Mock Trial:
The Trials of an Expert: Cross Examination

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4 Cs of testimony

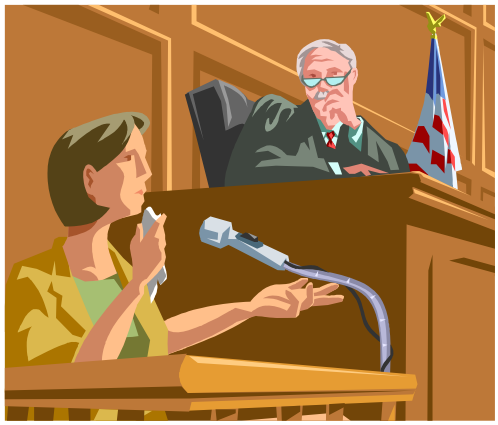
- Clearly
- Concisely
- Confidently
- Consistently

These four qualities will separate the skilled from the unskilled witness. Be polite to opposing attorney, showing the same degree of politeness you exhibited on direct examination. Keep in mind these four important aspects of testimony. Use the same facial expressions, body language, tone, and demeanor with both retaining and opposing counsel.

The best experts are patient, enthusiastic, engaging, make their points clearly, and never get upset. The expert should be dignified and nice. Credentials are not the most important quality- jurors will respond to what they see and your degree of genuine interest in assisting them understand. Make eye contact with the jurors but don't hold eye contact for too long, such as 5-10 seconds. Take a breath and move on to the next person. Use your skills of reading nonverbal body language. Translate technical terms into plain English, without becoming patronizing. Use stories and analogies

Jurors respond to common sense. Don't strain their credibility.

Useful techniques: Use your own words



You are not a mouthpiece for anyone. Don't let your client put words in your mouth that are not consistent with your opinion. Don't let the opposing counsel make you agree to a statement that sounds like a question if there are inaccuracies. Don't let him nod and smile and suggest something that sounds reasonable. Don't be pressured into agreeing in a hurry. Take your time. If something is just a little bit wrong, your answer should be "not exactly" or "that is almost correct". Additionally, if the attorney restates your answer incorrectly, do not agree with the restatement. Say, " No, that's not what I said, What I did say was…"

Expect the attack

Recognize that cross examination of expert witnesses may involve an attack on opinions, credibility, motivation, and/or lack of experience or knowledge. The opposing lawyer's job is to destroy or damage your credibility by attacking you, outsmarting you, frustrating or annoying you and probing for your most vulnerable characteristic and exploiting it. It is not personal. He is doing his job for his client. Expect this and do not take it personally. Cross examination is the aspect of litigation that most severely tests the expert witness.

Avoid arguments

All experts can appear intelligent on direct examination. Only true experts continue to appear confident, articulate, and non-defensive when being attacked by the attorney during cross examination. Don't quarrel or argue things that do not need to be argued. This affects the jurors' perception of your objectivity. Control your anger. The attorney is looking for your weak spots. Stay objective, calm, and in control. The qualities that make you an expert make It hard to avoid wanting to control the dialogue. You can't control it.

Lawyers want the jury to believe that the money paid to an expert discounts her opinions, but jurors expect you to be paid. It is often a waste of time to focus on fees. But if you become defensive, hostile, won't answer questions or visibly uncomfortable, you have made the fee an issue.

Make necessary admissions yet be consistent in opinions

You may have to admit to things that will hurt your side. Jurors like experts who call it as they see it. You won't win every point.

Look at the jurors on occasion to see if they are receptive to your message.

Avoid evasiveness

On cross, it is essential that you not appear to duck any questions from opposing counsel. Answer all his questions clearly and forthrightly, even those that may seem to damage your side's case. There are techniques., which we'll discuss, you can learn for answering a question and yet not giving opposing counsel the answer she or he wants. People who are trustworthy and objective don't try to worm out of tough questions. If you directly respond to the hard questions and do not make a big deal out of your answers, neither will the jurors. Don't get caught up in quibbling or arguing.

Biases

Expect to be asked about biases. These questions will cover your relationship with the retaining attorney or his client, whether he retained you on other cases in the past, how much time do you devote to forensic work, how much income you derive from it, the positions you have taken in the past that may be contrary to the facts of this case. Be prepared to explain why your positions have or have not changed in the light of new learning and technology.

Never overreach

Don’t exaggerate or make statements that are overboard. The expert may be asked: “Are you as positive about this as you are about the rest of your testimony?” Stop- are you? Don’t give an answer because you think it is what is desired. Only give an answer because it is the truth. If you refuse to concede anything, you can be taken to the point of absurdity. An experienced attorney will recognize overreaching. An inexperienced attorney may not, but when the judges does, it will destroy both the expert and the case.

Don’t guess

If you do not know, it is critically important to say so. No one knows everything.

Example:

“Nurse, how long does it take the body to metabolize a carbohydrate?”

