What the Expert Witness Should Know About the Cross-Examiner's Trial Tactics

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Just as we expert witnesses have our own "do's and don'ts" checklist, so does the trial lawyer who cross-examines you. Cross-examination is such an important part of the trial process that entire books have been devoted to the subject. I thought it would be of interest to aspiring (and even experienced) expert witnesses to obtain a view from "behind the scenes" and to see what rules and maxims have been established for the trial attorneys themselves.

In this article, I have taken material from the writings of two Canadian and two American legal authorities: Former Supreme Court of Canada Justice John Sopinka (when he was a practicing trial lawyer) in *The Trial of An Action*[1] and Ontario District Court Judge Roger E. Salhany in *Cross-Examination: The Art of The Advocate*.[2] The American authors are Peter Brown in *The Art of Questioning*[3] and the nineteenth-century trial lawyer, Francis L. Wellman, in his 1903 classic, *The Art of Cross-Examination*[4], Part I of which is entitled "The Principles of Cross-Examination" (243 pages) and Part II, "Some Famous Examples of Cross-Examination" (229 pages). Wellman had examined and cross-examined some 15,000 witnesses in his 25 years as a litigator.

This article consists of a "potpourri" of maxims and anecdotes shared by these renowned trial lawyers with their fellow attorneys. These provide some insight as to the cross-examiner's thought process — where he or she is "coming from" and why. Needless to say, these rules are by no means exhaustive. Whenever expert evidence is involved, I have included the relevant maxims.

Sopinka, in *The Trial of An Action*, gives several pages of advice (as an attorney) for preparing a trial lawyer's own witness for cross-examination:

> In order to further neutralize the terror generated by the witness box the witness should be given a preview of the cross-examination. When the witness is a main witness and will be subjected to a searching cross-examination, it is often productive to plan the examination which is expected from opponent's counsel and subject the witness to it ... .
>
> Apart from being given a preview of the examination there are a number of 'good pieces of advice' about behaviour from which a witness can profit ... . Don't fence with the cross-examiner. Don't lose your composure. ... no matter how much you dislike the cross-examiner treat him with respect. All of this will help to create a favourable impression on the tribunal.

Those of us who have given expert witness testimony know first-hand that the foregoing instructions are those typically suggested by counsel preparing his or her expert for cross-examination.

Sopinka notes that a witness' evidence can be contradicted or impeached by (a) previous inconsistent statements, (b) other evidence, (c) contradiction in the witness' own evidence or inherent improbabilities therein, or (d) attacking his or her memory, power of observation and credibility. As regards an expert witness (as opposed to the fact-witness), he makes the following suggestions to his fellow counsel:

- To cross-examine effectively, you must be schooled by an equally competent expert.
- The object is to flaw him/her so that your expert is preferred.
- The easiest way of discrediting the expert's opinion is to refute a basic assumed or found fact, which may be done in cross-examination or by other evidence.
- If a basic assumed fact cannot be refuted, attack the theory of the expert [presumably relying upon counsel's own expert].

SHOULD COUNSEL CROSS-EXAMINE?

Sopinka says that while there are many styles and techniques of cross-examination, it must serve at least one of three purposes:

- To obtain helpful admissions or evidence.
- To contradict or impeach the witness.
- To create an impression or atmosphere for the judge or jury.

But first the attorney must make the decision as to whether to cross-examine the expert at all, and, if so, what it will accomplish. In making such a decision, counsel must consider whether, by *not* cross-examining, it will imply to the court that the expert's evidence is accepted.

Wellman even suggests that nothing could be more absurd or a greater waste of time than cross-examining a witness who has testified to no

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expert TIP

Knowing the tactics that attorneys use in cross-examination can help financial experts better prepare their testimony.

material fact against the lawyer's case. He observes that the courts are full of lawyers who seem to feel it is their duty to cross-examine every witness who is sworn; they appear afraid that their clients will suspect them of ignorance or inability to conduct a trial.

In *The Art of Questioning*, Peter Brown gives the following advice:

> the early masters understood better than today's professors the importance of foregoing cross-examination and the stupidity of having an adverse witness repeat and thus reinforce all that was said so damagingly on direct ... .
>
> More cross-examinations are suicidal than homicidal. When in doubt don't ask a question. When in doubt don't cross-examine. Do only what's necessary, and then get the hell out.

