Cross-Examining the Expert Witness

What is Cross-examination?

When a witness presents evidence in a judicial proceeding in Canada, the opposite party has a right to cross-examine that witness. This right operates in all common law jurisdictions, and in many others, and is considered a fundamental principle of natural justice.

In their seminal work, "Cross-Examination: Science and Techniques", Larry Pozner and Roger Dodd[1] wrote:

> *Our system of justice does not blindly accept witness testimony. Every witness who takes the stand is subject to cross-examination. That says something about what our culture believes. It believes that the truth is best found if all testimony is subject to a searching inquiry by the opposing counsel.*

American legal scholar John Henry Wigmore said of cross-examination *"it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."*

What is an Expert?

An expert is someone who has special knowledge of a subject. "Special" means that it is not knowledge likely to be known by the ordinary person. The expert will have

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[1] L. Pozner & R. Dodd "Cross-Examination: Science and Techniques", 2nd ed. LexisNexis, 2004

acquired this special knowledge by education or experience.

The Need for Expert Evidence

Expert evidence is only needed if the trier of fact needs help to understand and reach conclusions about an area in which the trier of fact is unlikely to have any personal knowledge. The Supreme Court decision in *R. v. Mohan* dealt extensively with some difficult issues surrounding expert evidence. Writing for the court in that case, Justice Sopinka held as follows:

> *An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.*

Preparing to Cross-Examine an Expert

There are basic techniques for cross-examination of any witness which apply equally to the cross-examination of an expert. The fundamental principle is to maintain control of the witness at all times. This is achieved by asking only leading questions.

There are many excellent texts on the topic. The work by Pozner and Dodd referred to above is a leader in the field.

Seminars and workshops, particularly those involving practice sessions and feedback, are invaluable.

Current advice involves asking short questions, with only one point per question. If you understand the answer, but suspect the trier of fact may not (technical jargon, for example), it is useful to repeat the answer in plain English. All the questions should be prepared in advance, but obviously may need to be modified as you listen, very carefully, to the answers.

When writing out the questions, it is helpful to annotate with references to supporting documents and where they are located (at Tab X of the joint document brief, for example). I believe that nothing looks less professional than scrambling to find things while you are on your feet.

There are two diametrically opposed opinions about the order of the questions. You will need to choose the option that matches your style. The first opinion suggests you should use a "jumping around" technique to keep the witness off balance.

The second opinion favours choosing a logical order and then following it. In his excellent article, *"Cross-examining the Expert Witness",* Christopher E. Hinkson, QC [2]provides the following excerpt from the 1987 B.C. decision in *Mazur v. Moody*.[3] Chief Justice McEachern included the following quote in his reasons:

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[2] C.E. Hinkson QC, "Cross-examining the Expert Witness", Dec 2001

[3] Mazur v. Moody, 1987 CarswellBC 155, "BCSC)

> Mr. Smith, do you not think by introducing a little order into your narrative you might possibly render yourself a trifle more intelligible? It may be my fault that I cannot follow you – I know that my brain is getting a little dilapidated; but I should like to stipulate for some sort of order. There are plenty of them. There is the chronological, the botanical, the metaphysical, the geographical, why even alphabetical order would be better than no order at all.

Retaining Your Own Expert

The first step will seem obvious – you must retain your own expert in the area in question. In most cases, this expert's area of expertise will mirror that of the opponent's expert. However, that may not always be true. It is necessary to consider the issues. Do the issues require a certain type of accountant? A business valuator? An insolvency specialist? This is going to be a fact specific issue for your case. You may succeed in demonstrating that your opponent has retained the wrong type.

The next step is to require your expert to educate you about the area in question, and in particular, to educate you about the opposing expert's report. This education will need to be a supplement to your own education on the topic. Obviously you cannot match either of the experts in the total sum of their knowledge, but you can probably become quite knowledgeable in some narrow areas and this may be enough. You will need to crack the books!

A fruitful source may often be the references in the expert reports, as well as any publications listed in the experts' C.V.s. You must understand every principle stated in the reports. Some time spent with your own expert, probably at several stages of the case, will be invaluable. If possible, you may want your expert to attend for both the direct and cross-examination of the opposing expert.

Geoffrey Adair, in his text "*On Trial*", sets out seven techniques for cross-examining an expert[4]. These are:

1. Attacking the qualifications of the expert;
2. Attacking the bias of the expert;
3. Destroying the factual assumptions on which the opinion is based;
4. Attacking the methodology;
5. Contrasting the opinion with other leading authorities;
6. Exposing the opinion as a matter of judgment; and
7. Contradicting their opinion with prior statements.

Mr. Adair's list provides a useful framework for the organization of this paper.

Attacking the Qualifications of the Expert

This step requires careful scrutiny of the expert's C.V. and all available extrinsic material. Very occasionally, there

[4] G. Adair, "On Trial", 2nd ed. LexisNexis, 2004

will be an actual error in the list of qualifications. It is not unusual for people to exaggerate slightly when drafting a C.V. Sometimes an expert may be found to have done the same. For example, a C.V. may show that some professional step was completed, when in fact it was never quite finished. Alternatively, a job title or a particular set of experiences may have been inflated. Since this will be explored at the start of the expert's examination in chief, a successful attack here will be devastating.

