



## The defense expert cross-examination

THEIR EXPERT ISN'T ACTUALLY THAT COOL. HELP THE JURY TO SEE THAT

"I am head of spine surgery at your favorite local university. I reattached the spine of your favorite local sports hero who can now walk again. I am triple-board certified and I spend three months per year fixing scoliosis in newborns in third-world countries. My opinion? The plaintiff is fine. Her surgery was unnecessary. She has been duped by the lien doctors into believing she needed the surgery and has been tricked into believing she is now better."

Juror #1: "Your honor? Can we have the verdict form now?"

Even the best qualified and seemingly unrepachable expert doesn't testify because they believe in a higher purpose. They do it for the money. They use their training and qualifications to shield the lie they tell to the jury about your client not being hurt. Or your client's suffering isn't caused because of this incident. You know it. I know it. So what? So, what do we do about it? We must make the jury know it's about the money, not the medicine for this expert, and make the jury know *why* it matters. It is not the lie, it's the why.

What is the lie? The lie is that this expert is a person of science. A healer just stating the facts. A person of science who would rather be cutting into spines, researching nerdy issues in fancy scientific periodicals and saving lives. That is the story the defense tells on direct. The harder they go in on this line of puffery, the more it can feel like a gut punch, but it is actually an incredible opportunity for you. You can juxtapose this lie against the truth. The higher the pedestal the expert is placed on, the harder the fall. With a good cross, all the king's horses and all the king's men can't put this expert back together again.

### Jurors are overwhelmed

Jurors are in the courtroom with a lot of unfamiliar information flying at them. The judge to be respected (or feared) in his or her long black robe sitting high above everyone else in the courtroom. The bailiff or court attendant ushering them in and out of the courtroom. Ordered to sit here or there and answer questions that many people feel are at least borderline inappropriate in front of a room full of strangers. Then the jurors hear from the lawyers who they instinctively are hesitant to trust. Then the witnesses start, and the jurors only have a snapshot of this individual and they must decide, "Do I trust this person or not?"

The jurors will try to align witnesses with the characters in their own lives. David Ball discusses this in *Damages* when he discusses what it means to be on-code or off-code. The more the expert is "on code" for doctor or scientist, the more likely they are to be seen as a caregiver or professional and consequently to be believed. So, let's destroy the façade that this expert is a person of science who is testifying to facts. Let's show this doctor to be "off code." Let's show this doctor to be dangerous because he, like defendants, put profits over everything else. He is dangerous. He could come for you. And *he is just part of the defense*



*team* attempting to avoid responsibility. They are all the same over there.

### Structure and sequencing

The structure and sequencing of your cross explains to the jury what facts and issues are important and why those facts and issues are important. You have to start with something good, probably not your best information, but something to get the jurors hooked in that you know what you are doing and you have some place to go with this. You must score points early and consistently or risk losing jurors by the time you get to the best stuff.

Also, the order of the questioning creates a story to help the jurors understand why your questions and the answers matter. You may have all the best dirt on this expert (and it is vital to gather that information), but you run the risk that the jurors just shrug their shoulders and say, "So what if he makes a lot of money?" You must sequence the questioning of the witness correctly, so the jury understands that the defense expert is lying to them. And even worse, the defense expert is

lying to them, the jurors, at the expense of your client to put money in his or her own pocket. Tell the story through your questions and let the jurors draw their own conclusions. Let the jurors connect this expert with the hired guns that they have seen in their own lives.

Typically, it is best to go straight in on some examples of cases the expert has testified in recently and how much the expert has made on each of those individual cases. This shows quickly and immediately that this expert is a pro and not as much of a healer as he or she has created an impression of on direct. You are beginning to create the impression that this expert was lying to them about who the expert is and why the expert is there.

### Gathering your ammunition

This is where the CAALA community really serves to hold defense experts accountable. It is important to ask questions of the plaintiff's community to see who has faced your defense expert in the past few weeks or months. If you can string together a couple cases and how much they were paid in those cases, you will have begun to make cracks in the persona presented about this expert on direct.

