

Everyone Is Entitled to His Own Opinion . . . Reflections on the Cross-Examination of Expert Witnesses

BY IAN SIMMONS

IN MANY AREAS OF THE LAW, EXPERT witness testimony is uniquely powerful and persuasive. This can be particularly true in antitrust cases, where claims and defenses often turn on sophisticated economic analysis.¹ The cross-examination of an expert in an antitrust case therefore poses risks and opportunities. The risks are apparent: few if any lawyers can equal (much less surpass) an expert in his or her field, particularly if the subject matter involves complex econometrics. But cross-examination also presents an opportunity to use the expert as a vehicle to highlight and exploit key facts before the judge or the jury.

In thinking about how to navigate the risks and opportunities of cross-examination, one would do well to bear in mind Daniel Patrick Moynihan's observation that "[e]veryone is entitled to his own opinion, but not his own facts."² The facts of the case provide refuge to the examiner and allow her to show (or at least create the appearance of) a hiatus between the expressed opinion and the record. This gap can be created and exploited in three ways: (1) by highlighting strategically significant facts the witness did not consider; (2) by focusing on facts that the expert considered but that may lead the non-expert judge or jurors to draw contrary, more logical inferences than the one drawn by the expert; or (3) by exploiting facts that the expert misstates, overstates, or understates.

Trial cross-examination therefore provides the footing for closing argument by reinforcing important favorable facts and laying the groundwork to argue that the jury should not credit the expert's testimony because the expert either has ignored or incorrectly weighed certain facts. The Supreme Court provides a succinct formulation of this theme: "Expert testimony is useful as a guide to interpreting facts, but it is not a substitute for them."³

Below, I discuss these observations in the context of the combination of one or more of the three strategies that should animate any cross-examination: showing the jury (or judge in the case of a bench trial) the expert is wrong on the facts (impeachment), showing the jury the expert's analysis

fails to consider salient facts or data, and showing the jury that much of what the expert says is actually helpful to your case.

The Distinction Between a Trial Cross-Examination and a Deposition Examination

What is the definition of a "trial" (as distinct from deposition) cross-examination? A trial cross-examination is a series of confrontations between the examiner and the witness in which, on virtually every question and answer, one is the winner and the other is the loser. Therefore, controlling a hostile witness at trial—or at least appearing to control the witness—is central to transmitting the message that the examiner is winning more confrontations than she is losing. Arguing the facts through the witness is perhaps the best way to control the witness. Herb Stern puts this better than anyone else:

Cross examination is arguing through the witness to the trier of fact. It consists of the attorney putting questions in a series to the witness. These questions, looped together, put forth his position to the jurors, a position they will accept or reject and their votes will be cast immediately. Cross examination is an exchange between two people which the jurors judge immediately.⁴

The expert ostensibly is expressing an opinion based on facts found from personal inquiry or furnished by others. Federal Rule of Evidence 703 permits reliance even upon inadmissible evidence if it is of a type reasonably relied upon by experts in the field in forming their opinions.⁵ Admissible or inadmissible, observed or provided, the expert's "facts" often are not truly factual but can be characterized as working hypotheses.

As noted above, cross-examining an expert at trial—the flip side of qualifying an expert and buttressing her opinion through direct examination—inherently calls for the exploitation of any hiatus between the opinion and the record facts. This is plain from the language of Federal Rule of Evidence 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify

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thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁶

The Power to Choose

The cross-examiner's greatest power is the power to select the topic of discussion, without regard to chronology of the events of the case: "What the cross-examiner wishes to ignore, he skips over. What he wishes to emphasize, he dwells on."⁷ The ability to select the topic for cross-examination is a key attribute of the power to control any witness and perhaps none more than an expert witness. An examiner should not ask a question to which she does not know the answer, unless she does it strategically in one of those rare instances where she does not care about the answer and simply is arguing through the expert witness to the trier of fact (thereby perhaps showing that the witness is nothing but a paid partisan).⁸

