Effective Cross-Examination of Expert Witnesses

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EFFECTIVE CROSS-EXAMINATION OF EXPERT WITNESSES

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Expert witnesses are everywhere. In every type of litigation, on both sides of a case, expert witnesses are called upon to explain and interpret the facts. Experts look back and tell the court what happened, look at the present and tell the court what is happening, and look into the future to tell the court what will happen. They do so with opinions that only they are qualified to give, telling courts about probabilities, possibilities, likelihoods, and certainties. Modern courts have embraced expert testimony, so no matter what kind of litigation, all lawyers need to be ready to find expert witnesses to help their clients, develop and present opinions helpful to their clients, and cross-examine the testimony of experts presented by the opposing side.

Cross-examination has been referred to as an "art," but I contend it is also part science. There are tried and true methods and procedures that help every lawyer avoid cross-examination disasters, and sometimes, help advance your client's cause. I will demonstrate a few of the methods I was taught, and continue to use, and some that I have developed on my own, with the hope that I can give you some things to consider and think about to improve on the skills you already have.

WHAT IS AN "EFFECTIVE" CROSS-EXAMINATION?

Cross-examination of an expert witness doesn't always go well.

When I was a young lawyer, listening to the older lawyers talk about expert witnesses, I thought that every adverse expert was an opponent to be killed in battle. After a few years, I learned that trying to destroy every expert can backfire.

Sometimes it can be counterproductive to attempt to destroy the witness. Rest assured, when most of a jury laughs out loud at you during an expert cross-examination, you are likely to reassess your approach!

I learned that while I had been encouraged to think about going to war and winning every battle, that approach could hurt my client. The analogy to battle is seldom appropriate. Not every witness has to be attacked. Destruction is not always the best goal. Lesser goals can be useful with the right witnesses and the right issues.

Effective expert cross-examination requires preparation, planning, and flexibility. We need to:

- Identify a goal that we can meet.
- Use the best available means to meet the goal.

Finding the right goal is essential to making the cross-examination effective, because it requires us to think about what we can achieve, and what we can't do. Once we have a goal that can be achieved, we still need to apply the proven methods. Only then can we reasonably expect to change the trajectory established by the expert testimony on direct examination.

Effective cross-examination requires that the questioner is in control of the courtroom. The rules of evidence, combined with the reality of how most judges handle witness examination, allow us to use various means to achieve control of the testimony coming from that witness.

1. GOALS OF EXPERT CROSS-EXAMINATION

An unfocused cross without a specific goal will not be effective. Only when we know our goals can we begin to design an effective cross-examination. Thinking about your goal should be second nature, something you do every time you approach a hearing or trial where an expert will testify.

Defining the goal helps bring into focus:

- The best way to prepare for the specific issue
- The best way to prepare for the specific witness
- The best approach to take in cross-examination
- The most effective means to achieve the goal of the cross

Goals/purposes of Cross

There are only a few possible goals of cross-examination. They can include:

- Minimize damage done by the testimony of the witness
- Help our case
- Hurt the other side's case. There are two primary methods of doing this:
    - Repudiate the authority of the expert
    - Refute the conclusions of the witness

Defining Goals and Focusing the Preparation

The facts and circumstances of a specific expert testifying about a specific issue in our case helps us define the right questions.

We need to know for this case, for this issue, how much or how little we can expect to achieve, within the limitations of facts that have been or can be proven. We hope

to know something about the witness so the questions on cross-examination can be tailored to the witness' characteristics and habits.

We need to find out or figure out what kind of person this witness is, and we must consider what kind of opinion is being presented.

There is almost always something you can cross if you consider the type of witness and the type of opinion. All expert witnesses carry some baggage.

What can be accomplished with cross of this expert in this case?

