Practice Tips: A Primer on Cross-Examination of Experts, 2nd Edition

by Edward "Ted" McNabola

"More cross-examinations are suicidal than homicidal." - Emory R. Buckner

Despite the wisdom of this old saying, some lawyers fail to follow the rules of cross-examination. Most attorneys have the skills for a basic cross, but need an additional framework for cross-examination of expert witnesses at both deposition and trial. Every trial lawyer knows that a case may be won or lost on the cross of your opponent's expert. Unlike fact witnesses, an expert's testimony consists primarily of opinions that cannot be readily disproved. Consequently, counsel must use cross-examination to undermine the expert's opinions and their bases. This article focuses on the groundwork, discipline and persistence necessary to prepare for an expert's discovery deposition and suggests methods to effectively structure cross-examination at trial. Lastly, this article summarizes relevant Illinois law on expert testimony, including the most recent Illinois Rules of Evidence, the knowledge of which is crucial to adequate preparation.

I. Discovery as the Foundation for Cross-Examination

The preparation for cross-examining an opposing expert begins well in advance of trial. In fact, the groundwork is laid before the discovery deposition. Since the deposition can be a turning point, it can facilitate settlement. Thus, preparing for it is a worthwhile investment, possibly saving you the time and the risk inherent in trial. A well-researched, well-executed expert's deposition may also be critical in winning your case. The following six steps are suggested:

A. Consult Your Experts

Once the defendant has answered discovery pursuant to Supreme Court Rules 213 and 214, counsel should study the issues including reviewing any relevant literature. One must also consult his own expert(s) to prepare a questioning algorithm to undermine the opinions of the defendant's expert. This should include meeting with your experts and/or consultants to formulate questions that attack any weaknesses in the anticipated testimony. It should also include learning any terminology relevant to your expert's industry and clearly defining those terms at the discovery deposition. There is nothing worse than having to digress into a debate about semantics at trial.

B. Review Previous Testimony and Publications

The more a witness attests to on the record, the more you can hang them with their own rope. To this end, you should obtain as many depositions, trial transcripts, and publications authored by the expert as possible. Make certain to question the expert about all of their previous testimony. Establish how many cases they have reviewed, how many depositions they have given and how many times they have testified at trial. More importantly, determine what percentage of their work is for the defendant versus the plaintiff. Determine the names of any case in which they have acted as an expert that involved similar issues and get any trial or deposition transcripts from that case. Also, determine exactly how much money they have been paid or billed in the case along with the percentage of their annual income that is earned through expert testimony. If they are not provided through written discovery, prior transcripts may be available through various state bar associations such as ISBA or trial lawyer's associations such as ITLA and the American Association for Justice (f/k/a ATLA), or through LEXIS or Westlaw databases. Also, you should contact other attorneys who may have cross-examined the expert in the past. Even if it does not relate directly to your case, this testimony may provide valuable nuggets of information regarding the qualifications of the expert for purposes of impeachment.

You should also thoroughly review the expert's curriculum vitae and anything written and/or published by the expert that pertains to the case. Ask if the expert has ever given a presentation on any of the issues in your case. If so, determine if any written materials were prepared in conjunction with the presentation and obtain a copy. This inquiry should include unpublished works that may be obtained on the internet or through a Medline search. Be mindful of experts who have done work for the government and generated unpublished reports. These reports may be obtained by a Freedom of Information Act request. This

information can be invaluable as experts will look particularly foolish if they contradict or minimize a position they took in a scholarly work.

In light of the prevalence of internet and social media, conduct an internet search, looking for information on the expert as well as professional postings, blogs, or other social media, (*e.g.* Facebook pages, RSS feeds, Twitter entries, LinkedIn posts) that may have been used by the expert for professional purposes.

C. Study Everything the Expert Has Reviewed or Generated

The notice of deposition should include a rider that requires the expert to produce their entire file, including all letters, reports, depositions, and materials they have reviewed and any notes they have generated prior to the deposition. These documents will provide insight into an expert's thought processes. Hopefully you will have already obtained this information in advance through a 214 request, but such a request should also be included with the notice of deposition to obtain the most current information. You should fully examine all phone, mail and e-mail correspondence between the expert and the opposing lawyer. Also, try to get the witness to fully endorse the 213 answers by having him admit that he assisted in preparing the answers and that he reviewed and corrected a draft. Obviously, if there is a first draft, obtain a copy. However, please note that in federal court an expert's draft opinions may not be discoverable under FRCP 26(b)(3)(A) and (B) as specifically stated in FRCP 26(b)(4)(B).

