**38 Cross-examination strategies used by attorneys, and how to respond**

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(For more on the mistakes experts make in testimony, see “Critique the Expert 1″.)

The expert witness will encounter a number of strategies used by attorneys in cross examination. This appendix provides an overview of some of the more common techniques. The expert will become more skilled at identifying and reacting to these techniques by anticipating them and knowing effective ways of responding. Each strategy is briefly explained, followed by sample dialogue. A stands of Attorney, E stands for Expert.

**1. Expect detailed probing into the expert’s background, fee structure, and experience as an expert.** The expert should calmly and non-defensively provide the answers to these questions.

A: Nurse \_\_, where did you go to nursing school?

E: University of Louisiana.

A: Do you have any advanced degrees in nursing?

E: Yes, I have a masters of science in nursing.

A: You don’t have a doctorate in nursing?

E: No.

A: And yet you feel qualified to be an expert in this case?

E: Yes, I do, based on my experience as a nurse and my education. (*A doctorate in nursing is not the entry level degree for expert witness review.*)

A: Where have you worked as a staff nurse?

E: Baton Rouge Medical Center, and University of Alabama Hospital.

A: You realize that the nurses who were sued in this case worked in Denver?

E: Yes.

A: And yet you have never worked in Denver, have you?

E: I have not.

A: Why do you feel qualified to comment on the standard of care for nurses who work in Denver?

E: I believe the standard of care in a national one. The nurses in Denver are expected to adhere to the same standards as do the nurses in the state in which I work.

A: How much do you charge per hour to review a case?

E: $175 per hour.

A: How much? (shocked)

E: $175 per hour (repeats answer calmly)

A: Do you know how much nurses earn who work in hospitals in Denver?

E: Not precisely.

A: Why are your fees so much higher?

E: They reflect my education, training and expertise.

A: How much are you being paid for your testimony today? (*The expert should be clear that her opinion is not being bought, but rather her time.*)

E: I am being paid for my time at the rate of $200 per hour.

A: How many cases have you reviewed as an expert?

E: Twenty.

A: So, you are really a novice at this work, aren’t you? (*This question is an effort to intimidate the expert.*)

E: I have reviewed a fair number of cases.

A: How much money did you earn last year doing expert witness work? (*Generally the courts permit the expert to provide a percentage of income rather than having to reveal the expert’s income.*)

E: My expert witness earnings represented about 15% of my income.

A: Are you going to be paid a percentage of the recovery plaintiff hopes to get in this case?

E: No. (*It is illegal for experts to work on contingency.*)

**2. Asking questions in no obvious order** – this is designed to prevent the expert from seeing a pattern in the questions. The expert should answer each question as clearly as possible.

A: Let’s talk about your opinions in this case, all right?

E: All right.

A: What is your understanding about the responsibilities of the nurse for keeping the doctor informed of changes in the patient’s condition?

E: The nurse should report significant changes in the patient’s condition.

A: What is the purpose of giving insulin to diabetics?

E: it is to provide a medication that will control blood sugar.

A: What is a patient acuity system?

E: It is designed to help determine how to staff a nursing unit.

**3. Deliberate mispronunciation of words** – the attorney is trying to present an uneducated air so that the expert’s guard will be let down. The expert should ignore the mispronunciations.

A: Nurse\_\_\_, this case is about a patient who had hypertrophy of the ventricles. (Mispronounces words) Is that right?

E: Yes. The patient’s echocardiogram showed that the patient had hypertrophy of the left ventricle. (Pronounces it correctly)

A: What is that?

E: (YOU give an explanation of this term.)

**4. Flattery** – the opposing attorney acts impressed with the expert’s credentials in order to lower the expert’s guard. The expert should politely acknowledge the flattery and wait for the next question.

A: You went to nursing school, right?

E: Yes, I did.

A: You went to one of the finest nursing schools in the country to get your degrees, didn’t you?

E: Yes.

A: You have written a number of articles that have been published in prestigious journals, correct?

E: Yes.

A: Why, I bet you know more than about 99% of the nurses in this country, don’t you?

E: I don’t know about that, but I do know the standard of care and how it applies to this case.