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Cross-examination at trial is therefore very different from cross-examination at a deposition: a lawyer may well want to cross-examine a hostile expert witness at deposition, but she should also ask open-ended questions to uncover assumptions and identify all of the facts behind the expert's opinions. The trial cross-examination should in part juxtapose assumptions against record facts. Open ended questions are therefore altogether proper and fitting in a deposition as they may set up trial cross-examination: once you have the expert committed in deposition testimony and know the basis for the key elements of the expert opinion—or whether a statement is based on a fact or is simply an assumption posing as a statement based on fact—you can then assess which of the three strategies of cross-examination you wish to employ for any given statement.⁹ It is to those three strategies that we now turn.

Strategy 1: Impeachment Cross-Examination

Edward Bennett Williams once said, "You must think of [the expert to be cross-examined] as a man with a knife in his hand who is out to stab you." That is the mindset of impeachment cross-examination at trial. Impeachment is typically what we think of when we consider cross-examination. Impeachment means showing the trier of fact that the witness is: (a) wrong on the facts; (b) sloppy (taking liberties with the facts or engaged in overstatement (or understatement)); (c) a partisan

advocate (lacks credibility); or (d) of questionable honesty—or all of the above.

Although not an everyday occurrence, getting access to prior reports of the expert may provide a gold mine of impeachment material, particularly when it comes to issues of economic theory or the expert's views on the usefulness of certain econometric techniques. (For example, I once cross-examined an expert who stated in prior reports that price discrimination markets were properly defined relevant markets, but who had taken the exact opposite position in the report in issue.) Most experts do not retain final drafts of prior reports; therefore, if you want them, you typically have to subpoena them from counsel in the prior case. This does take some time and effort but it often is worth the investment.

Let me suggest two other pointers: First, carefully check the materials cited in the body of the report and each footnote. You may be surprised by the frequency with which documents are cited for a proposition that they do not support. You may also be surprised to find on occasion that the cited material stands for the exact opposite of the proposition for which it is being cited. Second, be sure to conduct a thorough search for all of the expert's academic or trade press writings. As with prior expert reports, the academic writings of the expert can provide fertile material for highlighting inconsistent statements or contradictions in an expert's own research and writings.

When an expert witness acts as a partisan and engages in lengthy, filibuster answers in front of the judge or jury, the cross-examiner has a couple of recourses. One is to move to strike, but that is risky because the motion may be denied with the judge feeling forced to say, "He answered your question" (when in fact the witness did not). More importantly, a motion to strike makes the examiner look like she's losing control. One technique that can be effective is to simply ask, "Is that a 'yes' or a 'no'?" and leave it at that. Another technique is to merely repeat the question, word for word, perhaps prefacing it with the expert's name and title—the jury will get the point. Statements by witnesses do not hurt unless they are believed. Merely because a witness says something does not mean that it will be believed. An attempt to avoid the testimony or to silence the witness will give greater credence to hurtful testimony than will a direct confrontation.¹⁰

Some experts attempt to obfuscate or demonstrate their superiority by using technical jargon. When cross-examining an expert in this situation, you must know the expert's lingo. One very powerful technique to display power over the expert is getting the expert to agree with your alternative explanation that uses everyday language. Doing this will demonstrate the expert's arrogance, and will raise your credibility with the jury because it will highlight your mastery of the subject matter and cast you as a "plain speaker." On a related note, one often fruitful avenue of impeachment is to challenge the expert's knowledge of the underlying business: the more the expert gets facts of the business or industry "wrong" or says they do not matter to her analysis, the more her credibility

will be strained and will play into your theme that the facts are an “inconvenience” to her ipse dixit.