D. Know Your Case

Experts often mistakenly assume their superior knowledge in their area of study can substitute for knowledge of the facts. Become intimately familiar with your case and in particular with the pertinent records. In a medical negligence case, a timeline is an effective tool. Once you have mastered the facts, you have gained a significant strategic advantage over most experts. This allows you an opportunity to undermine an expert's opinions by showing that despite being paid exorbitantly, they failed to study the specifics of the case.

E. Outline Areas of Inquiry for the Deposition

Once all of the information is compiled, prepare an outline or a checklist of the areas to cover without writing out specific questions that may inhibit your ability to listen carefully. You do not want to limit yourself with an outline that is too tightly drafted. Rather, be prepared to go where the expert's answers lead you. Have an exchange that allows for spontaneity. An attorney who fixates on an outline is less likely to listen and will fail to ask the unanticipated, but logical, follow-up questions. The outline will give you the freedom to follow

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an unexpected tangent while still ensuring that you address all relevant areas.

F. Be Persistent

Once you have prepared, take a comprehensive deposition examining all questions you and your experts have formulated to aid in this task. You should attempt to achieve the following goals:

1. Lay the groundwork for your cross-examination at trial;
2. Expose the expert's bias or otherwise undermine the expert's credibility;
3. Elicit as much information as possible regarding the expert's opinions and the bases for them;
4. Gain concessions to help support arguments you wish to make later through the use of leading and hypothetical questions;
5. Attempt to get the expert to support even a small part of your case so you can argue to the jury that even the defendant's expert agrees with the plaintiff on certain issues;
6. Buttress weaknesses in your case; and
7. Judge the demeanor of the expert (accomplished only in person and not via telephone deposition).

As a general rule, you are more likely to regret the questions you did not ask, not the extra questions you asked and do not need at trial. However, on rare occasions, you may refrain from a line of questioning to avoid alerting the expert to certain trial questions. For example, you may not want to divulge evidence that the expert has misrepresented his or her qualifications. Also, please remember that the witness' trial testimony will be limited to his discovery deposition and the 213 answers. Therefore, be careful not to elicit new opinions that may assist the expert. It can be a mistake to delve into areas not delineated in the 213 answers because an expert will simply develop new opinions at the deposition. Make sure to go painstakingly through every written opinion with the expert and his bases as provided in the defendant's 213(f) answers. This method may reveal a disconnect between the expert's actual opinions and the defense attorney's disclosure. Finally, if an expert is skilled in evading and/or not completely answering questions, be steadfast in your pursuit of these answers. Repeat the question as many times as necessary to get an answer to your question; not the answer to the question that the expert wants to answer.

II. Cross-Examination At Trial

Everyone knows that controlling the witness is important. However, I suggest that when dealing with an experienced and dangerous expert, control is absolutely critical. The cross-examination of a defense expert should always relate back to the theory of your case. You should prepare a draft closing argument first and work backwards. This provides a roadmap for the theory of your case so you know how to travel the road picking up the provisions you need along the way to get you to a positive result. Since cross-examination can be one of the more rewarding theatrical trial experiences, some lawyers mistakenly focus on form rather than substance. If you are looking to impress the jury with grand gestures and lofty rhetoric, your credibility will erode quickly along with your case. This is particularly true when it comes to expert cross-examination. Focus on the substance, and the form will follow. The following six steps may help:

A. Outline Your Cross-Examination

Your preparation for cross-examination of a defense expert is an evolving process. In the weeks immediately before trial, you should review and summarize the expert's deposition. You should review the points that you highlighted from the expert's previous depositions and trial testimony from other cases. As you study these materials, consider an outline of your upcoming cross-examination as it relates to your theory of the case. This is crucial.

Unlike the outline for the expert's discovery deposition, your outline for trial cross-examination should include an exact wording of virtually all of the questions you expect to pose at trial. The questions should be precisely organized and handwritten or typed with large spaces between questions so additional questions with respect to unexpected direct examination can be noted and addressed later during cross-examination. You are not looking for spontaneity in your phrasing of questions. You want the answers you elicit to mirror the answers the expert gave at her deposition. This precision in wording best enables you to control the examination and impeach the expert with her previous testimony. It also helps to reference in your outline the relevant deposition or trial testimony by exact page and line number. Thus, if the expert deviates from prior testimony, you can quickly impeach and force him back into step with his prior testimony. On the most crucial questions, you should track your question as closely as possible to your inquiry at the deposition. The use of the deposition to impeach is never as effective when the wording of the trial question is different than the wording of the question at deposition. This difference will invariably provide the expert with room to clarify or explain his position. If you have an effective deposition question and answer, then use the exact same question at trial. The drama of the impeachment really hits home when you read the identical question to which the expert has now given a completely different answer.

