

§ 7.6. Cross-examination

An expert witness is like any other witness — she can be crossed effectively if you use a sound approach and do the required prep. The purpose is always the same: an effective cross-examination should give the jury enough ammunition to question or refute the expert's opinions and reasons, and should create impressions of the expert that will carry into the jury room during deliberations.

I. Preparation

Cross-examining experts takes additional preparation. After all an expert is usually an experienced witness and usually knows more about their subject than you will ever know. You are playing on the expert's field and with the expert's ball. Consequently, cross-examining such a witness requires work on your part. There are several things you should do when you cross one of your opponent's testifying experts.

First, use your own expert to help you understand, and the expert's probable testimony. Your own expert should be your on the subject and your guide in what to expect from the ex cross-examine.

Second, read the literature in the field. Your expert can basic references. Reading these treatises and other scholarly works will make you familiar with the subject..

Third, obtain a copy of everything the expert has ever put in expert's résumé, which you should have through discovery, is a place to start. The expert's deposition is another place to check. How can you trust the résumé or deposition to be complete, since experts ignore publications they are now dissatisfied with, and Rule 26(a) (2) of Rules of Civil Procedure requires disclosure of publications oil ten years. Do an author check in the appropriate data bases in your university's library to get a full list of the expert's publications. Those publications may become impeachment at trial.

Fourth, learn where the expert has previously testified as i obtain a copy of that testimony whenever possible.

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The expert must disclose in writing all cases in which the expert has testified by deposition or at trial within the past four years. To check the disclosure for accuracy, and for older testimony, check with specialized groups. For example, the Association of Trial Lawyers of America (ATLA) and the Defense Research Institute (DPI), plaintiff's and defendant's personal injury associations, often compile data bases of experts for their members. This previous testimony may become impeachment at trial. Talk to the lawyers who have cross-examined the expert in the past.

Fifth, review the expert's résumé to pinpoint any weaknesses in the expert's education, training, and experience, and to determine if the expert's true area of expertise is other than the specific one involved in this case.

Finally, review the expert's written report, now required under Rule 26(a) (2) of the Federal Rules of Civil Procedure and Rule 16 of the Federal Rules of Criminal Procedure, and the expert's deposition transcript. These will tell you what her probable testimony at trial will be.

2. Cross-examination approach

Effective cross-examination of an expert is no different than of any other witness: you must have a sound analytical approach to the witness so that you can determine whether to cross-examine and, if so, how to organize and execute the cross-examination to carry out realistically attainable goals. This approach, discussed in detail in Chapter 6, involves the following basic considerations. -

a. Should you cross-examine? Not every witness needs to be cross-examined. If the expert has not hurt you, or if you have

no effective points to make, or your own experts have been more persuasive, consider not cross-examining. The decision to cross-examine is discussed in §6.2.

b. How should the cross-examination be organized? All cross-examinations have two possible basic purposes: eliciting favorable testimony, and conducting a destructive cross. Eliciting favorable testimony ordinarily comes before a destructive cross. If the expert has substantially helped you by agreeing to helpful facts, consider not attempting a destructive cross at all, although you have destructive ammunition. How a cross-examination should be organized is discussed in §6.3. -

c. Effective cross-examinations have a structure that starts strong, ends strong, and keeps it simple. They maintain control over the witness by asking simple, leading questions and stop when the point is made. These are discussed in §6.4. -

d. What favorable information can you elicit? Did the witness say things on direct that you can have her repeat on cross? Can the witness admit facts not yet mentioned that support your case? What must the witness admit that helps you? What should the witness admit that helps? These are discussed in §-6.3—6.5. - - -

e. What discrediting or destructive cross-examination can you do? Are the witness's perception, memory, or communication skills vulnerable? Can the witness be impeached? Can you expose the witness's bias, interest, or motive? Has she made prior inconsistent statements? Can the witness be impeached by a treatise? These are discussed in §-6.6 and 6.7.

3. Specific cross-examination techniques

A good approach to any cross-examination is to ask yourself: what will I say about this witness in closing arguments? Planning the cross-examination is then a matter of determining what facts you can realistically make the witness admit during cross-examination that support your planned closing argument. The following topics are the most frequently explored areas on cross-examination of experts.

a. Qualifications

Most cases that are tried will have opposing experts with different opinions and conclusions. The jury will invariably compare the opposing experts and make decisions on which expert to believe and why. Comparing the qualifications of the experts is one way the jury decides which expert to believe.

- Expert qualifications involve two things: education and training, and actual hands-on experience relevant to the case on trial. A common cross-examination is to show less than the highest degree or certification in the field. -

Example:

Q. Ms. Johnson, you're a psychologist?

A. Yes.

Q. You have a master's degree in psychology?

- A. Yes.