**5. Goading the expert** – the attorney is hoping the expert will lose his or her temper or respond in a flippant way. The expert should remain calm.

A: Did you speak to any of the nurses who were sued in this case? (*This is a misleading question to ask in front of a jury, as it implies that the nursing expert was not being fair to the defendants by not allowing them to tell her their side of the story.*)

E: I did not, as it is my understanding that I am not permitted to contact the defendants.

A: Did you think it was important to know what they had to say about how this incident occurred?

E: I did and that is why I read their deposition transcripts.

A: Have you heard the expression that hindsight is 20/20?

E: Yes.

A: Wouldn’t you agree that the nurses taking care of the patient did not have the benefit of hindsight?

E: I agree with that statement but it is my position that the nurse should have followed the standard of care.

A: You have testified that it is your opinion that the nurses did not follow the standards of care, isn’t that right?

E: Yes, I have.

A: This is only your opinion, isn’t it?

E: It is my opinion based on my education, training and knowledge of the standards of care.

A: You are telling this jury that these dedicated nurses, who work day in and day out, made a mistake, aren’t you?

E: Yes, they deviated from the standard of care.

A: You want the jury to believe that these nurses were negligent, don’t you? (*This is a blatant effort to attack the nursing expert. The expert must remain firm in the convictions.*)

E: Yes, I do.

**6. Using body language to intimidate** – pointing fingers, shouting, leaning into the expert’s space are often tactics that the attorney who retained the expert can bring to a halt by objecting.

**7. Asking questions in a rapid manner** – the attorney may be hoping that the expert will mimic the pace of questioning and give a careless answer in haste. The expert should think through the answer to each question and establish a pace that is comfortable for the expert, remembering that a pause does not show up on a transcript.

**8. Asking repetitive questions** – the expert should provide consistent answers to the same question asked several times.

A: Now let me be sure I have this right. You are saying that you don’t think the nurses did anything wrong with respect to the care that was provided to my client, right?

E: Yes, I am.

A: And you believe in your professional opinion that the standards of care were met?

E: Yes, I do.

A: There was nothing that should have been done differently, is that right?

E: That is true.

A: You are very sure about that?

E: Yes.

9. Asking vague or complex convoluted questions – whether done on purpose or because of difficulty framing questions, the attorney should be asked to rephrase the question so that it is clear.

A: What is nursing all about?

E: I don’t understand your question.

A: What do you do as a nurse?

E: In what context?

**10. Questioning the expert about details in the medical record to test the expert’s memory** – the expert is allowed to refer to the materials that were reviewed and does not have to answer questions based on memory alone.

**11. Use of silence** – the attorney may pause after the expert’s answer hoping the expert will elaborate on the answer. The expert should answer the question and wait for the next one.

**12. Asking about nursing literature to identify “authoritative texts”** – the attorney should prepare the expert to answer these questions based on the jurisdiction’s case law.

A: Nurse\_\_\_, what texts do you have in your library?

E: Luckman and Sorenson’s *Medical Surgical Nursing*, Barker’s *Neuroscience Nursing*.

A: What texts do you believe are authoritative in the field of medical surgical nursing?

E: I find several to be generally reliable.

A: Do you rely on those texts for information?

E: Yes, but no text is completely up-to-date because of the lag time from sending it to the publishers and getting it into print.

**13. Hypothetical questions** – the expert needs to be sure that the details included in the hypothetical question match the case issues.

A: Now Nurse, I’d like you to assume that the following is true. The patient has been admitted to the hospital for a breast reduction. She tells the nurses that she has numbness and tingling in her legs after surgery. She complains each shift to each nurse. What is the standard of care regarding notifying the physician of these changes?

E: I am having difficulty with your hypothetical because it is not based on the facts of this case. My review of the medical record and the depositions of the nurses show that the patient complained on only two shifts.

A: You are aware of my client’s testimony that she complained to each nurse who took care of her?

E: I read her testimony to that effect but it is contradicted by the nurse’s testimony.

A: Can you answer my question?

E: If I accept the facts of your hypothetical, I would want to know how often her physicians were visiting her and what they were documenting about her legs.

A: Nurse, I am not asking you about what the doctors were doing. I am asking you about the nursing standard of care. Do you understand that?