B. Command the Courtroom

Extensive preparation allows you to control the dynamics of your cross-examination. You will also keep the rhythm of the examination on your terms and not provide gaps between an answer and the next question so the expert can fill the silence with a "spin" of his previous answer. At no time should you allow the opposing expert to gain control. In order to accomplish this, never ask the expert to explain what they mean even after they have given an unexpected answer. As we all know, most experts love to hear themselves talk and will gladly seize any opportunity to be a "benevolent teacher."

Never ask an open-ended question because it provides the expert with a chance to eloquently reassert their opinions. Questions should be worded, as often as possible, in the form of statements from prior testimony, followed by reflective rejoinders such as "Isn't that right?" or "Didn't you?" This form of questioning is the least likely to allow for an explanation because it is easily answered in the affirmative or negative. If you encounter an expert at deposition who persists in non-responsive answers to well-phrased questions, alert the court, *in limine*, of the expert's propensity to evade. If the witness continues these evasive tactics at trial, the Court will be sensitized to the issue and, therefore, more likely to respond appropriately.

C. Use Pointed Questions to Undermine the Expert's Qualifications

Do not conduct a prolonged inquiry into the qualifications of the expert unless you have powerful evidence. If you have any information that undermines his qualifications get to them quickly and directly.

D. Create an Impression

The big picture on cross-examination of defense experts is that you must leave the fact finder with an impression that the defendant's case is weak. It is not necessary to take the expert to task on every issue. Instead, pick the points you can win handily. Cover the high points with depth and precision, and leave the minutia on the cutting room floor. Also, the concept of "primacy and recency" is an effective tool in structuring your examination. Therefore, begin and end your cross examination with your strongest areas to maximize the jury's attention to these points. In addition, control your emotions. Cross-examination does not mean you have to treat every witness with contempt. In fact, harassing or brow-beating often backfires. In most cases, such ferocity comes out during impeachment. Yet many lawyers forget that the goal of impeachment is not to intimidate the witness, but to expose the witness as either wrong or not credible. Particularly with defense experts, you want the jury to view the witness as a

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hired salesman who cannot be relied upon for his objectivity. On the other hand, if the situation calls for vigorous impeachment, seize the opportunity but only if it involves a critical point. Unless you attach some sense of incredulity to your examination at this point, it might slide by the jury. Also, be discerning in terms of where, when and what ammunition is used in order to obtain maximum impact. The issue must go to the heart of the case. Impeachment on irrelevant matters is easily ignored and dilutes your other points. Finally, use visual aides as much as possible. The jury wants to see what you are talking about. If you do not put the impeachment material up on the board or use an overhead projector, they might miss the point.

E. Avoid Refreshing Recollection

When examining an opposing expert you should not use the expert's prior testimony to "refresh" his recollection. This always invites unwanted explanation. The best way to handle an expert who has deviated from the line of questioning is to open to the appropriate page, identify the page and line number for the record, wait for opposing counsel to find the testimony, read the pertinent questions and answers into the record and simply ask, "I read that correctly, didn't I?" or "Did you give those answers to those questions?" The expert can only answer one way-"Yes." This way you maintain control and still undermine the expert's credibility .

F. Save Some Ammunition for Re-Cross

It is often prudent to save at least some effective examination for recross-examination. This requires you to do a balancing act in selecting testimony that you are willing to lose if the redirect does not touch upon the subject matter that you have saved. Thus, to some extent, you have to predict the redirect. The reason for saving a small portion of your examination is to assure that you have some solid material in order to end the expert's testimony on a high note.

III. Illinois Law on Cross-Examination of Experts

A. Foundation

For purposes of cross-examination as well as controlling the information a defense expert is allowed to introduce, it is important to have a command of the foundational requirements under the Rules of Evidence. The new Illinois Rules of Evidence became effective on January 1, 2011.