Q. But a master's degree is not the highest degree in your field, is it?

A. No.

Q. The highest level of accomplishment is the Ph.D. degree, right?

A. Yes.

Q. That's commonly called a doctorate degree, right?

A. Yes.

Q. That takes at least two or three years of additional study, doesn't it?

- A. It depends, but often takes that long.
- Q. Persons who hold a doctorate degree are allowed to be called doctor, right? -
- A. Yes.
- Q. But you haven't achieved the doctorate level, have you?
- A. Well, I'm working toward it.
- Q. Ms. Johnson, you haven't reached it yet, have you?
- A.No. -

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Example: -

- Q. Dr. Smith, you're a resident at Mercy Hospital?
- A. That's right.
- Q. You're in the fourth year of the residency program in orthopedics?
- A. Yes.
- Q. When you complete the program you'll be an expert in orthopedics, correct?
- A. Well, I like to think I already have expertise in my field.
- Q. Well, you're still training under recognized orthopedics experts in the residency program, aren't you?
- A. Yes.
- Q. Those experts, they're board-certified in orthopedics, correct?
- A. Yes.
- Q. That means they've taken and passed the examination given by the American Board of Orthopedics, correct?
- A. Yes.
- Q. You haven't taken that examination yet?
- A. Well, I'll be eligible to take it when I finish my residency.
- Q. You haven't taken that examination yet?
- A. Not yet.

Juries are usually impressed by hands-on experience, since that's how most of them become competent at their jobs. If the expert has impressive academic credentials, but doesn't have nearly the hands-on experience your expert has, cross-examination can often effectively point this out.

Example:

- Q. Professor Henderson, you're a professor in the engineering college at the state university?
- A. Yes.
- Q. And you've been at the university, teaching and writing, since you received your doctorate degree?
- A. That's right.
- Q. Professor, this case involves the design of the front wheel suspension of a passenger car. Have you ever designed a front wheel suspension?
- A. No.
- Q. Have you ever designed any part for a car?
- A.No.
- Q. Have you ever worked in the automobile industry?
- A. No.
- Q. Have you ever been employed as a design engineer in any industry?
- A.No. -
- Q. Have you ever designed any product that was actually put into production?

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- A. No.

Frequently an expert will have substantial expertise, but it won't be in the specific area involved in the lawsuit. An effective technique is to build up the expert's specialized area of interest, then point out that it

doesn't apply to the specific area involved in the lawsuit. -

Example: -

- Q. Dr. Andrews, you're a psychiatrist?
- A. Yes.
- Q. You work at the Madden Mental Center?
- A. Yes.
- Q. Most of the patients there are referred by the court system, right?
- A. Not all, but most are.
- Q. Those patients are mostly defendants in criminal cases, right?
- A. Again, not all, but most are.
- Q. And the court asks your center to determine if those defendants are legally insane, right?
- A. That's a common request.
- Q. In fact, most of your practice is concerned with determining whether those defendants are legally insane, right?
- A. Yes.
- Q. And the most common mental condition you deal with is schizophrenia, right?
- A. Well, that's not the only one, but it is certainly a very common one.
- Q. Dr. Andrews, you've specialized in the area of diagnosing and treating schizophrenia, right?
- A. Yes.
- Q. In fact, you've become a recognized expert in that area, haven't you?
- A. Well, I like to think I have, but you really should ask my colleagues.
- Q. And you've written extensively on schizophrenia?
- A. I've written some.
- Q. Over 20 published articles?
- A. Yes.
- Q. Dr. Andrews, the question today is whether Mrs. Thompson should be civilly committed because she is a danger to herself or others, right?
- A. That's right.
- Q. This is not a criminal case, is it?
- A. No.
- Q. No one asked you to determine if Mrs. Thompson is insane, did they?
- A. No.
- Q. And Mrs. Thompson does not suffer from schizophrenia, does she?
- A. No.

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In some jurisdictions the cross-examiner is permitted to "voir dire the witness" on her qualifications. This means that if the cross-examiner wishes to challenge the expert's qualifications to testify as an expert witness, he can do a cross-examination, limited to the expert's qualifications, before the expert can continue the direct examination. Unless you have a solid reason to believe that you can keep the witness from being qualified as an expert, which is difficult under the federal and most state rules, this type of cross-examination is better saved for the regular cross-examination. This is because a voir dire on qualifications is usually followed by the court stating that "the witness may continue her testimony," which is tantamount to telling the jury that the judge believes the witness is qualified and that the judge didn't think much of your attempt to disqualify her.

b. Bias and interest

A biased witness is a witness whose testimony is slanted for one side and against the other. A cross-examination that can demonstrate

bias is a powerful tool because it taints the expert's entire testimony. The most common kind of bias is the expert who typically testifies exclusively or predominantly for plaintiffs or defendants. This information is now easy to get because under Rule 26(a) (2) of the Federal Rules of Civil Procedure the expert must disclose in a required written report each time during the past four years that he testified by deposition or at trial.