Ask him in his deposition and have him produce his schedule for the past few weeks and his schedule in the upcoming weeks. Any slipperiness here from the expert works in your favor. The answers such as, "I don't know." "Someone else keeps my calendar." "Someone else does my taxes." It allows you to make your argument against this person in the questioning. A line of questioning like this tells the jury why this stuff matters:

1. "You testify frequently in front of juries, correct?"
2. "So, you understand the importance of the numbers and how much you make potentially goes to your bias, correct?"
3. "Don't you think there is a difference though that a jury might want to hear if you're making \$200,000 a year or like \$2,000,000 a year going and testifying against

injured people, saying they shouldn't have gotten surgery?" Or testifying 50 times a year for the defense.

Jurors and attorneys may get lost in the science, but everyone knows that money is a temptation. The more money, the more temptation. "Those who want to get rich fall into temptation and a trap and into many foolish and harmful desires that plunge people into ruin and destruction." (1 Timothy 6:9.)

Jurors understand this but it is still necessary to come out directly and confront the expert with it. The expert has a plan on how he or she will handle the testimony and the money bias question. But a slightly unorthodox approach can get them off balance. As Mike Tyson says, "Everyone has a plan until they get punched in the mouth."

This is where you ask one of the most powerful series of questions:

- "You rose your hand and swore to tell the truth when you first took the stand, correct?"
- "And the jury is relying on you to tell the truth, correct?"
- "And you want the jury to believe you when you tell them things, correct?"
- "And that is why you go through your resume, your qualifications and all the great things you've done, correct?" (Throw in here any other ridiculous pandering that was done to ingratiate himself to the jury.)

Then the truth:

Start really going through your best numbers. How much did they make this year doing defense work? How much have they made the last three years doing defense work? How much the last 10 years? The frequency with which they do defense work? How many hours a week do they spend?

If you have a defense expert who testifies 90% for the defense, ask them why? Ask an economist (or any other type of expert) why she is retained 90% of the time by the defense. Whatever the answer, tell the jury the real why with your question: "Well it is because you are able to squash the numbers down as tiny as possible and they (standing behind defense counsel pointing directly down at

her so the jury sees her reaction) like it when you give them little numbers, so they hire you more? Then they tell their friends and you get paid more and then again and so on, correct?"

You are now well on your way to putting the expert into the character that jurors know, and love to hate: The hired gun. And even more upsetting to the jury is that this hired gun lied to them on direct and made the jurors fall in love with him. Not the doctor who saved my favorite baseball player? Not the guy I see on TV all the time! I have been betrayed!

### Make sure the jury knows all the bad guys are in on the ruse

Now is the time to let the jury know that defense counsel is in on the lie too. Let the jury know now that defense counsel has pulled this ploy on other unsuspecting juries.

"How many times have you been retained by defense counsel here? His firm? Work with him often?"

There are a number of places you can gather evidence of the relationship between the expert and the defense for this part of the cross. The purpose is to show how chummy they are:

- Text messages – ask to see the expert's phone during deposition.
- Emails – make sure they produce prior to deposition.
- Socialize outside of this case?
- How did defense get referred to this expert?
- Initial intake conversation – what did defense tell you about the case?
- Billing – look at what work was done when and what conversations were had when relative to the work done and for how long. Why did you talk on this date? The billing can show that the defense was signaling what opinion they wanted this expert to give long before the expert actually gave it.

The dream cross is where you can hit the defense expert trifecta:

1. The defense expert makes a lot of money.
2. The defense expert testifies for the defense much more than for plaintiffs.

3. The defense expert and defense attorney/firm have done this act before.

If these three points are made in your cross, you can probably just sit down and shut up because you crushed it. But to really win the cross, you need to get into the science.