Presumably the deposition has established—and locked in—the assumptions the expert is making to support her conclusions. And presumably you have established in deposition that if any assumption is incorrect, that would alter her conclusions. At trial, the deposition transcript can be used to list those assumptions for the jury. The facts can then be juxtaposed against the expert’s assumptions and can be used to suggest to the witness that her opinions must change. If she says yes, then you have hit a home run. And if she resists, she will again be playing into your theme that she comes up with excuses to ignore facts that are contrary to her assumptions.

One final, well-worn lesson of impeachment cross-examination: do not overreach, and know when to stop. As Herb Stern writes,

Mastery of this tool of cross-examination is vital, since one of the great errors of cross-examination is the asking of questions without the power to compel agreement or to punish deviation. If you do not have the material . . . to make the witness answer your way at the pain of being impeached, then you should avoid the confrontation.¹¹

Strategy 2: “Limiting” Cross-Examination

The limiting strategy of cross-examination is designed to show the jury or judge facts the expert did not consider or examine or investigations she should have undertaken but did not. Its purpose also is to distinguish “assumptions” from “facts” and to clarify where the expert is confusing the former for the latter. The objective is to demonstrate that the witness’s testimony does not matter or, if it matters, that it supports your side. In this way the cross-examiner sidesteps the expert’s testimony by demonstrating that the witness is not on a collision course with the cross-examiner’s central theme of the case.

The deposition should accomplish the objective of locking the opposing expert into her opinion and eliminating all means of supplementation or equivocation. This is especially true if you believe the opposing expert has committed an error in her analysis. “Limiting” cross-examination is often more fertile for highly skilled expert witnesses than traditional impeachment, but it requires the cross-examiner to inventory all of the key facts and analysis that the expert witness did not consider or expound upon. The cross-examination then should transfer to the expert the burden of explaining why they do not matter. The expectation animating this technique is that the cumulative effect of omissions or overlooked facts and methodologies will permit the cross-examiner to argue to the jury (and the judge) that the expert’s opinions cannot bear the weight that is being placed on them. It may, therefore, be useful to have the expert admit all of the things she has not done, such as consumer surveys to support a market definition analysis or calculations relating to cross elasticity of demand.

Strategy 3: “Ride Along” Cross-Examination

The “ride along” strategy of cross-examination simply means that you build upon the areas where your expert and the adverse expert agree. This technique allows you to use the opposing expert to buttress the credibility of your own expert. This includes getting the expert to validate the training and past writings of your expert. Presumably, there will be significant areas of disagreement between the experts, but you should attempt to get the opposing expert to admit that certain aspects or features of your expert’s methodology are generally acceptable. (Plainly, much of the groundwork for this tactic has to have been laid during the deposition.)

There are some additional avenues of potential “ride along” testimony: again, if the groundwork has been laid in the deposition, it may be helpful to get the expert to endorse the kinds of documents and data relied upon by your expert. This will feed right into a cross-examination of the expert on particular facts and in whose favor the record tips. (It also feeds into the closing argument that the opposing expert is not contesting certain facts or factors but the expert is not giving them the weight they deserve.) Under certain circumstances, obtaining an endorsement of how your expert processed the data may also be worthwhile:

An expert who refuses to admit the possibility that her theory, method, and conclusions can be criticized by someone as well qualified as she appears arrogant. Each of the following sentences states a theme for cross-examination: 1. There are different theoretical paradigms for almost any subject; 2. There are well-qualified people who support any of several basic theories; 3. There are books and articles that support and oppose the different theories; 4. Even among those who have the same theoretical perspective, two qualified observers might honestly disagree.¹²

How to Best Deploy Cross-Examination Strategies

What is the proper order to employ these three cross-examination strategies? One rule of thumb is that you want a “positive” examination to precede a “destructive” examination, because once you lock horns with the expert, it may be very difficult to find any common ground or get her to endorse aspects of your expert or to admit to limitations of her testimony. This order of proceeding allows you to get what you can in terms of “ride along” and “limiting” cross-examination before you “put a bit of stick about it.” This ordering also allows you the best opportunity to end your cross-examination by seriously neutralizing—if not injuring—the opposing expert. But this is only the most general rule of thumb, as plainly there are situations where you may want to start out—and go initially flat out—with impeachment in order to discipline a truly partisan expert and demonstrate to the judge or jury that your credibility stands on a higher plane than does the testifying witness. This may be particularly true with long-winded experts who are unwilling to give “yes or no” answers to questions that are plainly calling for those answers.