E: Yes.

A: Now can you answer my question?

E: I would have to say if I accepted your hypothetical that I would expect the nurses to report this finding to the doctor if it was a new one but I understand from the testimony of the nurse that the patient said this was not new.

**14. Failing to bring materials to the deposition will make it more difficult for the expert to answer questions.**

A: Do you have with you the copies of materials that were provided to you for review in this case?

E: I do not have a copy with me but Mrs. Wilson does have the materials which you reviewed in order to supply this expert report.

A: When you say Mrs. Wilson has copies of those materials, did you bring your copies with you today?

E: Mrs. Wilson has a copy of my nurse expert report and he has copies of all of the material that was sent to me from her office which I reviewed in compiling the report.

A: I realize that she has copies of those materials, but does she have your copies of the materials?

E: No, my copies are home.

**15. Making derogatory remarks on the material that was reviewed is not advisable and should never be done.** The attorney has the right to look at anything in the expert’s file.

A: Did you make any notations or marks of any kind on the materials you reviewed?

E: Yes, I did.

A: May I see your file? (Looks at materials.) Why did you highlight this sentence in Nurse Perry’s deposition?

E: I thought it was significant.

A: What was significant about it?

E: It was in conflict with what the doctor said happened.

A: I see a comment in the margin of the report that was prepared by Nurse Watson, who is the expert for the plaintiff. What does this mean: “She should stick to obstetrics where she belongs and not review this case?”

E: I thought the expert was not qualified to review this case.

A: What does this comment mean: “What a jerk.”

E: I thought his conclusion was not correct.

**16. Failing to read and consider all information** – the expert should ask for pertinent documents, depositions and other records needed to obtain an opinion.

A: When you undertook this assignment, did you want to render a fair opinion?

E: Yes, I did.

A: And in order to render a fair opinion, did you think it was important to know as much as you could about the facts of this case?

E: Yes.

A: Did you read the depositions of the nurses?

E: No, I did not.

A: Why did you not read them?

E: They were not sent to me.

A: Did you ask the attorney for them?

E: No. (*This question is designed to make the expert look unfair. The expert is placed in an awkward position if the attorney does not provide him with the depositions. The expert can prevent this type of trap by asking the attorney for all relevant material.*)

**17. Failing to listen to the question, failing to stay focused**

A: Could you explain to the jury why Mrs. Queen was admitted to the hospital?

E: She stayed in the hospital after her fractured hip because they were trying to find a nursing home bed.

A: I asked you why she was admitted. What caused her to be hospitalized?

E: She was unsteady on her feet and falling frequently.

A: Can we agree that there does not appear to be an order for taking these compression stockings off this patient?

E: No, ma’am.

A: No, we can’t agree or—

E: We can agree.

**18. Failing to be responsive**, especially giving more explanation or more information than is asked for

A: Did the job as an instructor involve teaching emergency nursing to students?

E: Yes, I took the students into the emergency room for one semester. They were assigned to do observe the triage nurse and to perform simple treatments. At times, they would observe cardiac arrests, of course always standing in the back of the room where they would not be in the way. Many of them found this to be the most traumatic experience they had as students, although I did have one student one time who fainted when the doctor started suturing a head laceration on a child. (*This was a yes or no question.*)

**19. Failing to stand behind the expert report**

A: It says in your report that Nurse Williams did not deviate from the standard of care when she administered Morphine to my client.

E: Yes, that is what it says.

A: Do you hold that opinion today?

E: Actually, I have changed that opinion.

A: What have you changed about your opinion?

E: I now believe that she should not have given 35 mgs of Morphine at one time, when the doctor ordered 10 mgs. (*This expert should have come to this realization long before the deposition.*)

**20. Going too far out on a limb** – not being flexible (*Note: this is actual testimony from a trial.*)

A: How often does the tube feeding bag need to be changed?

E: It should be changed every 24 hours.

A: What is the purpose of changing the tube feeding bag?

E: It is to keep the bag sanitary.

A: You have heard testimony that Mrs. Viglione’s family saw fungus growing on the inside of the tube feeding bag, correct?

E: Yes, but that does not really matter.

A: Why is that?

E: The stomach is not sterile, so fungus will not hurt it.