Example: -

- Q. Dr. Williams, you were asked to be a witness in this case by the defense?
 A. Well, the defense asked me to consult on the case.
 Q. Part of your job was to be a witness for the defense if the case went to trial, right?
 A. I agreed to be a witness if necessary.
 Q. And that was for the defense, right?
 A. If the defense wanted to call me, yes.
 Q. Dr. Williams, you weren't planning to be called as a witness by the plaintiff, were you?
 A. No.
 Q. In fact, you make it a habit of testifying as a defense witness, don't you?
 A. I'm available as a witness to whoever wishes to retain me.
 Q. Over the past four years, how many times have you testified by deposition or at trial?
 A. I think it's been about 12 times.
 Q. Well, your written report says it's been exactly 12 times, right?
 A. Yes.
 Q. And of those 12 times, you also know how many of those times you were called by the defense, don't you?
 A. Yes.
 Q. How many times? -

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- A. Each time. -
 Q. Twelve out of twelve times you were called by the defense, right?
 A. Yes. -

Another way to demonstrate bias is to use the expert's previous publications. If the expert's article has an obvious slant, or appeared in a publication that represents a particular point of view, this can effectively be established. -

Example: -

- Q. Dr. Baker, you say that the defendant, Mr. Williams, doesn't have any serious psychiatric conditions?
 A. That's right.
 Q. In fact, you claim that Mr. Williams is a malingerer, right?
 A. Yes.
 Q. And a malingerer is a person who either fakes or exaggerates symptoms?
 A. That's basically right. -
 Q. Dr. Baker, you wrote an article called "The Malingerer and How to Expose Him," right?
 A. Yes.
 Q. In that article you said, on page 27, quote: "A doctor can, by careful questioning, get most patients to make statements that will support an evaluation of malingering." Did I read from your article accurately?
 A. Yes. -
 Q. Your article appeared in a magazine called DPI?

- A. Yes.
 - Q. DPI stands for Defense Research Institute?
 A. Yes.
 Q. That's the magazine for defense lawyers in the personal injury field, isn't it?
 A. I think so.

Another frequently used technique is to show that the expert has a financial interest in being a witness and is willing to be a hired gun for anyone.

- Q. Mr. Sullivan, you've retired from your old employer, the Ajax Construction Company?
 A. Yes.
 Q. Now you work solely as a construction engineer for your own consulting business?
 A. Yes.
 Q. You advertise your services?
 A. Well, I have professional announcements in certain journals.
 Q. And those announcements state that your services as an engineer are available?

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- A. Yes.
 Q. To anyone who will pay your fee, right?
 A. Yes.
 Q. You advertise in ATLA?
 A. Yes.
 Q. That's the magazine for plaintiff's lawyers, right?
 A. Yes.
 Q. You advertise in DPI?
 A. Yes.
 Q. That the magazine for defense lawyers, right?
 A. Yes.
 Q. And you advertise in the Journal of the American Bar Association, right?
 A. Yes.
 Q. And that one goes out to all the lawyers?
 A. It has a large circulation.

Another technique, but one that should be used sparingly, is to show how much money the expert makes being a witness. This approach, however, can just as easily be used against your expert as well. Therefore, make sure that your expert compares favorably on these points.

Example:

- Q. Professor Silverman, you're a full-time professor at the state university?
 A. Yes.
 Q. You teach?
 A. Yes.
 Q. Do research?
 A. Yes.
 Q. And publish articles? -
 A. Yes.
 Q. The university expects you to do those things?
 A. Yes. -
 Q. The university considers yours to be a full-time job, right?
 A. Yes. -
 Q. But you also hold yourself out as a consultant?
 A. Yes.
 Q. You earn extra money doing that?
 A. Yes.
 Q. Professor Silverman, what's your hourly rate?

- A. In this case it's \$200 per hour.
- Q. Is that your usual rate? -
- A. Yes.
- Q. And how-many hours have you put into this case?
- A. About 50 hours.
- Q. So you've earned how much on this case?
- A. Approximately \$10,000.

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- Q. How many other cases are you presently consulting on?
- A. I think it's about six or seven others.

c. *Data relied on*

The opinions and conclusions of experts are valid only if the data on which those opinions and conclusions are based are themselves accurate. It is not uncommon for the expert to have based her opinions solely or principally on data and information received from the client, and yet have made no effort to verify that data or information. If you can show that the data and information are inaccurate or incomplete, the expert's opinions and conclusions must fall as well. In short, you can take the "power" away from the expert by attacking the reliability of the data the expert relied on.

Example:

- Q. Dr. Crane, you never saw the defendant before this crime was committed, did you?
- A. No.
- Q. Never treated him for any psychiatric condition?
- A. No.
- Q. You were brought in after he was arrested?
- A. Yes.
- Q. And after he was charged with murder?
- A. Yes. - - -
- Q. And after he had been held in jail?
- A. Yes.
- Q. The basis for your psychiatric evaluation is the interviews you had with the defendant, right?
- A. That and the police reports.
- Q. The police reports contained statements from other witnesses, right? - -
- A. Yes. -
- Q. Did you ever interview those witnesses to see if they had additional information about the defendant's state of mind at the time this crime was committed?
- A. No, I relied on the police reports.
- Q. The police reports also contained statements from the defendant, right? -
- A. Yes.
- Q. - But you interviewed the defendant to get additional information about his state of mind at the time of the crime, right?
- A. Yes. -
- Q. And he gave you additional information about himself?
- A. Yes. -
- Q. Dr. Crane, did you ever talk to the police or witnesses to check that the information the defendant was giving you was accurate?
- A. No, I based my evaluation principally on my interviews and evaluation of the patient.