Illinois Rule of Evidence 703 governs the bases of expert testimony in Illinois state courts. It states that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or

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before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Ill. R. Evid. 703. The facts or data upon which expert opinions are based may be derived from three sources under Federal Rule of Evidence 703 and accompanying advisory committee notes (as adopted in Illinois):

i. Observation of the witness such as a treating physician;

ii. Presentation at trial. The technique used may be a hypothetical question or having the expert attend the trial and hear the testimony establishing the facts;

iii. Presentation of data to the expert outside of the court and other than by his own perception.[1]

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.[2]

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.[3]

Expert witnesses cannot read from or summarize medical literature as a basis for their opinions on direct examination.[4] An expert is allowed to reveal the contents of materials upon which they reasonably rely in order to explain the basis of their opinion; but they may not publish those materials to the jury in the sense of physically distributing a copy of them to the jury.[5] There is no Illinois authority holding that a trial court must allow copies of impeachment materials to be distributed to the jury, either in the courtroom or the deliberation room.[6]

B. General Areas of Cross-Examination

1. Facts and Data

An expert is under no affirmative duty to reveal facts or data that they considered before they rendered an opinion. Illinois courts have held that cross-examination is the appropriate method for eliciting facts underlying an expert's opinion. You may attack an expert witness by showing that their opinion would be different if certain facts were assumed or if certain assumed facts were changed. An expert witness may also be attacked for the purpose of impeaching their credibility on matters not directly related to the accuracy of his opinion. It follows that you may explore the partiality or bias of an

expert witness for any reason.

2. Bias

Partiality or bias may be shown by probing the expert's financial interest and frequency of court experiences. The Illinois Supreme Court found that inquiry into the 700 cases reviewed by a retained witness was proper.[7] Thus the court found that it was proper to inquire into the expert's annual income derived from expert testimony for the two years immediately prior to trial.[8]

The Illinois Supreme Court has expressly allowed cross-examination on the following matters to establish bias or interest: fee arrangements in the case at bar;[9] financial interest in the outcome of the case;[10] the number, frequency, and financial benefits of patient referrals from the adverse party's attorney;[11] annual income derived from services relating to serving as an expert witness;[12] and a comparison of the frequency with which an expert testifies for plaintiffs and defendants.[13] It constitutes reversible error when counsel is denied information relating to the bias and the financial interest of the expert.

C. Permissible Areas of Cross-Examination

1. Records and Reports

A medical expert may be cross-examined not only as to the records that they reviewed but upon which they did not rely.

2. Income

In addition to inquiry into an expert's income, you may question a medical expert regarding fee arrangements, financial interest in the case, frequency of referrals, number of referrals, and the financial benefit derived from them.[14]

3. Discipline

There is no prohibition in Illinois that a physician expert can only be cross-examined regarding discipline if it resulted in a restriction on his or her practice.[15] On the contrary, the fact that the physician expert is unable to practice medicine without supervision is highly relevant to their credibility where their testimony pertains to whether other physicians failed to exercise the appropriate standard of medical care.[16] The fact that the Illinois Department of Professional Regulation found it necessary to reprimand a physician for the failure to recognize the presence of a medical condition reflects on their qualifications and has some tendency to lessen their credibility as an expert.[17]

4. Asking Hypothetical Questions

You have the right to ask an expert witness a hypothetical question that assumes facts that you perceive are shown by the evidence.[18] The assumptions contained in the hypothetical question must be based on direct or circumstantial evidence, or reasonable inferences therefrom.[19] It should incorporate only the elements favoring the party's

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theory of the case, and it should state facts that the interrogating party claims have been proved and for which there is some support in the evidence. On cross, the opposing party may substitute in the hypothetical those facts in evidence that conform to their theory of the case.

Typically, on cross-examination, counsel will supply omitted facts and ask an expert whether the facts affect or alter the expert's opinion. The omitted facts may include another expert's impression, such as another physician's clinical opinion, as long as it is within the realm of the evidence.[20] Alternatively, counsel may present a different hypothetical on cross so long as the hypothetical is supported by the evidence.[21]

An expert witness's answers to hypothetical questions are an acceptable basis for her expert opinion.[22] A physician may testify as to what might or could have caused an injury.[23] However, the trier of fact still must determine the facts and the inferences to be drawn from this expert testimony.[24]

5. Limitations Based on Direct Examination

The proper scope of cross-examination is not limited to the actual material discussed during direct, but the subject matter of direct examination. Nevertheless, on cross examination a litigant may properly develop circumstances within the witness' knowledge, which explain, discredit, or destroy the witness' testimony on direct. This is true even if the information may not have been given on direct examination. Furthermore, one may go outside of the scope of direct examination for the purpose of testing the credibility of the witness.[25]

6. Physician's Personal Preference

During questioning, it may be appropriate to inquire as to the personal preference of the expert witness. Even though their personal preference does not relate directly to the applicable standard of care and cannot be used for that purpose, the testimony is relevant because it has persuasive value as to the credibility of the expert's testimony.[26] It is important to expose the fact that the expert is claiming the standard of care allows treatment that they would not render to their own patients in the same situation.