“I don’t know.”

What you don’t want to do is to state something as a fact when you really don’t know. The attorney wants to be able to point out to the jury why your testimony is reliable, and that when you don’t know something, you readily say so.

Prevent misstatement of your opinions

On cross, don’t let opposing counsel get away with misstating facts, your opinions or important principles of your field. Practice ways of responding respectfully but firmly with the correct information.

Correcting answers

Sometimes the expert is in the midst of testimony and realizes that a previous questions was incompletely or incorrectly answered. When it is important enough to return to this answer, the expert should announce “I gave an incorrect or incomplete) response to an earlier question and I would like to correct it.” Do not be alarmed if you are not given the complete opportunity to correct or add to an incomplete previously given answer by the attorney who is cross examining you. It demonstrates to a jury that you are careful when giving your opinions. It also demonstrates to a jury that you are human, in that you forgot something. Moreover, merely stating that you want to add or correct previous testimony will clue your client’s attorney that she/he needs to ask you a question on re-direct so that you give your complete and correct answer.

Dealing with difficult questions: Wouldn't you agree?

Questions stray from facts to conclusions (of the opposing counsel) when you are asked loaded questions, such as

Don't you think?

Would you care to hazard a guess?

Can we safely theorize..?

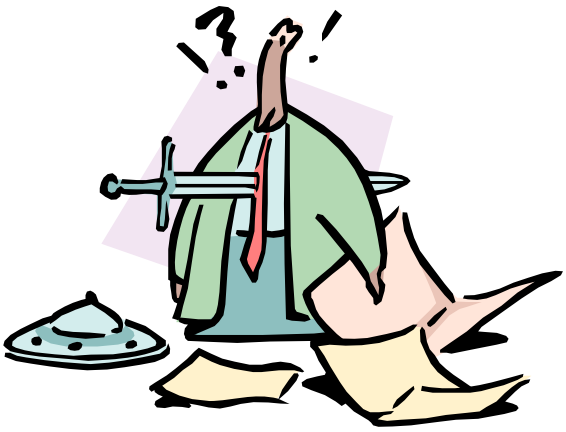
Would it be fair to assume or presume?

Do you find it curious that ?

Isn't it logical to infer?

Be alert to these questions. They are always asking you to buy the theory of the opposing counsel. Don't speculate. Of course, you should agree with questions that present facts with which you agree. You do not want to appear unduly obstreperous or combative when it is not necessary.

Isn’t it possible?



Know the rules that govern your testimony. In a standard of care case, you need not agree that if the nurse had done something it is 100% likely that something would have occurred. The standard is to a reasonable degree of probability or more likely than not.

Example:

Attorney: “Nurse, are you saying that if the nurse had been in the room at the time, it is 100% likely that she could have prevented Mr. Wilson from jumping out the window?”

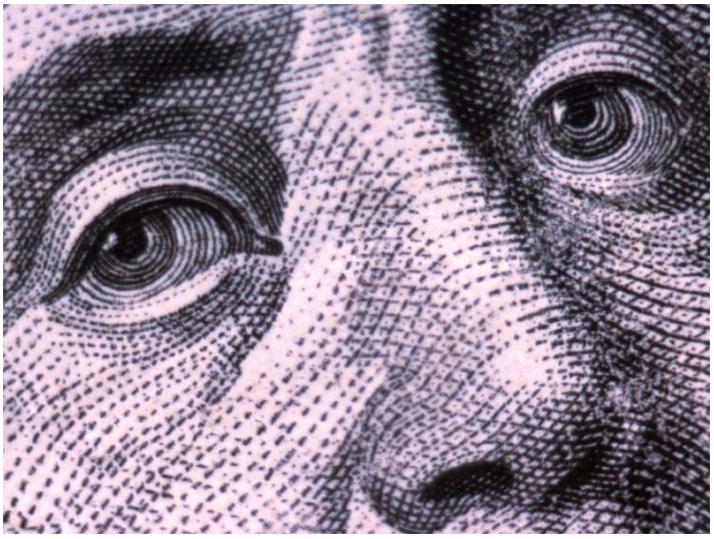
Expert: “It is my opinion to a reasonable degree of probability that she could have stopped him.”

Attorney: Isn’t it possible she could not have stopped him?”

Expert: It is more likely than not that she could have stopped him.”

Please remember that there is a difference between the words possible and probable. Possible means something may or may not occur. While probability means that there is a better than 50% chance that something would occur. These are fine distinctions but need to be articulated by you as the expert.

Mind reading



This technique asks the expert to read what was going through the minds of others at the time of an incident or the care that was rendered.

Example:

Attorney: Nurse, why did the physician not note the complaints of the patient?

Expert: I don't know.

Attorney: Shouldn't the physician have written down the complaints?

Expert: Yes.

Attorney: What explanation do you have for why the doctor did not write down the symptoms?

Expert: I don't have one. I have no way of knowing.