Brown states that if the witness whom counsel is about to cross-examine has demonstrated that he is a good citizen, decent and unbiased, ... and has not harmed the case in any essential way, counsel should not cross-examine him. If he/she does, it should be for a specific purpose and that purpose should always be a significant material gain for the client's cause. In this connection, he refers to the comments of another American trial lawyer, Max Steuer, with forty years of experience as a cross-examiner:

> ...cross-examination should be pointed to two objectives: either to destroy the story told by the witness or to destroy the witness himself. If neither of these objectives is attainable (and if you have properly prepared your case, you should know the prospect) a pointless and scoreless cross-examination does your case more harm than good. And when you have scored your point on cross-examination, for heaven's sake, quit.

This brings us to the basic "rules" that the cross-examiner should follow, over and above such obvious ones as "Be prepared."

RULES FOR THE CROSS-EXAMINER

1. Don't ask a question in a court-room context without knowing the answer first.

Sopinka believes that while this rule may generally apply, there might be exceptions:

> The truth lies in between. In a strong case, not dependent on cross-examination, the cross-examiner should take no chances. He should restrict his questions to matters that are either not capable of doing damage or in respect of which the witness is constrained by previous statements. But in a case that depends on cross-examination this approach is too stultifying. The cross-examination must be built up on probabilities. The cross-examiner tries to foresee the different answers that may be given and formulates questions to meet them. Eventually, despite the fact that the desired answer is not obtained, the witness' response runs counter to the probabilities of the situation.

As one renowned trial lawyer, Emory Buckner, put it: "When the cross-examiner rises and does not know exactly what to ask or where to begin, he should say 'no cross-examination'!"

2. Size-up your witness.

In his book, Judge Salhany categorizes certain witnesses under the following headings, among others:

- The brilliant witness.
- The garrulous witness.
- The reluctant witness.
- The flippant answer lying witness.

Each of these witness categories requires a special approach by the cross-examiner in attempting to destroy the witness' testimony.

3. Begin the cross-examination dramatically.

Sopinka believes that the best technique is a dramatic beginning: This is when counsel has the attention of the judge and when the witness is most vulnerable. Counsel should not permit the witness to become acclimatized and gain confidence, rather, put to the witness an early series of questions that go to the heart of the matter.

4. Cross-examine in plain English.

Sopinka recommends that counsel should force an expert to use non-technical language. If the suggestions put forward by counsel in cross-examination are logical, the judge will prefer them to the expert's negative response couched in abstruse technical language: "The advantage you have is that the judge ... [speaks] your language, while the technical jargon is as foreign to [the judge] as it was to [the attorney]."

5. Show that the expert's conclusion is erroneous not because the expert is not qualified but because the facts relied upon are inadequate to draw such a conclusion.

Wellman says that it is generally unwise for the cross-examiner to attempt to cope with a specialist in the latter's own field of inquiry. Lengthy cross-examinations along the lines of the expert's theory are usually disastrous and should rarely be attempted and that "[w]hen the cross-examiner has totally failed to shake the testimony of an able and honest expert, he should be very wary of attempting to discredit him by any slurring allusions to his professional ability ... "

Attacking the expert's expertise will force the cross-examiner to deal in areas where the expert clearly has the edge. But by simply sticking to the facts, the cross-examiner may attempt to neutralize it and retain control of the cross-examination.

Salhany states that the foundation for an expert's opinion and its subsequent validity will depend entirely upon the establishment of the underlying facts. If those facts have been misstated by counsel or it turns out they are not proved or accepted by the judge, then the entire opinion will crumble. It is crucial, therefore, that an attack be made on the proof of the

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underlying facts. Salhany gives an example of how cross-examination might proceed in this respect:

> ***Counsel:*** If I understand your opinion correctly, it was your opinion that ... (opinion is stated).
> ***Witness:*** Yes.
> ***Counsel:*** That opinion, of course, depends entirely upon your assumption of the truth of the facts that my learned friend has related to you.
> ***Witness:*** Yes.
> ***Counsel:*** And those facts are (each underlying factual assumption is listed).
> ***Witness:*** Yes.
> ***Counsel:*** So it is fair to say then that if it turns out that any one of those factual assumptions is not correct, then your opinion might be different?

