (August 2000).

²⁶ Many lawyers hesitate to extensively cross-examine expert witnesses in trial because it can be difficult to explain the weaknesses in the testimony to the jury. However, with the judge as the audience in a *Robinson* hearing, counsel should not hesitate to go into as much detail with their cross-examination of the expert as the court will permit.

²⁷ Francis L. Wellman, *THE ART OF CROSS-EXAMINATION*, at 95 (4th ed. 1979).

²⁸ Edward E. Rundell & Sam N. Poole, Jr., *Cross-Examination of Plaintiff's Expert: The Art of War*, 48 La. B.J. 104, 107 (August 2000).

²⁹ For a good discussion of the Texas Rules of Evidence, one may want to consider reading GERALD READING POWELL ET AL., *A PRACTICAL GUIDE TO TEXAS EVIDENCE: OBJECTIONS, RESPONSES, RULES AND PRACTICE COMMENTARY* (2003).

³⁰ Walter R. Lancaster, *The Art of Expert Cross-Examination*, LITIGATION, Fall 1997, at 46.

³¹ James W. McElhaney, *Don't Take the Bait: Slip-up on Cross is Cue for Opponent to Spring a Surprise*, 83 A.B.A.J. 80 (June 1997).