- Q. Did you ever talk to his family, friends, or schools to verify the information he gave you?
- A. No.
- Q. And when you did these interviews he knew that you were hired to evaluate a possible insanity defense, right?
- A. He knew I was there to clinically evaluate him.
- Q. So if the defendant gave you false or exaggerated information, your opinions may be affected, right?
- A. Well, it's possible, but a trained clinician can usually tell if the patient is lying.
- Q. And if a patient is a good liar, you sometimes can't.
- A. It's possible.
- Q. Dr. Crane, the field of psychiatry has lots of case histories where patients have successfully misled their psychiatrists, isn't that true?
- A. There are known instances of that happening.

Example:

- Q. Professor Strong, you say this drug is reasonably safe, right?
- A. Yes, that's my conclusion.
- Q. The basis for your conclusion is the result of tests conducted by the manufacturer?
- A. Yes. - -
- Q. That's the same manufacturer that's the defendant in this case?
- A. Yes.
- Q. That's the same manufacturer who stood to profit if this drug was put on the market?
- A. Well, I assume they hoped it would be profitable.
- Q. Professor Strong, did you ever conduct your own tests to determine if this drug is reasonably safe to the public?
- A. No.
- Q. Did you ever ask that this drug be tested by an independent laboratory? -
- A. No.
- Q. So the data on which you base your opinion all came from the defendant, right?
- A. Well, from the company and the people who did the actual tests.
- Q. Those people who did the tests, they were all employees of the defendant, weren't they?
- A. Yes.
- Q. If those tests were improperly designed, that would affect your opinion, wouldn't it?
- A. It might.
- Q. If those tests were improperly conducted, that would affect your opinion, wouldn't it?
- A. It might. -
- Q. If those tests were improperly analyzed, that would affect your opinion, wouldn't it?
- A. It might. -

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- Q. - Your opinion is only as good as the tests on which your opinion is based, right?
- A. That's true.

Remember that the expert opinions are only as good as the data that the expert had access to. Hence, any time you can establish that the expert "didn't know" an important fact, or "didn't do" something important, his credibility is affected. This approach works well if the reason the expert didn't know or do something is that the lawyer retaining the expert didn't give the expert that fact, or didn't ask the expert to do that something. The expert will be more likely to blame the lawyer for shortcomings than himself.

This approach can sometimes be used to show that the expert relied solely on reports and exhibits provided by the lawyer conducting

the direct examination, and never received or considered material from the other lawyers.

d. Assumptions

Experts make assumptions. If you can expose the assumption, the opinion becomes suspect. You can then ask the expert if her opinions would change if the assumptions were different. If the expert agrees, you can later argue that the other side's expert supports your side, since your side's assumptions are true. If the expert disagrees, you can later argue that the expert is biased and will never change her opinion regardless of the facts. -

Example:

- Q. Dr. Wexler, your opinion is that the defendant had a psychotic episode at the time he killed his wife?
A. Yes.
Q. You concluded that he was in what you called a dissociative state at the time of the killing?
A. Yes.
Q. You based this clinical opinion in large part on your interviews and examination of the defendant, right?
A. That was certainly an important part of it.
Q. When you interviewed the defendant, he claimed that he didn't remember the actual killing, right?
A. Yes. --
Q. And you interviewed him how long after the killing?
A. It was about a month later.
- Q. Your clinical opinion is based in part on the defendant's claim that he couldn't remember the killing?
A. Well, many things formed my evaluation of this patient. -
Q. And the defendant's claim that he couldn't remember the killing was one of those things, right?
A. Yes.
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Q. Doctor, a patient in a dissociative state shouldn't remember an event that happened while he was in that state, should he?
A. You wouldn't expect it.
Q. So this defendant's claim that he didn't remember the killing was a significant fact to you, wasn't it?
A. Yes. -
- Q. Doctor, if the true fact was that the defendant remembered the killing after he did it, would that change your opinion that he was in a dissociative state when he did the killing?
A. It might. -
Q. Doctor, if the true fact was that the defendant told someone shortly after the killing that he had just killed his wife, that would change your opinion, right?
A. It might.

Sometimes you can get an expert to agree that the known facts are consistent with another explanation. In this situation you effectively convert the expert to your position in the case.

Example:

- Q. Officer Woods, you took Mr. Johnson's breath sample at 11:00 P.M., right?
A. 'Yes.
Q. That's when you arrested him at his house?
A. Yes.
Q. The accident he was involved in happened at 10:00 P.M.?