Judge Salhany continues:

> This question puts the witness in a dilemma. It may be that his opinion is not dependent upon every one of those facts. The question, however, is only designed to establish that the opinion might be different. If counsel asked if his opinion would be different, then the witness could properly say in response 'not necessarily so.' This would place the examiner in the position of having to ask 'Why do you say that?' This would leave the witness in a position of having the opportunity of expanding his answer much more fully.
>
> On the other hand, by asking simply whether his opinion 'might be different' leaves it open for counsel in re-examination to ask the following question:
>
> ***Counsel:*** In response to my learned friend's question as to whether your opinion might be the same if all of the assumed facts did not exist, you answered 'no.' Would it necessarily be different?
>
> This would give the witness the opportunity to expand fully on his answer.
>
> The cross-examiner who is secure in his position should pursue the issue and determine what assumed facts are essential to the opinion. He can ask the expert to state what facts he relies upon to support his position. Once he does so then counsel is able to ask the question:
>
> ***Counsel:*** Is it fair to say then that if any one of those facts is not true, then your opinion would not be the same?
>
> ***Witness:*** Yes.
> What the cross-examiner must then do is attack the evidence in proof of one of those facts. He will then be able to go to the judge ... and argue that [the judge] should reject the testimony of the expert because it was dependent upon proof of certain facts which were not established.

6. Work with the skill of a surgeon.

Brown refers to the comments of Lloyd Paul Stryker in *The Art of Advocacy*:

> [A cross-examiner's education] never ends, and each witness called affords him a new study. Each one presents the problem: Has he told the whole truth or only part of it? Has he tried to give his honest recollec¬tion, or is it only the fallibility of memory that has interfered? Is he testifying from some bias that even he does not appreciate? Is there something he has omitted that would be helpful to your client?

Brown describes Stryker as the keen observer who would watch carefully how the witness behaved in the courtroom and on the stand:

> [Stryker] would rivet his eyes on the quarry during direct examination. He did not, as most of us do, sit there, eyes down, making notes. He studied the specific mannerisms of the witness. He looked for clues in the ways the individual expressed herself or himself. He listened for the variations in tone of voice caused by the tightening of vocal cords. He noticed pauses. He noted flashes of anxiety, dryness of mouth, moistening of lips, hesitations, discomfort, and uncalled-for repetitions of coached material. He watched for stammer and for needless reference by the witness to counsel's name ... Eyes were of particular interest. How and when did pupils shift and dart? When did eyes narrow or blink? The giveaway laugh and wipe of forehead. Hands wring, cling, scratch, and readjust. Legs shuffle. A hand touches the pocket with notes taken from his lawyers on what to avoid at all costs ...

Brown concludes his observation with: "Observe your subject, and then go for the jugular!"

7. Use the opposing expert to help your own cause.

Wellman suggests that the art of the cross-examiner should be directed to bring out such scientific facts from the knowledge of the opposing expert as will help his or her own case, and thus tend to destroy the weight of the expert's opinion.

No question should be put to an expert which is in any way so broad as to give the expert a platform to expatiate upon his own views, and thus afford him an opportunity in his answer to give his reasons in his own way, for his opinions, which counsel calling him as an expert might not have fully brought out in his examination (or, as noted earlier, to provide the expert an opportunity to repeat and reinforce). Wellman would warn his colleagues that:

> The professional witness is always partisan, ready and eager to serve the party calling him. This fact should be ever present in the mind of the cross-examiner. Encourage the witness to betray

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his partisanship; encourage him to volunteer statements and opinions, and to give unresponsive answers. Jurors always look with suspicion upon such testimony. Assume than an expert witness called against you has come prepared to do you all the harm he can, and will avail himself of every opportunity to do so which you may inadvertently give him. Such witnesses are usually shrewd and cunning ... , and come into court well prepared on the subject concerning which they are to testify.