D. Impermissible Areas

1. Licensure

Evidence should be elicited, although it may not be admissible at trial, that an expert is not board certified in their specialty.[27] Also, you should explore at deposition whether the witness passed the board exam on the first attempt.

2. Negligence Cases Pending Against Expert

Counsel cannot inquire as to the number of medical negligence cases against the defense expert.[28] Nor is it proper to ask an expert whether they have ever been sued for medical negligence and whether sums have been paid on his behalf in the settlement of medical negligence claims.

3. Other Impermissible Areas

The court may preclude a defendant from asking their own expert questions regarding prior instances where the defense expert had recommended to counsel for the defendant that he settle a case. A pending medical disciplinary charge against plaintiff 's expert was a collateral matter so that after the expert denied the existence of a pending charge on cross-examination, defense counsel was bound by that denial and could not impeach the expert by producing a document purporting to set forth the disciplinary charge. [29]

Conclusion

Effective cross-examination of expert witnesses demands thorough preparation. A successful cross-examination often determines whether your client will win, lose, or settle. It is a rare expert who is impervious to cross-examination. Everyone has an Achilles' heel whether it is exorbitant fees, lack of qualifications, ignorance of the facts, lack of preparedness, bias, or faulty methodology. It is up to you to expose it.

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Endnotes

[1] *Wilson v. Clark*, 84 Ill. 2d 186, 49 Ill. Dec. 308 (1981).
[2] Ill. R. Evid. 704.
[3] Ill. R. Evid. 705.
[4] *Mielke v. Condell Memorial Hospital*, 124 Ill. App. 3d 42, 463 N.E.2d 216 (2nd Dist. 1984); *Schuchman v. Stackable*, 198 Ill. App. 3d 209, 555 N.E.2d 1012 (5th Dist. 1990); *Prairie v. Snow Valley*, 324 Ill. App. 3d 649, 756 N.E.2d 474 (2nd Dist. 2001).
[5] *Downey v. Dunnington*, 384 Ill. App. 3d 350, 382, 324 Ill. Dec. 108 (4th Dist. 2008).
[6] *Id.*
[7] *Trower v. Jones*, 121 Ill. 2d 211, 219-220, 117 Ill. Dec. 136 (1988).
[8] *Id.*
[9] *Kim v. Evanston Hosp.*, 240 Ill. App. 3d 881, 181 Ill. Dec. 298 (1st Dist. 1992).
[10] *Id.*
[11] *Sears v. Rutishauser*, 102 Ill. 2d 402, 408, 466 N.E.2d 210 (1984).
[12] *Trower, supra.*
[13] *Id.*
[14] *See Trower v. Jones, supra* (an expert witness's fees and the frequency with which she testifies are proper inquiries on cross-examination).
[15] *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 35, 934 N.E.2d 506 (1st Dist. 2010).
[16] *Id.*
[17] *Id.*
[18] *Leonardi v. Loyola Univ. of Chicago*, 168 Ill. 2d 83, 96, 212 Ill. Dec. 968 (1995).
[19] *Id.*
[20] *Horwitz v. Michael Reese Hosp.*, 5 Ill. App. 3d 508, 284 N.E.2d 4 (1st Dist. 1970).
[21] *Elliot v. Koch*, 200 Ill. App. 3d 1, 146 Ill. Dec. 530 (3rd Dist. 1990).
[22] *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 407, 940 N.E.2d 742 (1st Dist. 2010).
[23] *Id.*
[24] *Id.*
[25] *Neal v. Nimmagadda*, 279 Ill. App. 3d 834, 842, 216 Ill. Dec. 364 (1st Dist. 1996).
[26] *Schmitz v. Binette*, 368 Ill. App. 3d 447, 455-456 (1st Dist. 2006); *Gallina v. Watson*, 354 Ill. App. 3d 515, 519, 290 Ill. Dec. 275 (4th Dist. 2004).
[27] *Kurrack v. American D Tel. Co.*, 252 Ill. App. 3d 885, 900, 192 Ill. Dec. 520 (1st Dist. 1993).
[28] *Id.*
[29] *Poole v. University of Chicago*, 186 Ill. App. 3d 554, 561, 134 Ill. Dec. 400 (1st Dist. 1989).

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