We need make the decision whether it is more helpful to use the expert to prove our points or to attack the expert. It all depends on the specific issue and the specific person we are cross-examining. Think about:

- **Is the opinion obviously correct?** We aren't going to get anywhere attacking this opinion.
- **Is the opinion demonstrably incorrect?** We can undermine it with the right kind of information or facts.
- **If accepted, does the opinion prove something important or unimportant?** We may want to leave alone the unimportant stuff. We might want to attack it anyway, if it helps us attack credibility, so that we can impair the effect of a more important opinion.
- **Is the opinion filling a gap in the other side's case?** We might try to focus the cross on that gap of proof, to focus doubt on the whole case or claim.
- **Is the opinion creating an obstacle to your client's ability to prove a point?** Maybe we need to use our facts or our expert's opinions in the cross-examination of the adverse expert.

When defining goals, always be aware of your own expert's opinion. Will the adverse attorney be able to pick on your expert the same way you go after his? Are your expert's opinions honest and well-supported, or a carefully constructed house of cards?

We need to consider the context of the opinion, and the person giving it. We can choose to embrace the helpful aspects of the opinion, and/or to attack the unhelpful aspects of the opinion.

Generally, we do not want to attack an expert opinion and embrace the same expert's testimony within the same cross-exam. It may not look good to attack someone who is making points for your case. If you do that, be sure to separate these parts of the cross examination from each other in your outline, so they do not run into each other.

What kind of person is this witness?

Except for the rare witness whose interest is in providing a free public service to the court system, the parties, and/or the jury, the retained expert witness (and, often, a non-retained expert) has a *purpose* or a *motivation*. These are always the source of cross-examination material.

Common purposes and motivations

- Making money
  - The purpose of the expert may be to receive money in return for the time spent evaluating the facts, rendering a report and/or testifying.

- Fame
  - The expert may be motivated by notoriety.

- On a mission
  - The expert may be motivated by a sense of right and wrong, or strong personal beliefs in the opinions. This is often the case for defense experts in med mal cases. The expert may be on his or her own personal crusade.

- Ivory tower
  - The expert may be completely devoted to the field of study, and he or she may feel a corresponding strong sense of public duty.

- Doing a job
  - The expert may be a public employee whose job includes expressing opinions, like a coroner
  - The expert may be a treating physician of a patient whose condition is at issue in the litigation.

Such motivations are important to the cross-examiner, because for our purposes, the **motivation of the expert can be a source of the expert's vulnerability**.

Old evidence treatises recognized this fact. Lord Campbell wrote:

> Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence.

Taylor, "Law of Evidence":

> Expert witnesses become so warped in their judgment by regarding the subject in one point of view, that, even when consciously disposed, they are incapable of expressing a candid opinion.

Compared to these old treatises, modern rules of evidence are far more tolerant of experts, but for cross examination we are always trying to show that those old evidence experts were right. The key is finding why they "are incapable of expressing a candid opinion" and why "hardly any weight should be given to their evidence." If we know the motivation and purpose of the witness, we can find out whether the opinion is strongly or weakly held and whether the witness truly believes the opinion. Knowing these things helps us fashion an effective cross-examination.

What kind of opinion does this person have?

In developing goals for cross examination, we need to consider both the source and the nature of the opinion being delivered by the witness on direct examination. Is this an opinion that the witness truly believes? Why does the witness truly believe in this opinion? Is it likely or unlikely that the witness will have any doubt about the opinion? Is this opinion expressed as a matter of convenience?

The approach to a witness whose opinion is held and expressed "honestly" can be substantially different than the approach to a witness who has presented an opinion that is conveniently shaped to fit the facts of this case, or who selectively perceives the facts so the facts will fit the preconceived opinion. An opinion of convenience is not a legitimate opinion.

We often encounter a witness whose opinion is the same, regardless of the facts of the case. This is an "illegitimate" opinion because it isn't a firmly held belief shaped by the unique circumstances of the case at hand. Though it has obvious vulnerabilities, it isn't necessarily easier to cross-examine.

With professional witnesses and people who testify regularly, the opinions tend to fit themselves to facts in ways that may not make sense to the outside observer. Every expert, like all other people, has a set of filters (or blinders) that affect the way he or she sees and interprets facts from the perspective of that paradigm. The extent to which an expert is willing to adjust his or her opinion as the facts change, makes the witness more vulnerable to cross examination for this opinion that is poorly fitted to the facts.