About this time your client should be objecting "Asked and answered." Or, the lawyer for the client will be objecting by saying "this question calls for speculation".

Compound or unclear questions

The expert is responsible for asking the attorney to break a compound question into pieces. For example, the attorney asks:

Did the nurse have a responsibility to withhold the medication and to notify the physician?

The expert might agree to the first part of the question, but not to the second. The answer would be,

“Yes, she had the responsibility to withhold the medication, but it is my opinion that the standard of care did not require her to notify the physician.”

The expert is responsible for asking the attorney to define any terms that are unclear. Don’t answer a question that you do not understand. Ask the attorney to rephrase the question. “That question does not make any technical sense” is a good response, but don’t educate the attorney to let him off the hook.

Just answer yes or no

Experts like to explain their answers. The more they explain, the harder it is for the opposing attorney. This is a common battle ground. Whenever possible, don't start the answer to q question with "yes". Work your way up to it and then say yes. This provides opportunities to explain your answer. "The way you've asked the question makes it impossible to answer yes or no." Qualify your phrase, with "under certain circumstances" or "usually". Recognize that an occasional judge will not allow you to answer in any way other than yes or no. When the attorney cuts your answer off after "Yes", it looks like the attorney is trying to hide something.

Dealing with hypothetical questions

Hypothetical questions are often asked of experts. They typically begin as “Ms. Expert, assume for the purposes of this question that the following facts are true”. Then the attorney will state a number of facts that have been introduced in evidence during the trial and ask the expert to give an opinion based on these facts. The tricky ones are long, involved, and do not include all of the relevant information. Avoiding answering hypothetical questions that do not give enough information to support a solid conclusion. Qualify the answer to show that the facts in the hypothetical question do not match the facts in your case.

Please remember as well that in most jurisdictions the person asking the hypothetical question is obligated to ensure that the information in the hypothetical being presented to the expert does accurately reflect the facts in the particular case. If you do not notice that the facts being inaccurately presented, hopefully the attorney representing your client will recognize that and make the proper objection that it calls for speculation on facts that are not in evidence. You must be ever vigilant as the expert and do your utmost to protect your opinions and the client.

When you are interrupted

If you are interrupted before you finish your answer, wait patiently for the next question to be asked, and then return to the previous one. “I’d like to finish my answer to the previous question before I answer this one.” Then do so. You may also turn to the judge and state that you were not finished with your answer. The attorney who hired you should make some statement at this point to allow you to finish.

Verify context of a quotation from your deposition

Impeaching an expert with testimony from a deposition is a favorite tactic of attorneys. When your deposition is being quoted, ask to see the deposition transcript. Is the quote being taken out of context? Did you clarify your statement later in the deposition? The attorney will try to prevent you from being able to refer to the later clarification.

<u>This is how impeachment is done.</u>

You prepared for the deposition ahead of time;

You knew it was going to happen before you arrived;

You were not caught by surprise;

You came with your client;

The same client who is with you today;

The lawyer was there for every one of my questions;

You knew what the lawsuit was about;

I brought up this topic at the deposition;

I asked you under oath, page 119, line 23 (hold up transcript, read answer);

That is what you told me;

That is what you told me on the day you were deposed;

That is what you told me on the day you were thinking about it;

That is what you told me on the day when you knew you were there to answer questions;

That is what you told me with your client right beside you;

How to cope

Listen to the question that was asked, not the one you wished was asked. Consider the question and pause, allowing your side to object to the question. If the question was not clear, say so. Maintain eye contact. When you don't know how to answer a question, your first nonverbal response will be to drop your eyes while you think of something appropriate to say. In that second, you lose credibility. Opposing counsel will pick up on the hesitation. Keep your eyes on the attorney while you pause to consider your answer. Remember that the re-direct will provide an opportunity for your attorney to clarify points.

Show respect to the jury and judge. Stop instantly if a judge interrupts you. When an attorney objects to a questing, wait for the Judge to rule or tell you to continue. The judge may ask you questions either during cross or direct. In some jurisdictions, the jury is also allowed to submit questions to ask the witnesses, and the judge rules as to whether those questions may be asked.

Remember that you are the expert in the subject matter and know more about it than any other person in the courtroom.

Reiterate points that undermine the opponent's position.

Avoid sarcasm, defensiveness, displays of flippancy or anger, or being a crusader.

Be uniformly polite, calm and respectful to the cross-examining attorney.

Emphasize that you are being paid for his or her time, not for testimony.

You are there to advise the jury, not to "win" a case, beat a cross-examining lawyer, or play strategic games.

Don't budge from your themes. Don't give up ground if you feel tired or weak, and don't make concessions that are unnecessary.

Difficult questions in cross-examination are not personal attacks on the expert, just the attorney being an advocate for the client.

Don't try to be smart. Don't joke or use humor. It can be easily misinterpreted. Don't be lured into relaxing until you are told, "That is all," and you have left the building.

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