- A. That's my understanding. -
Q. You say he was intoxicated at 11:00 P.M. in his home?
A. The test showed he was well over the legal intoxication level.
Q. At 11:00 P.M., right?
A. Right. -
Q. You weren't with Mr. Johnson between 10:00 and 11:00 P.M., were you?
A. No.
Q. You don't know if he drank alcohol during that time, do you?
A. No. -
Q. Officer Woods, if Mr. Johnson were alcohol free at 10:00 P.M., and had drunk alcohol after the accident, he could have produced the test results you got, right?
A. It's possible, but he would have had to drink a lot.
Q. But you can't say whether he did or he didn't, can you?
A. No.

e. Prior inconsistent statements - -

A fertile ground for expert cross-examination is impeachment with the expert's prior inconsistent statements. Through discovery you can learn

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what the expert has published and in which previous cases, if any, the expert has testified either by deposition or at trial. You can then get those publications and sometimes the expert's previous testimony transcripts. Through discovery you can also get the expert's written report in this case and depose the expert before trial. The result is that you can usually get solid information on both what the expert will say at trial -and what the expert has said in the past. The past statements can then be used to impeach if the expert's trial testimony differs.

Impeachment with a prior inconsistent statement should use the same technique as for any witness. (See §6.7.) The technique is in three steps: commit, credit, and confront — then stop. Commit the witness to the direct examination testimony you want to attack. Credit, or build up, the reliability of the prior statement. Confront the witness by reading the statement, then stop. -

The better technique is to read the impeaching section, then ask the witness if you read it accurately. Don't make the witness read the impeaching section. You will do a better job of reading, putting the proper emphasis on the key words.

Example:

- Q. Dr. Schmidt, you say that Mt Gable should be able to regain full range of motion in his elbow joint?
A. That's right.
Q. The fact that Mr. Gable has only limited range of motion is explained, you say, by his unwillingness to complete the therapy?
A. I believe that's the principal reason.
Q. You say that his elbow injury was not severe enough to account for the limited range of motion he now has?
A. That's right.
Q. Dr. Schmidt, you wrote an article in the Journal of Orthopedics, right? - -
A. Yes.
Q. Your article is called "Dislocations and Treatment"?
A. Yes.
Q. Your article appeared in the January, 1995 edition of the Journal of Orthopedics?
- A. Yes.

Q The Journal of Orthopedics, that's a reliable authority in the field, isn't it? -

A. Yes.

Q. In fact, you subscribe to it,?

A. Yes.

Q. You sometimes rely on it yourself?

A. Sometimes.

Q. That's because you know the journal checks its articles for accuracy before publishing them, right?

A. I think so.

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Q. Doctor, you know they checked your article before publication, didn't they?

A. Yes.

Q. Dr. Schmidt, I'm going to read a section from your 47, counsel. Please follow along with me to make sure I read it right. Your article says: "The medical literature is replete with instances where relatively minor injuries to joints have resulted in painful and permanent loss of motion." Doctor, did I read from your article accurately?

A. Yes.

Consider using a blow-up of the impeaching section in court, which will make the impeachment visual and dramatic. Many courts will permit this, even though the impeaching section is not admissible as substantive evidence under FRE 801 (d) (1) (A). -

f Treatises

The expert can also be impeached by treatises. FRE 803(18) requires -that the treatise or periodical be established as a reliable authority, either during the cross-examination, through your own witness, or through judicial notice. The impeaching portion can then be read, although the treatise itself is not admitted as an exhibit. Using a treatise to impeach is a powerful technique since a treatise represents the collective wisdom of the particular field. --

The technique is much like impeaching with a prior inconsistent statement: commit, credit, confront — then stop. Commit the witness to the direct examination testimony you want to attack. Credit, or build up, the reliability of the treatise. Confront the witness by reading the impeaching portion of the treatise, then stop. Use the treatise itself during the impeachment, since it will look impressive. You might have photocopies of the impeaching page to give the judge and opposing lawyer so they can follow along, and another copy for the clerk to include in the record, since the treatise itself is not usually admitted as an exhibit. In some jurisdictions you are allowed to use a blow-up of the impeaching section in court.

Where necessary, have the witness explain technical terms in the impeaching treatise before you read from it. This will prevent the witness from defining the terms after hearing the impeaching section, when the expert might twist the meaning of the terms to lessen the impact of the impeachment.

Example:

Q. Dr. Alberts, several factors can affect the reliability of eyewitness testimony, right?

A. Yes.

Q. These include the length of time the eyewitness had to see the robber? - -

A. Yes.

Q. The anxiety level of the eyewitness?

A. Yes.

Q The lighting and distance between the eyewitness and robber?

A. Yes.

Q. And the length of time between the robbery and the lineup?

A. Yes.

Q. Dr. Alberts, the race of the eyewitness and robber has an effect on reliability, doesn't it? -

A. It may.

Q. In this case the eyewitness was Caucasian, and the robber was African-American. You know that, don't you?

A. Yes, I was aware of that.

351 accepting that's commonly called a cross-racial identification, isn't it?

A. Yes.

Q. If the eyewitness and subject are of different races, that is, a cross-racial identification, that can affect the reliability of the identification, right?