We can encounter legitimate opinions expressed by legitimate experts; illegitimate opinions expressed by legitimate experts; legitimate opinions expressed by illegitimate experts; and illegitimate opinions expressed by illegitimate experts.

Each combination requires a different cross-examination approach. We want to attack, disparage, disprove, and expose the illegitimate opinion or expert. We want to be very careful attacking or disparaging legitimate opinions or experts. Far in advance of the testimony we need to do our best to identify which of these combinations applies. Legitimate, honestly held opinions are not likely to be abandoned, and they cannot be effectively attacked head-on.

In general, if the opinion is legitimately based on special expertise or science in which the witness truly believes, it is better to leave the complicated, specialized knowledge out of the cross-examination and focus the cross-examination on grounds where the expert has no natural advantage. In that case we need to focus on the grounds on which the cross-examiner has the natural advantage.

In contrast to strongly held, well-supported opinions that a witness truly believes, "illegitimate opinions" will be abandoned much more readily by the witness, and can be effectively attacked, even if they are not completely abandoned. An "illegitimate opinion" is one that:

- Has no basis in the facts of the case. This is easy to deal with.

- Is based on a selective choice of the facts to use as the basis for the opinion, or it emphasizes some facts over others. This kind of opinion ignores known facts; discounts or explains away inconvenient facts, and/or avoids mentioning inconvenient facts.

- Is based on a mistaken understanding of the facts. This opinion is illegitimate because we can prove that the expert must have been too busy to sweat the details, or just didn't take the time to carefully review all the information, or was just sloppy, so the opinion is simply wrong. This might lead you to plan to use the cross-exam to draw a contrast between the amount of money paid to this expert, and the "careful, thorough" job the witness will say led to the opinion.

- Reflects a failure to know all the information at hand. This can mean the witness has not adequately prepared, despite being an honest, decent witness. This opinion might be perfectly legitimate, but just a little mistake can make a big difference, especially if we give it extra emphasis during cross-examination.

- Reflects a failure of the hiring attorney to provide key information

- Is malleable, and it may be readily changed or abandoned. We can identify this witness by the words at the end of his report, where he always says:

  "I reserve the right to change my opinions in the event of ….."

  This is a clear signal that a hypothetical question, assuming different facts, perhaps including your client's version of the facts, can generate a potentially favorable answer on cross-examination. This witness wants to preserve his or her own credibility, often at the expense of the lawyer who hired him or her. The opinion can be effectively attacked, even if the opinion is not abandoned.

- Has no basis or a limited acceptance in the field of expertise. A legitimate expert witness can have an illegitimate opinion. The expert might be well qualified, but the opinion is outside of the accepted parameters of the field of expertise. This presents a classic Daubert problem. This kind of opinion is hard to attack on cross, and it is probably better to deal with it by filing pretrial motions.

2. PLANNING FOR EFFECTIVE CROSS-EXAMINATION

Know your material

The jury will assess your depth of knowledge and commitment to the case by your demonstrated ability to handle the details of cross-examination.

When you appear vague on the details, the jurors may conclude that you are unconcerned about the finer points of the case. Thorough preparation also will ensure that the witness appreciates your competence, which can be very helpful in establishing control over the witness. But your most important audience is the jury. That jury should never doubt your commitment to the details.

Discovery

Pretrial preparation involves discovery methods and background investigation. We must focus on what is needed and what we are willing to do to get it. We must ask: what are the weapons that can be used? Are those weapons worth the effort? How do I get the information?