A: Would you eat bread that has mold growing on it?

E: No.

A: Why is that?

E: (long pause) I would not want to get sick.

A: If a fly flew into the tube feeding solution, would you feed the fly to the patient?

E: Yes, I would, because the stomach is not sterile. (*This is actual testimony by a nursing expert.*)

**21. Testifying to issues outside his or her expertise**

A: Do you have an opinion as to whether or not Dr. White should have prescribed Keflex to this patient?

E: Yes, I do.

A: And your opinion is?

E: My opinion is that he should not have prescribed the Keflex even though I am not an orthopaedic surgeon, based on the fact that the patient herself had requested that she not be given this drug.

Defense attorney #1: Can we just take a two minute break? I want to talk to her outside.

Defense attorney #2: I object to any break.

A: Are you through with your response?

E: Based on those two things I still believe that Dr. White should have, based on his medical judgment, not given Keflex to the patient.

(Attorney #1 puts his hand on expert’s arm, whispers in her ear and forces her to stand up.)

Defense attorney #2: Let the record reflect that the attorney is coaching the expert during this deposition. His witness did not ask to speak to counsel. Counsel has asked to speak to his expert. The expert and her attorney are leaving the room.

Defense attorney #1: I object to the use of the word coach in terms of characterizing because I want to speak to my expert witness. I just want to talk to my expert in private with regard to the scope of her testimony that we will hope to use at the time of trial. I would like to clarify with her and I don’t consider that coaching at all with regard to anything. We will be back in a few minutes after I have had that opportunity to talk with her.

Defense attorney #2.: Coaching is a good word and I stand by my description of what you are doing here, Counsel.

A: Before you leave, are you able to put on the record the scope of this witness’s intended testimony?

Defense attorney #1: I intend to do that when I come back.

A: You can’t do that beforehand?

Defense attorney #1: I will come back and do it.

Defense attorney #2: That’s after he coaches her.

Expert and defense attorney #1 leave room for a minute, then return.

Defense attorney #1: Before we begin, I would like to put a statement on the record with regard to my conversation with the witness.

A: Which the record should reflect was three minutes.

Defense attorney #1: I have had the opportunity to discuss with the expert the scope of her review. I was concerned that she might have some questions about her role. She is being offered as a nursing expert who will address the standards of care for the nurse. At the end of her report, she has a paragraph that seems to conclude that Dr. White prescribing Keflex may have been a cause of the problems.

A: Let me ask you this.

Defense attorney #1: Go for it.

A: Will this witness be testifying about causation? In other words, what damages (if any) were caused by administering Keflex?

Defense attorney #1: We are offering her as an expert witness as to the standard of care of the nurse. We are going to limit her testimony to the duty of the nurse.

Defense attorney #2. Exactly! (The nursing expert may not testify about the physician standards of care.)

**22. Failing to know the topic**

A: What is the nursing process?

E: It is the process by which we give nursing care.

A: Can you be more specific?

E: No, I can’t.

A: Can you list any of the steps of the nursing process?

E: No.

**23. Using terms such as “always” and “never” can be too sweeping and trap the nurse.**

A: Does a nurse read the entire medical record before she takes care of a patient?

E: Yes, nurses always read the chart.

A: So, without exception, nurses always read about the patient before they take care of him, is that correct?

E: Yes.

A: The standard of care requires the nurse to always read the medical record, is that what you are saying?

E: Yes, it is.

A: Can you give me a reference to an article or textbook that says that the nurse should always read the medical record before taking care of the patient?

E: No I can’t.

A: So this is your opinion on what the nurse should do?

E: Yes, it is.

A: In your practice as a nurse, have you seen nurses sit down before taking care of the patient and read the entire medical record?

E: No, I have not. But they should do it. (*It is difficult to maintain this is the standard of care if the expert cannot support her opinion with a text or common practice.*)

**24. Trying to be a lawyer is not advisable.** The nursing expert should avoid adopting legal language.

A: Do you believe that the patient did anything wrong?

E: Yes, I believe she was contributorily negligent.

**25. Being biased or an advocate is to be avoided.** The expert’s role is to be objective and an educator about the standard of care.