A. It may have some effect.

Q. In fact, Dr. Alberts, it has a significant effect, doesn't it?

A. It has some effect, but I wouldn't characterize it as significant.

Q. Dr. Alberts, you know the book written by Dr. Helen Lipton called "Eyewitness Identification"?

A. I do.

Q. In fact, Dr. Lipton is one of the most prominent persons in the field of eyewitness testimony?

A. Yes.

Q. And her book, "Eyewitness Identification," that's a reliable authority in your field?

A. Yes.

Q. In fact, you probably have a copy of her book, don't you?

A. I do.

Q. Dr. Alberts, I'm going to read from Dr. Lipton's book called "Eyewitness Identification." You follow along to make sure I read it right. On page 136 it says, quote: "Research has repeatedly shown that cross-racial identifications are approximately three times less accurate than identifications made between members of the same race." Did I read that right?

A. Yes.

The "did I read it right" question is the safer final question if the witness has been difficult to control. Another approach is to ask the expert "do you agree with the treatise?" Regardless of the answer, the witness is impeached. This final question may be more effective if the witness has fairly answered your previous questions. On redirect, the obvious rehabilitation questions — "Why do you disagree with the treatise?" or "Why did you use a procedure other than the one recommended by the treatise?" — will have less impact. -

g. Experts disagree -

Frequently you will have little ammunition to reduce the effectiveness of the expert's testimony. In those situations the best you can realistically

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achieve is to level the playing field. Show that the experts on both sides are essentially equal and, in effect, cancel themselves out. This puts the task of deciding who's right in the hands of the jury, where it really belongs anyway. In this way you empower the jury to decide the case without needing to directly decide which expert's testimony to accept and which one's to reject. This is always a useful approach whenever the other side's experts are either more impressive or more numerous.

Example:

Q. Dr. Johnson, you doctors don't always agree on everything,

- do you?
- A. No. -
- Q. Sometimes one doctor will have one opinion, and another doctor will have a different opinion?
- A. Yes.
- Q. You've seen that happen?
- A. Yes.
- Q. That's happened in your practice as well?
- A. Sometimes.
- Q. In this case you know that Dr. Smith's opinion is different from yours? -
- A. Yes, I'm aware of that. -
- Q. Your opinion is that Ms. Williams' injuries prevent her from returning to work as a typist? -
- A. That's right.
- Q. Dr. Smith feels that Ms. Williams, following surgery and therapy, should be able to return to work? -
- A. That's her opinion.
- Q. Dr. Johnson, you know Dr. Smith, don't you?
- A. Yes.
- Q. She's a colleague of yours? -
- A. Yes.
- Q. She's a good doctor, isn't she?
- A. I think so.
- Q. You respect her as a colleague, don't you?
- A. Yes. - -
- Q. And you respect her professional opinions?
- A. - Yes.
- Q. This is one of those cases where two experts disagree?
- A. It is. -
- Q. Dr. Johnson, when two experts disagree, it's up to the jury to decide what to believe, isn't it?
- A. Yes. - -
- Q. That's why we have the jury system, isn't it? -
- A. Yes. -
- Q. And you don't have any problem with our system — the jury decides — do you?
- A. No.

- Q. What Dr. Adams did, that's what you would have done if you had been the treating doctor?
- A. I can't say I would have used exactly the same procedures as Dr. Adams, but she certainly did competent work.
- Q. The therapy that Dr. Adams prescribed, that's a standard therapy program for the kind of injury Mr. Elliot had?
- A. Yes.
- Q. You would have prescribed the same kind of therapy if you had - been the treating doctor?
- A. Yes.
- Q. Again, what Dr. Adams did, that's good medicine, isn't it?
- A. Yes.
- Q. You don't have any criticism of the medicine Dr. Adams practiced on Mr. Elliot, do you?
- A. No. -

Effective cross-examinations of experts principally create general impressions about the experts in the mind of the jury, because frontal attacks on competent, prepared experts almost always fail, and obviously so. Instead, successful cross-examinations create the impressions that control which of the competing experts the jury accepts on key issues. One expert appears friendlier, more down-to-earth. Another appears defensive. Yet another one looks like a hired gun. And yet another appears argumentative. Whatever it is, the impressions experts make frequently control which side's experts the jury will ultimately embrace.

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§ 7.7. Examples of cross-examination

Now put all these concepts together. Remember that the jury will not remember the details of your cross-examination, but they will keep impressions of the witness that were formed during your cross-examination. Keep the basic organization and structure of cross-examinations in mind. Start strong and end strong. Keep it simple. Use leading questions when it is important to do so. Remember that the cross-examination's purpose is to have the witness admit facts that will support the themes of your case that you will emphasize in your closing argument. Above all, don't argue with the expert or try to show how much you know about the subject. This usually turns off the jury and makes it side with the expert.

The following example of a cross-examination is of the same doctor whose direct examination is at the beginning of §7.5.

Example:

- Q. Dr. Klein, good morning.
- A. Good morning.
- Q. "Patient, heal thyself." You've heard that phrase?
- A. Of course.
- Q. That's a phrase all doctors learn in medical school?
- A. Yes.
- Q. Every patient has to take responsibility for his own recovery, doesn't he?
- A. Well, a patient needs to be motivated to get better.
- Q. Doctors can't make a patient get better by themselves, can they?
- A. No, it usually requires a patient's cooperation.
- Q. A well-motivated patient is often essential for a full recovery, isn't it?
- A. That's often true.
- Q. It's particularly true where the patient has to do therapy to achieve a full recovery?
- A. I think that's accurate.
- Q. Dr. Klein, let's talk about medicine. Mr. Gable was prescribed Tylenol No. 3 with codeine at the hospital?