Essential Information

Our preparation must include at least some of these key areas of knowledge or inquiry:

- Knowing the facts of the case is most important. This is one advantage the lawyer can most easily gain over the expert.
- Research the background of the expert
- Review depositions of the expert taken in other cases
- Contact lawyers who have encountered the expert
- Check for advertisements or expert listings
- Carefully review all aspects of the expert's curriculum vitae to ensure that it is accurate in every material respect
- Search the internet
- Look at the expert's own web pages
- Look for their participation in online discussions
- Learn about the substantive field of expertise that underlies the opinions in the disclosure or report of the expert

- Figure out the substantive basis for the opinion itself
- Obtain the communications between the expert and the attorneys (but keep in mind the limitations on discovery of these communications)

Rules of Evidence

Keep in mind that what you are ultimately going to do is to present evidence. Much of cross-examination is style and technique, but the substantive content that holds the case together is evidence.

Anticipate problems with the authenticity and admissibility of documents needed for cross-examination.

Prepare trial briefs or motions in limine. You want the cross-examination to move as seamlessly as possible.

With expert witnesses, first and foremost, it is important to master the report and/or deposition taken in the case at hand because they represent the greatest opportunity for impeachment. But other items can be equally effective if handled properly.

Decide what points to make

You have to know the points that can be made with the witness. Before trial, *write them down*, because it is critical to make a list of what should be accomplished on cross. Then figure out *exactly* how you are going to make the points. There is no substitute for taking the time to think about this case, this witness, and nothing else. Review the deposition, your notes, and the documents, again. I often get my best ideas after working through everything more than once.

Now we must figure out how to make these points and how to package them to enable effective communication of the points to the jury.

Outline

In developing the cross-examination outline, ask yourself what you want the jury to remember about the expert during closing argument. Do you want the jury to remember that the expert was dishonest, exaggerating? Do you want the jury to remember the expert was a little too eager to give the critical opinions?

I find it helpful to use the points that are going to be made in the closing argument as a starting point for the development of an outline for the cross examination of the expert witness. There ought to be several points that I want to make during the closing argument, and there out to be at least one or two of them that can be made through the expert witness. Of course, PIK 102.4 contains this admonition:

> Statements and arguments of counsel are not evidence, but they may help you understand the evidence and apply the law. However, you should disregard any comments of counsel that are not supported by the evidence.

My closing argument is not evidence, at least according to the PIK instruction. But when I am in control, and while cross-examining an expert, my statements and arguments are evidence, *if the witness adopts them, endorses them, blesses them, or is hoisted on his own petard by them*.

So, I want to formulate questions and topics for the cross using my best arguments so they will be supported by the evidence.

Knowing the goals and the points that *can* be made, the next step is determining the best points you *should* make.

Finally, put them in order from best to worst.

The outline should *always start with the strongest point first*. The next best point should be the last point in the outline. Take these two points and separate them. When you stand up to start the cross-examination, you want a guaranteed winner to start, and a guaranteed winner to finish your cross examination. If those two points are handled well, everything else is of secondary importance.

In between the very best point and the second-best point are all the other points that need to be made with the expert. These can follow any logical progression that fits the circumstances of your case best. It can be a chronological list. It can be a list that goes from one topic to the next, or issues that are important in the case. It can deal with facts. It can deal with opinions. It may relate to your own expert's opinion. It can deal with learned treatises.

If a point is worth making on cross-examination, decide how best to make it. Keep in mind that patience is a virtue in cross-examination. The jury must understand the context of a given point. The goal is not just to reach the destination. The goal is to lead a journey—a search for truth—on which the jurors want to accompany the lawyer. The cross examiner needs to be willing to lead the journey.

To bring home the point clearly and concisely, take the jury through each step towards the conclusion. By the time you get to the conclusion, it should seem inevitable.

The outline itself should contain whole quotes, or at a minimum, the key phrases and words of any impeachment material you might have. The backup documents should be readily available in hardcopy or electronically to confront the witness with a visual.

Developing a good cross-examination outline is very useful. In the heat of the battle, being organized, effective and quick to the point is critical.

But surprises happen, and in mid-cross, you may want or need to pursue a line of questioning that is out of order in the outline. An article, document or transcript may be needed unexpectedly for impeachment. All these items must be accessible immediately. You must find your own method that allows you streamline your outline and the materials to be used so that you can move around easily. It helps to have the confidence to work from a shorter outline.