### **The medicine and the science – You’d better be sure**

Tread lightly. Very, very lightly here. This is the lion’s den. Do *not* enter unless you are sure you can score some points. A great cross-examination can be quickly undone by unwittingly offering up some softballs for the expert to crush and reminding the jury that this person may actually know what he or she is talking about. This part should almost always be handled after you have dismembered the expert through the bias cross. Do not forget: They are experts because they do this stuff day in and day out. They know the weakness and strengths of their testimony and will be prepared. Hopefully, you have gotten some important concessions in deposition and can just quickly, plainly and succinctly lay those out for the jury. This is a dangerous place where you can lose a jury.

That being said, be sure to keep the expert honest.

### **Articles, textbooks and journals**

Look at articles the expert has written and find out in deposition which journals and textbooks are commonly relied upon in his or her field. California Evidence Code, section 721, subdivision (b)(3) allows you to get into evidence a publication that has been established as a reliable authority by the testimony or admission of the witness or by other expert witness or judicial notice.

A lot of doctors like to be deposed in their office. Look at their shelves. See what they have, what they rely upon and then go buy those books. There are invariably things good for your case in those books. But the expert will be ignoring that book for purposes of the testimony before the jury. It is a great opportunity to show how the expert is hiding things from the jury.

Dorothy Clay Simms’ book, *Exposing Deceptive Defense Doctors*, is an incredible resource for information on the bias cross-examination and the actual cross-examination on the science and the medicine. See if someone at the university the expert works at has published anything on the topic of the testimony. I have seen a neurologist attempt to wash out a patient suffering from migraines only to be impeached by the seminal publication on migraines by the head of the migraine clinic at that expert’s university.

### **Expert’s website**

A lot of ammunition can be found going through a defense expert’s website. Experts, especially medical experts, will provide more honest information to their patients via their website. An expert may try to wiggle out saying they are not responsible for what goes on there. But the AMA disagrees in its opinion 5.027, which states in part, “Physicians responsible for the health-related content of the online site should ensure the information is accurate, timely, reliable and scientifically sound.”

If they have good information on their website, marry the doctor to the website using the AMA opinion and get the information in front of the jury. Some doctors will actually have statistics regarding car crashes and back injuries and other very helpful information.

### **Testimony when retained by plaintiff**

This is a great place to impeach an expert on the science and the foundations of his or her opinions. Experts wanting to appear unbiased will get retained as a plaintiff’s expert and give some closer-to-honest opinions in those transcripts. Contact Mike Alder’s office and the CAALA listserve to see who has prior depositions from the expert. But the best evidence usually comes from cases in which the expert was retained by the plaintiff. This is where you can unearth gold for impeachment on the science.

### **The preparation**

Planning is essential. Jurors have already been listening to this expert for

a while and the jury will tune you out when you stop scoring points. Don’t start reaching too far and get outside of the areas where you know you can score points. You will quickly find yourself in quicksand and risk undoing all the great work you just did. A five-minute flurry of haymakers is far more effective than a meandering walk through a medical history.

Take all the good stuff you have on this expert and all the topics you want to hit the expert on and organize the information by topic. I call this part of the process “chunking.” Chunk together the things that fit best together and cut out anything that lacks punch. You will need to make difficult decisions involving facts or issues that may detract from your better points. A big danger is diluting your strong points with cross points that aren’t that great. Keep it crisp and score your points and get out. Then take those major topic areas and put them in the most effective order. Have a strong plan for starting and ending each section and the transitions. Anything in the middle of a topic you can probably free-style because you have a plan for where you want to begin and end. You must be free to listen to the expert and let them tie themselves up.

### **Conclusion**

Every defense expert wants to be liked. In order to be liked, they need to seem unbiased, impartial, and as far from a testifying witness as possible. You must destroy this storyline and create your own the jurors can identify with. A great cross tells a great story. Prepare, plan and execute in order to tell the story that will save the day for your client: The defense expert and the defense will do anything to protect their money.

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