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If your approach is to level the playing field for the experts, you can sometimes use the opposing expert to build up your own expert. This is a useful approach if your expert is younger and less experienced.

- Q. Dr. Jones, you weren't the treating doctor, were you?
- A. No.
- Q. Dr. Adams was the treating doctor?
- A. That's right.
- Q. Dr. Adams treated Mr. Elliot's leg at the hospital?
- A. Yes.
- Q. And treated him after his discharge?
- A. Yes.
- Q. Dr. Jones, you became involved after that?
- A. Yes.
- Q. And that was at the request of the defense?
- A. Yes.
- Q. To evaluate Mr. Elliot's leg, you reviewed the hospital records?
- A. Yes.
- Q. And Dr. Adams' records?
- A. Yes.
- Q. Let's talk for a moment about what Dr. Adams did at the hospital and later on. Dr. Adams did a good job of setting Mr. Elliot's leg?
- A. Yes.
- Q. That was good medicine?
- A. Yes.

- A. Yes.
 Q. He stopped taking it a few days later? -
 A. Yes, he said he didn't like the way it made him feel.
 - Q. Dr. Klein, the field of medicine has thousands of medications, doesn't it? -
 A. Yes.
 Q. And probably dozens of pain killers?
 A. Yes.
 Q. In fact, doctors have a book called the Physician's Desk Reference which describes all those medications?
 A. Yes.
 Q. You have that book in your office?
 A. Yes.

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- Q. If Mr. Gable had asked you for another pain killer, you could have prescribed one?
 A. Yes.
 Q. And if he didn't like how that one made him feel, you could have tried yet another one?
 A. Yes. - -
 Q. Until you found one that didn't have side effects that Mr. Gable didn't like? -
 A. Probably. - -
 Q. But Mr. Gable never asked you to prescribe another pain killer for him, did he?
 A. No.
 Q. So he did the therapy without pain medication?
 A. Well, he told me he was taking over-the-counter medication.
 Q. But no prescription pain medication?
 A. No.
 Q. At anytime? -
 A. No.
 Q. Dr. Klein, let's talk about the therapy you prescribed for Mr. Gable.

The therapy is designed to return full range of motion for the joint, right?

- A. Right.
 Q. That therapy consisted of soaking the elbow in hot water, letting the heat penetrate the joint, then stretching the arm back and forth?
 A. That's right.
 Q. Three or four times a day?
 A. Yes.
 Q. Until full range of motion returns.
 A. That's what we hope for.
 Q. Most patients with an injury like Mr. Gable's do regain full range of motion? - of motion?
 A. Most, but not all.
 Q. **In fact, 80 to 90 percent of patients regain** full range of motion?
 A. That's what the medical literature shows.
 Q. Those patients who regain full range of motion — they do the therapy, don't they?
 A. Yes. -
 Q. **If they didn't do it, they couldn't** expect to recover fully, could they? -
 A. No.
 Q. Therapy is sometimes painful, isn't it?
 A. Yes.
 Q. The patient has to be able to handle the pain before he can do therapy fully, right?
 A. Well, the pain cannot be so severe that it keeps the patient doing the required therapy.
 Q. And doctor, the pain can be helped by pain killing?
 A. Yes, although no medication will completely block the pain.
 Q. But pain killers can help?
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- A. Yes.
 Q. After a while Mr. Gable stopped doing the therapy?
 A. Yes.
 Q. He said it stopped getting better?
 A. Yes.
 Q. He said it hurt?
 A. Yes.
 Q. And during this entire time he never asked you for a single pain killer to help him do the therapy, did he?
 A. No.
 Q. Dr. Klein, you know that the other doctor, Dr. Bradsky, has a different opinion?
 A. Yes.
 Q. He says that, with proper pain medication and supervised therapy, Mr. Gable should be able to regain full range of motion in his arm.
 A. Yes, I've seen his report.
 Q. You know Dr. Bradsky, don't you?
 A. Yes.
 Q. You consider him a good doctor?
 A. Yes.
 Q. And you respect his opinion? -
 A. I do, although I disagree with him here.
 Q. Of course. But Dr. Klein, medicine is the kind of field where two experts can disagree over something, isn't it?
 A. Yes.
 Q. And in that situation, it's up to the jury to decide?
 A. I guess so.
 Q. And you don't have any quarrel with that — letting the jury decide?
 A. No.