You can use separate outlines for each major point. This is especially helpful when you have a lengthy cross-examination. Divide up your outline and the attachments into discrete units that can work on their own, or together, in order or out of order, and with a back-up plan for each anticipated adverse ruling or answer that you might encounter. This is when your preparation will distinguish you from the unprepared lawyer.

3. CONDUCTING AN EFFECTIVE CROSS-EXAMINATION

Leading questions

You should almost never ask an open-ended question to an expert witness, except if the answer to the question literally makes no difference whatsoever. This old rule is a good one; using only leading questions advances one of the important dynamics of the courtroom—control. Control allows the cross-examiner to be forceful, fearless, knowledgeable, informative, and most importantly, credible with the jury.

Technique and Art of Cross-Examination

Be sure that when the witness concedes a point, the jury understands the advantage. There has to be some dramatic flair or some means of drawing attention to the concession. You can use a change in tone of voice, or movement from the podium. Feign inability to hear the answer, or “make sure all of the jurors heard it.” Make the witness repeat it.

All of this involves style and judgment. Highlight and illustrate for the jury. Enumerate key concessions so the jurors can see them. This can be an important way for jurors to remember the points made. They hear the points, and then they see the points. Any time a point can be visually made or recorded, do so. It allows counsel to relate back to this visual point during closing argument.

Demonstrative exhibits or other visual aids generally make cross-examination more interesting, and the more interesting the cross-examination, the more attention the jury will give it.

Application of the rules of evidence and the burden of proof

On direct examination, expert witnesses are required to state opinions to a reasonable certainty within the field of expertise of the witness. On direct exam, your adverse party and the expert carry an extra burden: not only must the opinion be to a reasonable level of certainty within the field of expertise, but it must conform to the requirement that the opinion express the probability—*as opposed to the possibility*—that the conclusion is correct and true, i.e., that it is (or was at the time of the incident) reality.

The law specifies that an expert opinion must be reasonably probable and expressed to a reasonable certainty. It has long been the law of Kansas that expert witnesses "should confine their opinions to relevant matters which are certain or probable, not those which are merely possible." *Nunez v. Wilson,* 211 Kan. 443 (1973); *see also Ratterree v. Bartlett,* 238 Kan. 11 (1985) ("opinions by expert witnesses should not concern matters which are a mere speculation or conjecture."). When medical experts provide opinion testimony, the expert must give such opinions within a reasonable degree of medical probability. *Pope v. Ransdell,* 257 Kan. 112, 122 (1992).

Proof of proximate cause has to "afford a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Yount v. Seibert,* 282 Kan. 619, 628 (2006).

For experts presented by an adversary with the burden of proof, the cross-examination can always focus on the two components of the required opinion—*probability* and *certainty*. During cross, the court can't stop us from referring to these two terms repeatedly. After all, these are the terms required by the law. As a cross examination technique, this reemphasizes and reiterates the burden of proof requirement that is imposed by the law on the other party.

As a matter of persuasion and rhetoric, the more times I can repeat my references to the burden of proof and the need for certainty, the more I can reinforce in the jury's mind that the adverse party has failed to meet the burden of proof. The desire here is to awaken the jury's natural cynicism, so I can help the jury to question the authority of the expert witness.

We can do this because extraordinary latitude is given to the cross-examination of experts. *Pope v. Ransdell,* 257 Kan. at 112. Using the broad scope of cross-examination that is allowed by the rules and case law, it is always a good idea to raise questions about alternative explanations for the conclusions and opinions of the expert called by the party with the burden of proof. In *Pope*, cross-examination of expert witnesses based on questions about possibilities was explicitly endorsed. The Court must give "great latitude" in cross-examination of experts so that the "intelligence and powers of discernment" of the witness can be tested and submitted to the jury so it can determine the value of the testimony in light of the witness's capacity to form a correct opinion. *Pope*, 251 Kan. at 123. Questions

about any number of various possibilities regarding the cause of the plaintiff's injuries were allowed in *Butler v. HCA Health Services*, 27 Kan. App. 2d. 403 (1999).