One additional word on sequencing: By proceeding from the general to the specific one fact at a time, the cross-examiner is putting the witness in the dilemma of answering general questions before the witness knows where the general questions will lead to specifically. More experienced witnesses, professional witnesses, and expert witnesses are more adept at realizing where the specific factual goals may lie when a general question is asked. Consequently, that witness will begin to fight the cross-examiner intentionally at the very beginning of general questions.

Finally, four common mistakes in the cross-examination of an expert witness are worth considering. First, the cross-examiner should not let the expert simply repeat her direct testimony; the cross-examiner must control the encounter and set the terrain and facts that will decide the battle. Second, unless you do not care about the answer or unless you are locked into an answer by the deposition, the cross-examiner should not use open-ended questions, such as “how would this document affect your opinions in the case?” Third, as noted above, be careful about using the expert’s jargon. Instead, use simple language the jury will understand. Fourth, do not allow an expert to explain an answer by referring vaguely to a sea of documents; force the expert to be specific and to identify the particular documents.

Conclusion

“First, do no harm” should be the watchword of any expert cross-examination. And doing harm in the context of a cross-examination means failing to control the witness and therefore giving the impression the witness, rather than the examiner, is winning the confrontations. Deciding what to confront the expert on and what to rebut through direct testimony of your fact witnesses or through argument should be informed by an underlying humility that can be conveyed to the jury as confidence that you do not need to undo each and every opinion by the expert. ■

¹ For an excellent survey and discussion of the role of expert testimony in antitrust cases, see John E. Loptatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617 (2005).

² See http://www.brainyquote.com/quotes/authors/d/daniel_patrick_moynihan.html.

³ *Brooke Grp. Ltd. v. Brown & Williams Tobacco Corp.*, 509 U.S. 209, 242 (1993).

⁴ HERBERT J. STERN, TRYING CASES TO WIN: VOLUME III: CROSS EXAMINATION 57 (1993). This is the single best treatment this author has read on cross-examination, and this article is indebted to the book.

⁵ FED. R. EVID. 703 & Advisory Committee Note.

⁶ FED. R. EVID. 702.

⁷ STERN, *supra* note 4, at 58.

⁸ As Stern puts it: “The cross-examiner should never make an assertion he is not prepared to vindicate—and preferably immediately.” *Id.* at 59.

⁹ Lisa Wood observed, correctly, in her 2005 article in this magazine, “A preferred deposition technique is to lock the expert into an approach, understand why she did not use different methodologies to analyze the issue, and

confirm that the work reflects the expert’s best effort and analysis of the issue.” Lisa C. Wood, *Cross-Examining an Expert Economist at Trial*, ANTITRUST, Fall 2005, at 80. In deposition, it is worth using the language of Rule 26 itself by getting the expert to agree her report contains “a complete statement of all opinions the witness will express and the basis and reasons for them.” See FED. R. CIV. P. 26(a)(2)(B)(i) (emphasis added).

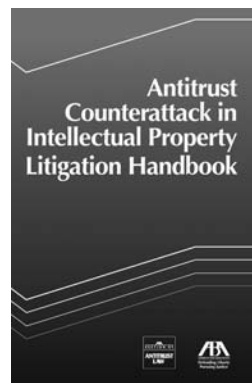
¹⁰ In preparing an expert for cross-examination, the expert must have reviewed conflicting testimony and documents that may cut against her opinions.

¹¹ *Id.* at 86.

¹² MICHAEL E. TIGAR, EXAMINING WITNESSES 424, 425 (2004).



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