The following example of a cross-examination is of the same economist whose direct examination is in §7.5. -

Example:

- Q. Professor Howard, economists make assumptions, don't they?
 A. Well, in a sense.
 Q. -Let's talk about some of the assumptions you made in this case. You assumed that Mr. Adams would work as an accountant at Arthur Anderson until age 65, right?
 A. -I assumed he would work as an economist in the private sector, yes.
 Q. You assumed that? - -
 A. Yes. -
 Q. But you can't guarantee that he would have done that, can you?
 A. No, not 100 percent.
 Q. You assumed that Mr. Adams would have worked continuously until age 65, right?
 A. Yes, -

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- Q. You didn't take into account the possibility that he could be laid off or fired?
 A. No, he thought he had a good track record at Arthur Anderson.
 Q. Professor Howard, you can't guarantee that he would never be laid off or fired over 35 years, can you?
 A. No.
 Q. You can't guarantee that Arthur Anderson will exist as an accounting firm over the next 35 years, can you?
 A. No.
 Q. You also assumed that Mr. Adams would live another 45 years, right?

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- A. Yes, that's what his actuarial life expectancy is.
 Q. But you can't guarantee that, can you?
 A. No.
 Q. You assumed that his spending habits, what you call his personal consumption rate, would remain the same over the next 35 years?
 A. Yes.
 Q. Professor Howard, you know that many people, as they get older, spend less and less on themselves, right?
 A. That's sometimes true.
 Q. That's well documented in the professional literature, isn't it? -
 A. The literature notes such a trend in some individuals.
 Q. But you assumed Mr. Adams' personal consumption would never change over his lifetime?
 A. That's what I assumed in this case, yes.
 Q. You made some assumptions about inflation too, didn't you?
 A. Yes.
 Q. You assumed that inflation would average 3.3 percent over the next 35 years?
 A. That's right.
 Q. **Of course, you don't know** that for a fact, do you?
 A. No, it's my best projection of the likely inflation rate.
 Q. You did that by looking at the past 40 years?
 A. Yes. -
 Q. And you think that the future 35 years will be like the past 40 years?
 A. Well, that's my best projection of what's likely to happen.
 Q. Again, you can't guarantee that, can you?
 A. Of course not.
 Q. Taxes, Professor, you made the same kind of assumptions there, didn't you?
 A. I did the same type of projection, yes.
 Q. You assumed taxes would be the same in the future as they have averaged over the past 40 years?
 A. Yes.
 Q. **You assumed** that a safe investment rate for the next 35 years would be 5 percent, right? - -
 A. Yes. -
 Q. Again, you can't guarantee these either, can you?
 A. - Guarantee, no. -
 Q. Professor Howard, you can't predict the future, can you?
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- A. Economists can make what we feel are reliable projections into the future.
 Q. But you can't predict it with certainty?
 A. No.
 Q. You can't guarantee that your projections will actually happen, can you?
 A. I expect them to be accurate, but I can't guarantee them.
 Q. Because no one can predict the future, can they?
 A. No.

§ 7.8. Redirect examination

The most effective redirect examination takes place during direct examination, by anticipating and covering the points the cross-examination is likely to make. This will make a redirect examination unnecessary. Anticipating and refuting on direct is usually more effective than refuting on redirect. - -

In real life, of course, you can't always anticipate everything, and it's the same with cross-examination. Hence, redirect examination is often necessary. The basics of redirect examination are the same for any witness. (See §4.14.) The witness can clarify things. he witness can answer "why" questions, such as explaining the reasons for an inconsistent statement. The witness can put things in context. These are particularly important with experts, who can often be given a freer rein on redirect examination.

As always, prepare for the possibility of redirect examination with the witness. Let the witness know that you may need to redirect, depending on what the cross-examination does. Above all, the redirect must sound positive, not apologetic. Show the jury that the only reason there is any redirect at all is because the cross-examination distorted matters, or took them out of context, and an explanation is necessary for the jury to accurately understand the situation. -

Example:

- Q. Dr. Johnson, on cross-examination the other lawyer read part of a treatise on obstetrics. You remember that?
 A. Of course. - -
 Q. The sentence that was read said: "If the infant is not breathing, a 3.5 millimeter endotracheal tube is recommended, in conjunction with bag ventilation, to ensure that the infant receives a proper supply of air." You remember that?
 A. Yes. -
 Q. Dr. Johnson, do you agree with what the treatise says? -
 A. As a general rule, yes.
 Q. But you didn't follow it in this case?
 A. No.
 Q. Why not?

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- A. The treatise is dealing with the normal situation of a full-term infant. In that situation what the treatise says is good medical advice. In this case we were dealing with an infant that was premature by several weeks. Trying to put an endotracheal tube in such a premature infant is extremely dangerous. I would never do that in this situation, and I don't know of any obstetrician who would either.

Example:

- Q. Dr. Smith, your emergency room report says, as was pointed out by the other side, "Impression: fracture of the left tibia, distal third." Is that correct? -
 A. Yes.
 Q. But the patient in fact had a comminuted fracture of the left fibula, right?
 A. Yes.
 Q. How did that happen?
 A. An impression on the emergency room report is just that: the doctor's impression from examining the patient. You don't begin treating the patient until you make a final diagnosis. That diagnosis is not made until X rays are taken and, if appropriate, lab tests are done. In this case, the X rays showed that the fracture was in the fibula, not the tibia. I then treated the patient in accordance with my final diagnosis.