8. Don't put the evidence of your own expert to the expert you are cross-examining.

According to Sopinka, any direct reference to counsel's own expert should be limited to an admission (which will normally be forthcoming) by the opposing expert on the witness stand that counsel's own expert is well-qualified and highly regarded: "While much of the substance of your expert's theory will be put to the witness, a specific identification of your expert's evidence in the question may result in getting a rebuttal in advance."

9. Exercise self-control when you have elicited a damaging answer to your cause.

Both Brown and Wellman note that rather than showing surprise, an experienced trial lawyer (rather than being pulverized by a damaging answer) will appear to take the answer as a matter of course, let it fall perfectly flat and proceed with the next question as though nothing had occurred, or simply say "uhm-mm." Again, the essential thing for the trial lawyer is not to lose control of the witness. Sopinka gives the following advice:

Develop a stoical attitude to bad answers. Go on to something else without apparent emotion. If you think of something to dilute the bad answer, come back to it. Avoid long awkward pauses... try to finish on a positive note.

10. Don't ask why.

According to Brown, the only times when you can ask "why" in cross-examination is when the adverse witness is inextricably "impaled" or if counsel's pre-trial examination-for-discovery and other testimony has made him or her aware of facts that the opposing party simply cannot explain away. In this latter context the question "why" is rhetorical and the witness' silence tells the tale.

Once the witness/evidence has been discredited, don't ask more questions. If cross-examining counsel continues to ask more questions once the adverse witness or his/her testimony has been discredited, the witness may be afforded an opportunity of explaining away prior admissions. Similarly, counsel should not over-stress, as this may provide the witness an opportunity of qualifying his or her answer or shrewdly placing the matter in another context.

As Peter Brown notes, "you will have plenty of opportunities to emphasize the damaging admission or testimony in summation to the court."

Max Steuer has written a chapter in Wellman's book, in which he states that if, through cross-examination, the integrity or truthfulness of the witness is destroyed, the examiner has greatly helped his case, but there remain two dangers:

(a) To cross-examine when it is unnecessary; and

(b) To over-do the cross-examination.

11. Don't ask open-ended questions.

Brown suggests that the attorney's questions should be short, definite, clear, pithy, without characterization, and close-ended. He suggests that counsel does not ask general questions that the witness can answer with a speech. This would give the hostile witness a chance to bring in testimony otherwise inadmissible and self-serving. The cross-examiner must control the opposing witness on cross-examination or the witness will destroy the questioner and, in turn, the client's cause. For the hostile witness, leading questions (permitted in cross-examination but not in direct) or close-ended questions are those that call for a "yes" or "no" response such as "Isn't it correct ... ?" In fact, all questions in critical areas should be close-ended. By carefully limiting the answers, counsel can successfully preclude the expert from expounding on his or her theory and may even succeed in planting seeds of doubt in the court's mind about the expertise of the witness.

Open-ended questions simply give the expert an opportunity of reasserting his/her opinions and explanations.

12. Don't be indignant.

The late British barrister, Clifford Mortimer, stated that "the secret of cross-examination is not to examine crossly." The advice to trial lawyers is that indignation can destroy one's objectivity and judgment. This rule applies no less importantly to expert witnesses, whose objectivity and credibility are at stake. In the case of counsel during cross-examination, judgment is also at stake.

13. Make the point with silence.

Brown suggests that when the opposing witness during cross has finally been "coaxed or coerced" into making a material admission that is important to the cross-examiner's case, it is often effective to stop asking questions for a moment and let the response sink in with the court. "A moment of quiet in the courtroom can be startling ... "

As Wellman puts it: "It cannot be too often repeated ... that saying nothing will frequently have a better result than hours of questioning. It is experience alone that can teach us which method to adopt." He refers to the story of John Philpot Curran, known as the most popular advocate of his time, who once indulged himself in the silent mode of cross-examination but who had made the mistake of speaking his thoughts aloud before he sat down:

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> 'There is no use asking you questions, for I see the villain in your face.' The witness replied with a smile: 'Do you, Sir? I never knew before that my face was a looking-glass.'