The testimony of an expert in a proceeding follows these steps. Counsel for the first party calls the expert to the witness box. The witness is sworn or solemnly affirms to tell the truth. That counsel then introduces the expert's C.V. and makes it an exhibit. That counsel then takes the expert through the C.V. Only rarely will counsel skip this step, even if opposing counsel is willing to stipulate as to the expert's qualifications, knowing that it is important to emphasize the expert's credentials. To speed what can be a rather tedious process however, counsel may lead the expert through much of the boilerplate, pausing to highlight crucial areas.

When the C.V. has been thoroughly explored, counsel will then ask the court or tribunal to accept that witness as an expert, permitted to testify in that particular area of expertise.

At that point, the witness is offered to counsel for the opposing party for cross-examination on the issue of expert standing. This requires a careful decision. Cross-

examination on the expert's ability to testify as an expert should only be attempted if there is a very high probability of success. If you know for a fact that there is an error in the C.V. or if you know that counsel has selected the wrong type of expert, then a cross-examination is likely to be fruitful. The best possible outcome will be disqualification of the expert. Second best is that you have created some reservations in the mind of the trier of fact.

The worst possible outcome is that you have enhanced the standing of your opponent's expert. This is why you must be quite certain of the outcome in advance.

Attacking the Bias of the Expert

It is possible for an expert to be biased in several different ways. It is possible that the expert has some connection with the party who retained him or her. You will not need to show actual bias – mere apprehension is usually enough to soften the expert's impact.

Similarly, you may be able to show that the expert testifies regularly and exclusively for one side. This is less likely in the commercial litigation setting, more common with medical experts in personal injury or malpractice cases. However, the expert may often be retained by large institutional clients to the exclusion of litigants like your client.

Perhaps the expert is a member of organizations that take a strong stand on certain issues, so that the expert is unlikely to be impartial.

All issues of possible bias will be uncovered by pre-trial research. The internet is your friend.

Destroying the Factual Assumptions on Which the Opinion is Based

Your very extensive analysis of the expert's report will permit you to prepare a list of the facts underlying it. Those facts should now be compared with the actual evidence. It is possible that there are facts which are inconsistent with the opinion. These could be facts known in advance of trial, or facts which emerge at the trial itself.

It is worth noting here that you must always be aware of the rule in *Browne and Dunn*[5]. This rule says that you cannot rely on evidence that contradicts the testimony of a witness without first giving the witness the opportunity to explain the contradiction. It seems unlikely that this rule could be broken in our current climate of expert battles. However, it should always be kept in mind.

Attacking the Methodology

Sometimes an expert will not have carried out all the proper procedures for arriving at an opinion. If this is the case, it

[5] Browne v. Dunn (1893) 6 R. 67 (H.L.)

will have been revealed by your expert upon reviewing the report. If not already provided accompanying the report, you will need to ask for copies of raw data, calculations etc. Ask your expert to repeat the calculations. If you find an error – even a small one – it will undermine the expert's credibility. It will allow you to go down that delightful avenue of questioning about how many other errors there may be in the report etc.

Contrasting the Opinion with Other Leading Authorities

If your preparation, generally with the guidance of your own expert, leads you to conclude the expert's opinion is not in agreement with some text or other authoritative work in the field, you may put this to the witness. However, a careful foundation must be set up.

Firstly, you must ask the witness to acknowledge that the work you are referring to is recognized as an authority in the area. If the expert agrees, you then put to the expert the passage that contradicts the witness's evidence. If the witness denies that the work in question is an authority, you can no longer pursue that line but you may have undermined the expert somewhat.

On a similar note, if your expert is a well-known authority in the field, you may put that to the opposing expert and obtain an acknowledgement.

Exposing the Opinion as a Matter of Judgment

It is sometimes possible to get an expert to acknowledge that there is an alternative explanation for the facts in evidence. In reality, there often is more than one explanation. An expert who steadfastly refuses to admit that any other explanation is possible, even if less likely, risks looking very unreasonable. Sometimes, if the trier of fact is leaning your way, this chink of possibility may be all that's needed to permit your theory of the case to carry the day.

Sometimes it is possible to use the opponent's expert to bolster your own case in areas where there is no disagreement. Even though the two opinions ultimately diverge, the opposing expert can be used to establish as much as possible of the basis for your expert's opinion.

Contradicting the Opinion with Prior Statements

It is occasionally possible to strike gold in your research of the opposing expert, particularly if that expert has had a long career. You may turn up a paper, a speech, or a newspaper article where the expert has expressed an opinion that contradicts the opinion in the present case. Few experts will be able to finesse that line of questions.

Some Professionalism Issues

Rule 4 of the Rules of Professional Conduct sets out the professional obligations of a lawyer acting as an advocate.

Rule 4.01 (1) states:

> When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

There is a particular rule – Rule 4.04 - about communicating with witnesses. This rule of course applies equally to lay witnesses and experts. When you have finished the examination in chief of your own witness, you may not speak to that person about the evidence already given or any matter touched on in that evidence. Best not to speak at all, in my opinion.

However, Rule 4.04 (f) provides as follows:

> During cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness.

The commentary on this rule suggests that if in doubt, it is often appropriate to obtain consent from opposing counsel, or from the tribunal before having the conversation.