4. FULFILLING THE GOAL OF LIMITING DAMAGE

Find basic points of agreement that the witness can agree upon. These can include simple opinions, but they can also include factual information.

Limiting damage can be achieved with getting the expert to agree to some basic points; these can include any fact or opinion that the witness might agree upon, including even the simplest point, with the goal being to have this provide some support for any fact in your case so that something (anything) positive can come out of this cross-examination. Examples:

- "That doesn't mean…"
- "You are not 100% certain…"
- "It is not guaranteed…"
- Alternative possible explanations for the opinion on causation or damages might also be worth exploring. The case law allows you to do this.

You might get lucky and have an expert who disagrees with even the most agreeable basic principles, in which case you have one you don't even need to attack, because his or her bias will be obvious.

In general, what you want to do to minimize damage or help your client's case is to bring the expert "into the fold." This is done by having the witness agree to anything that you ask him, all in terms of facts that are favorable to your client's case. Find the points that no one can disagree upon, make those points, and move on with this witness, or sit down, and save your major points for another witness.

Careful and judicious questions that seek to bring out separate facts and separate points from the knowledge or experience of the expert that tend to support the theory of the examiner's own side of the case usually produce good results. This can bring out scientific facts (not necessarily opinions) from the knowledge of the expert that will help your side, and therefore, tend to decrease the weight of the opinion that the expert has given.

There is no reason you cannot cross examine an expert witness on the facts of the case. Use the opportunity. In some cases, you can even get evidence into the record that is otherwise inadmissible. *See, e.g. Fed. R. Evid. 705 and Fed. R. Evid. 703*.

I have seen this done, with devastating consequences, against me. However, you have to keep in mind, what the expert evidence statutes (K.S.A. 60-256) and

Federal Rules of Civil Procedure allow, because they may limit your ability to do this.

5. FULFILLING THE GOAL OF ATTACKING THE EXPERT OR THE EXPERT'S OPINION

When taking on the expert directly, preparation, or the lack of it, will show.

When attacking an expert or the opinion directly, pretrial preparation is even more important. Use both discovery methods and informal background investigation.

You must focus on what you need and what you are willing to do to get it. You must ask yourself: what are the weapons that can be used? Are those weapons worth the effort? How do I get the information?

Preparation must include at least some of these key areas of knowledge or inquiry:

- Knowing the facts of the case is most important. This is one advantage you can easily attain against the expert.
- Research the background of the expert
- Review depositions of the expert taken in other cases
- expert witness databases are available from which to gather background information on a particular expert
- contact lawyers who have encountered the expert
- check for advertisements or expert listings
- carefully review all aspects of the expert's curriculum vitae to ensure that he or she has been accurate in every material respect
- Search the internet
- Look at the expert's own web pages
- Look for their participation in online discussion
- Learn about the substantive basis of the field of expertise that underlies the opinions in the disclosure or report of the expert. But don't make the mistake of thinking you really know it!!
- Figure out the substantive basis for the opinion itself
- Obtain the communications between the expert and the attorneys, but keep in mind the limitations on discovery of these communications. *See, e.g.* 60-226(b)(5)(B) & (C)

Repudiating the Expert's Authority

Repudiate: "to reject the authority or validity of; refuse to accept or ratify"

Effective repudiation removes the veneer of expertise and/or credibility associated with the expert. This is effective because it gets at the heart of what attracted the other side to the expert in the first place. This witness was chosen because of qualifications, extensive knowledge, impressive academic credentials,

publications, and presentations made at important gatherings of other professionals.

There is an inverse correlation between the veneer of reputation/credibility and the impact of impairing or repudiating the reputation or credibility. Often the greater the reputation or veneer of credibility, the easier it is to take apart that edifice. “The bigger they are, the harder they fall.”

Encourage the witness to be or appear to be unreasonable

You can quickly remove the advantages of reputation by contrasting the precise nature of that reputation within the context of the issue in the present case. For example, an academic doctor or other expert may be in the “ivory tower,’ and may not be familiar with the real issues “in the real world.” Simple examples may suffice. The expert may be “too important” to participate in the mundane or routine aspects of your case might help show that the other side is relying on his reputation instead of the content of his opinions. A “very important” witness may have gotten to the point where he expects his reputation will be all he needs, and he may have foregone the detail work needed to be persuasive about this case.