14. Avoid petty points.

Brown recommends that when a witness in direct examination has scored a direct hit on the cross-examiner's case, and the cross-examiner knows that the witness cannot effectively be turned around, the attorney should resist the temptation of bringing out trivial inconsistencies in the direct testimony in the hope that they would discredit the witness and his evidence:

> That would amount to answering a strong argument with a weak one. The contrast will only make matters worse for your client. Rise, say firmly, 'no questions.' Get on with the case, your face unconcerned and free of redness.

Counsel should avoid descending to the use of petty points in questioning instead of foregoing cross-examination unless there is something of substance to cross-examine on.

15. Consider timing.

During cross-examination Brown suggests that counsel look for a high peak (if there is one) upon which to terminate and sit down.

> Keep an eye on the clock, because it is always best to finish a session strong and, in some cases, to have overnight for honing of further cross-examination. Try to have your best thought come just before you finish the day's session.

While the foregoing comments were taken from the writings of Canadian judges Sopinka and Salhany and American trial lawyers Wellman and Brown, there are also a few other suggestions that have been made by other cross-examiners and which have appeared in *For the Defense*, a monthly publication of The Defense Research Institute in the U.S.:

16. Never pass up an opportunity to expose the ... expert as a "professional witness.

While the expert's qualifications should not, as noted earlier, be attacked on cross-examination, counsel should instead challenge the motivation for the expert's testimony. This can be accomplished by having the expert reveal the amount of his or her fee, the income earned by the expert during the preceding year from testifying or consulting with attorneys in litigation matters, the number of times he/she has testified for plaintiff's lawyer and defendant's lawyer, the manner in which he or she attracts clients (e.g., advertising, seminars, or direct contact with attorneys). This is to have the judge infer that, not only is the expert paid for his/her services as would be expected, but that the expert has a vested interest in pleasing the attorney and continuing to cultivate the "business" as a professional witness.

17. Never leave the floor open.

When a question has been asked in cross-examination and the expert has given a response, don't allow there to be silence following such response. If the cross-examiner does, the expert may decide to add further explanations to the answer just given. Therefore, while the cross-examiner may be considering the next question he/she can forestall the situation after a question and answer by simply saying "Now let me ask you this ... ", or words to that effect. This way, should the expert decide to add further comments while counsel may be considering what the next question is, counsel could immediately respond "Excuse me ... let me ask my question." This technique should enable the cross-examiner to prevent additional, unwanted testimony by the expert.

18. Word the questions in the form of statements.

To avoid giving the expert an opportunity of explaining his or her views, word questions as much as possible in the form of statements from prior testimony, followed by reflective rejoinders such as "Isn't that right?" or "Didn't you?" These questions can easily be answered yes or no and are least likely to invite or allow explanation.

19. Drive home a point more than once by asking a series of questions (to which you know the answers).

Rather than asking a "tail-end" question such a,s "You did not do any verification of the company's results before January 2004, *did you*?" and risk a simple admission from the expert that "No, it wasn't necessary," a *series* of questions would better emphasize the point. For example, you could take a "slice" of the answer by asking, "You didn't do any verification around *X* date, did you?" and "And you didn't do any objective verification around *Y* date, did you?" Thus, slices of the same point can be driven home to the judge in a negative way.

20. Save a little for re-cross-examination.

The cross-examiner should select testimony that he or she is willing to lose if no re-direct examination is undertaken or if it does not touch upon the subject matter which has been saved. By saving at least a small portion of cross-examination for re-cross is to assure that the cross-examiner has some solid material to end the expert's testimony on a note that is positive for the cross-examiner.

Conclusion

While the expert should try as much as possible to familiarize himself/herself with the courtroom techniques of the cross-examiner, there is no substitute for very thorough and careful preparation for trial and having first-hand knowledge of the underlying facts, issues, and context of the litigation.

[1] John Sopinka, QC, *The Trial of An Action*, Butterworth's (Toronto: 1981).
[2] Roger E. Salhany, *Cross-Examination: The Art of the Advocate*, Butterworths Canada LTD. (Toronto: revised 1991).
[3] Peter M. Brown, *The Art of Questioning*, Collier Books, Macmillan Publishing Co. (New York: 1987).
[4] Francis L. Wellman, *The Art of Cross-Examination*, Fourth Edition (New York: 1936).
[5] Lloyd Paul Stryker, The Art of Advocacy, Simon & Schuster (New York: 1954).