A: Nurse \_\_, you have been retained to be an expert in this case, isn’t that correct?

E: Yes, I was hired to defend the nurses.

A: I’m confused, isn’t Mrs. Corner the defense attorney?

E: Yes, she is.

A: What do you see is your role?

E: My role is to make sure that these nurses don’t have to pay for something that was not their fault. It was not their fault that the patient did not follow instructions. There would be far fewer lawsuits if patients just did what they were told!

**26. Being argumentative, aggressive or too clever is not recommended.** The expert often comes out on the losing end of this type of tactic.

A: It is your opinion that the nurses at Major Hospital did nothing wrong, is that right?

E: Yes, it is, I think the nursing care was perfectly fine.

A: Do you have an opinion about whether this order sheet existed?

E: (Smiling) I have an opinion that will remain private.

A: Why?

E: I find it interesting that this order sheet was supposed to be in the chart, and it is the most crucial document in this case and it is missing. I find it unusual that it is missing because it should be there. I mean, I have never seen this type of patient being cared for in the hospital without that type of order sheet in place.

A: I don’t think you have answered my question as to what your belief is as to whether that order sheet ever existed.

E: I cannot testify with any certainty that the document existed because I was not there to see it. Based on my review of the deposition of the nurse and her answers to interrogatories, I question that a possibility does exist that this order sheet was there, and then destroyed.

A: When I asked you the question originally, and I know that the reporter can’t take this down, but you gave a little smile as to indicate that perhaps you did have an opinion as to whether or not this existed. What is your opinion about whether or not it really existed?

E: I think anything is possible at this point since we have so many pieces of paper involved in this case.

A: Yes or no, do you believe- is it more likely than not in your opinion that the paper existed?

E: I would say no, that it probably did not exist. It is a possibility either way, 50/50. (*This response is completely ambiguous and not helpful.*)

**27. Answering two-part questions with one answer** – each part of the question should be answered separately or the attorney should be asked to rephrase the question.

A: Do they read the whole chart or just portions of the chart?

E: Yes.

**28. Speculating about the actions of others is dangerous.**

A: Do these numbers appear to have been changed?

E: I read that it says 50 percent.

A: Does it appear that the numbers have been changed?

E: There is some writing underneath it.

A: What do you think it is? Forty?

E: I don’t know.

A: Doesn’t it look like forty and fifty written over it?

E: Under the 12:00 line it appears to be a four. The other mark I can’t really tell.

A: Why was it changed?

E: You would have to ask the person who wrote the line why it was changed.

**29. Do not fall into the “isn’t it possible” trap.**

A: Are you aware that Nurse Quigley documented that she found a pulse in the patient’s left leg at 10:00 AM?

E: Yes, I am aware of that note.

A: Is it possible that note is correct?

E: It is my opinion that that note is not correct.

A: On what do you base that opinion?

E: I base that opinion on the note of the vascular surgeon, who diagnosed compartment syndrome at 10:45 AM and the operative note, which states that the popliteal artery and vein were found to be shredded.

**30. Do not charge fees that are difficult to justify to the jury.**

A: What do you charge to come to court for the day?

E: My trial fee is $5000 per day.

A: Do you know how much nurses make at General Hospital?

E: The nurse working in a hospital makes between $22-$35/per hour.

A: So, that is $176/day if we use $22 per hour and $320 per day if we use $35/hour, right?

E: Yes.

A: And you charge $5000 per day, correct?

E: Yes, I do.

**31. Explain medical terms in the language of lay people to avoid talking over the heads of the jury.** Avoid doing what this expert did:

A: Could you explain to the jury what type of surgery Mrs. Wilson had?

E: She had a bilateral salpingo oopherectomy and a vaginal hysterectomy with fulgeration of areas of endometriosis. (*The jury will have no idea what she just said.*)

**32. Avoid talking down to the jury.**

A: Could you explain to the jury what type of surgery Mrs. Wilson had?