A professional witness is always partisan, ready, willing, and eager to serve the party calling him. Those facts, should be in the mind of a cross examiner at all times. An expert called against you who is a professional witness is prepared to do all the harm that he can and will avail himself of every opportunity to do so.

The witness should be encouraged to betray the partisanship. If the witness shows a propensity for overstatement and argumentative answers, consider encouraging him to volunteer statements and opinions and to give unresponsive answers. The simplest methods of repudiation may be the most effective.

Consider these simple techniques:

- If you know the witness will give testimony that seems incredible, then push the expert further and further out on a limb. It’s easier to make him fall the further out you push him.
- Make the witness seem unreasonable. If he isn’t willing to concede the simplest point, by all means keep giving him opportunities.

Sometimes you may want to abandon leading questions. Generally, when you ask open-ended questions, you are handing the expert the opportunity to expand upon his opinion or his basis for the opinion, especially in ways that may not have been fully explained on direct exam.

Here are some examples of when you do not need to ask leading questions.
But it’s still best to know the answer before you ask.

Q. Why don't you just tell the jury how many times you have testified in a court of law?

Q. How much money did you make last year testifying?

Q. Of the thousands of learned treatises published around the world, tell the jury how many have asked you to publish the theory you have expressed in this courtroom?

Q. How many other experts between here and your location would have qualifications similar to yours?

Impeachment

It can be very useful to attack the expert with collateral/tangentially related information. This is done by impeachment of credibility or the use of prior inconsistent statements.

Formal impeachment of credibility relies on information that usually would not be admissible except as to the credibility of the witness. It includes the classic impeachment elements:

Bias
Prejudice
Interest
Corruption.

But PIK allows you to impeach in other ways:

> IMPEACHMENT
>
> In deciding the weight and credit you will give to the testimony of a witness, you may consider, along with all the other evidence, all evidence that affects the credibility of the witness, including:
>
> Evidence of prior conduct of the witness.
>
> Evidence that on some former occasion the witness, made a statement, acted in a manner, testified, inconsistent with testimony the witness gave in this case.
>
> Evidence that the reputation of the witness for honesty or veracity is bad.
>
> Evidence of the interest the witness has in the result of the trial or reasons the witness might favor one party over another.
>
> Evidence that the witness has been convicted of a crime involving dishonesty or false statement.

You may consider this evidence only as it affects the credibility of the witness and may not consider it for other purposes.

Impeachment can also be achieved by using specific statements or comments. These generally would need to relate to the case, but not always, and can come from the deposition or report, from prior testimony, and other statements/internet postings, Twitter, Facebook, etc.

Handling the impeachment material also requires preparation and organization. You must know the materials and have them readily available. Key materials should be cross-referenced within the outline and organized in a series of folders to retrieve them quickly.

Impeaching with prior statements (deposition, report, former testimony) also can be tricky since this requires some knowledge before trial that an impeachment opportunity exists. You must first locate the impeaching material. Then you have to ensure that you can lay the foundation. It is not enough to have it and to present it in the courtroom. The impeaching material must be used effectively, and sparingly, and only for telling points.

The same rules apply for any other impeaching material – whether published articles, statements on a website, letters or reports.

Refuting the conclusions and opinions of the expert

This is really a topic for another presentation. The only time to cross-examine an expert on the details of expert's specialty, is when you have thoroughly studied the particular subject, and have sufficient medical or technical literature or books to clearly expose the erroneous conclusions or opinions of the expert.

This can only be done when it is something that the jury will be able to understand readily. The important audience is seated in the jury box. The jury must understand the points being made on cross-examination.

Reduce the technical to the simple. This is important in all phases of the trial, but it is most important in cross-examination when counsel is attempting to undermine the case of an opponent through the testimony of the opponent's witnesses.