E: Every woman has a uterus, ovaries and tubes. The eggs are made in the ovaries. The male seeds are called sperm. The male seeds meet the egg in the tube and travels down the tubes to the uterus or womb. The fertilized egg stays in the uterus until the baby is ready to be born. The baby comes out the birth canal or vagina. The patient had removal of her ovaries and tubes. Her womb was removed from her vagina. She had areas of endometriosis, which are made up of cells from the uterus which travel outside of the uterus. Each month when a woman has her monthly, these cells swell and this causes pain. The doctor used electricity to burn these cells.

**33. Avoid making statements that defy the commonsense of jurors.**

A: Do you accept as true everything that the nurse said happened?

E: Yes, I do. I believe in her honesty.

A: So if I told you that she testified yesterday that she took care of the patient on February 30, would you believe her testimony was true?

E: Yes, I would.

**34. Referring to the insurance company is to be avoided.**

A: Have your bills been paid by my firm?

E: No, I have gotten my checks directly from the insurance company. (*The jury is not supposed to know that an insurance company is involved in the case. This response could result in a call for a mistrial if it was given in the courtroom. Don’t let this happen to you!*)

**35. Being able to cite sources of information makes the expert’s testimony stronger.**

A: What do you base your opinion on that restraints may not have been mandated on the evening shift?

E: I based that opinion on the testimony of the plaintiff and on the medical record which states that the patient was cooperative and awake, alert and oriented, and the testimony of the patient’s mother and her friend.

**36. The attorney may ask questions of the expert to trap the expert into admitting she has committed malpractice.**

A: Have you ever been a staff nurse assigned to a patient who was in restraints of any nature where the patient sustained an injury?

E: No.

A: Have you ever been a staff nurse assigned to a patient where the patient was not restrained and sustained an injury as a result of not being restrained?

E: No.

A: Have you ever been a staff nurse assigned to a patient who sustained an injury in a hospital?

A: Yes.

A: Tell me about those circumstances. First of all, on how many occasions?

E: Do you mean when I was caring for the patient?

A: Yes.

E: I can recall taking care of an elderly person with frail skin. I inadvertently applied pressure to the skin and the skin tore. I recall that situation. Other than that I don’t recall other situations.

A: Okay. Have you ever cared for a patient where a patient fell out of bed?

E: No.

A: Have you ever committed malpractice?

E: Not that I know of.

A: Have you ever been sued for malpractice?

E: No.

**37. The expert should avoid being backed into a corner.**

A: Is it your opinion that any time the patient sustains an injury while in four point restraints that malpractice has occurred?

E: I would be hard-pressed to agree to a blanket statement like that. I would have to know the circumstances.

A: Have you cared for patients who were in four point restraints because they were being abusive, combative and at risk to themselves or others if they were not restrained?

E: Yes.

A: And in those situations is it possible that the patient can sustain an injury while in four point restraints in the absence of nursing malpractice?

E: I personally have not seen it happen. I’ve seen many efforts to try to avoid friction, irritation, rightness and problems with circulation. It’s my opinion that if the standard of care is followed that the probabilities of the patient sustaining injury are greatly reduced.

A: So would that allow for the possibility that even if the appropriate standards of care are followed for monitoring a patient in four point restraints that an injury may happen in any event?

E: It would be a very remote possibility.

A: Is it possible that a combative patient in restraints can create a friction burn?

E: Yes it is possible, if she is continuously pulling.

A: Okay. So even if they are being monitored to make sure that the restraints are not too tight, and they are being released from them periodically as the protocol requires, that could occur?

E: The answer to that question is not that simple because when a nurse observes that type of continuous friction and pulling against the restraint, the nurse is obligated to consider alternatives to avoid the friction. These could include putting padding under the restraint to prevent the abrasion to considering the fact that the very act of restraining the patient can cause combativeness. The combativeness can be independent of the underlying medical reason that the combative behavior might have existed. There must be some efforts at problem solving with respect to how to avoid damage to the skin. So, your question was can it cause abrasion? Yes it can, but there are multiple interventions to avoid that outcome and I do not see that those were taken in this situation.

**38. The attorney may question the knowledge of the expert or realize that he has just laid a trap for himself.**

A: Your criticism that Nurse Winters failed to release the restraints is based on the patient’s testimony, correct?

E: Well, Nurse Winters also testified that she did not release the restraints.

A: That’s your recollection? Let’s strike that.

E: Would you like me to show her testimony to you?

A: No.