

# Cross-Examination of an Expert Witness

By Douglas Bates and James Gassenheimer

The best cross-examination of an expert starts before the witness takes the stand.



The cross-examination of an expert witness requires a lawyer to enter the domain of the professional who is on the stand and engage the witness in a subject matter in which the witness will generally possess superior knowledge and experience. It is rare for the expert witness to collapse under a blistering cross-examination if the inquiring lawyer tries to engage the witness on his or her terms. This article will explore how counsel can level the playing field by using their own unique knowledge of the process and their unique skill set.

To disarm the opposing expert, a trial lawyer is best served to start the battle well before the expert witness takes the stand. Excluding evidence and limiting it through targeted discovery, pre-trial motion practice—particularly motions in limine—and effective depositions are some of the powerful tools available to attorneys, but these tools are often downplayed. In addition, trial lawyers often overlook the value of addressing the expert's anticipated testimony in their opening statements. A trial lawyer's goal should be to win the cross-examination before the expert witness ever takes the stand.

In this regard, seasoned attorneys often overlook the

powerful tools found in Federal Rule of Evidence 702, which states the following:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as and expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) *the testimony is based on sufficient facts or data*, (2) *the testimony is the product of reliable principles and methods*, and (3) *the witness has applied the principles and methods reliably to the facts of the case*.

Fed R. Evid. 702 (emphasis added).

When creatively applied, a wide body of law that emanates from this rule allows the effective trial lawyer to exclude an expert from testifying or limit his or her testimony. Each case presents its own story; therefore, this article will provide a general presentation of ideas that can be creatively applied to the specific facts of a case. The goal is to use the judge as a gatekeeper and to limit the ability of the

opposing expert to present the full story; eliminating just a few key components of the expert's opinion can render that opinion and related testimony disjointed and unper-  
suasive when presented to the jury.

Whether an expert is qualified to offer a specific opinion is a question of law. *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002). Merely possessing an advanced degree is not sufficient to permit an expert to testify concerning an issue within a field of study. *Ralston v. Smith & Nephew Richards Inc.*, 275 F.3d 965 (10th Cir. 2001). A witness' qualifications alone do not suffice; the expert must be qualified to relate the opinion to the specific question presented in the case. *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994) cert. den 513 US 1111 (1995); *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals Inc.*, 254 F.3d 706 (8th Cir. 2001). Under Rule 702 of the Federal Rules of Evidence, an expert may testify only to "scientific, technical or other specialized knowledge if the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. See *United States v. Prince-Oyibo*, 320 F.3d 494, 504 (4th Cir. 2003) (emphasis added).

Unless the expert's opinion is relevant to a fact at issue in the case, the opinion is not admissible. *Angrand v. Key*, 657 So.2d. 1146 (Fla. 1995). In addition, practitioners should not overlook a fundamental component of Rule 702 found in part 3 (formerly part c), which requires an expert witness to apply "the principles and methods reliably to the facts of the case." Fed. R. Evid. 702(3). An expert's failure to apply his or her opinion to the facts of the case can be critical and can result in the expert's testimony being ruled inadmissible.

One reason for the judicial gatekeeping function is to protect juries from seemingly impressive expert testimony that is not reliable or from the "flashy" expert who is offering testimony that is not related to the real issues in the case. The word "Daubert"—which comes from the decision handed down by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. (1993)—has come to describe an all-encompassing standard to be applied when determining whether or not an expert's testimony should be admissible. As the Supreme Court instructed in *Daubert*, trial courts must exercise a gatekeeping role when determining the admissibility of expert testimony. As stated by the 11th Circuit Court of Appeals, a trial court "abuses its discretion by failing to act as a gatekeeper." *McClain v. Metabolife Intern. Inc.*, 501 F.3d 1233, 1238 (11th Cir. 2005). Fundamentally, the *Daubert* standard is made up of two requirements: reliability and relevance. *Daubert*, 509 U.S. at 590–591.

Pursuant to Rule 401 of the Federal Rules of Evidence, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Rule 402 states: "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. The trial court must look to the standards of Rule 401 in analyzing whether proffered expert testimony is relevant." *Amorgianos v. National R.R. Passenger Corp.*, 303 F.3d

256, 265 (2nd Cir. 2002). The job of trial lawyers is to use *Daubert* and Rule 702 to keep expert within their proper scope of expertise. *Smith v. Ford Motor Company*, 215 F.3d 713 (7th Cir. 2000). Even qualified experts must use reliable principles from their field of expertise to derive the conclusions reached in the cases in which they are testifying. *Oglesby v. General Motors Corp.*, 190 F.3d 244 (4th Cir 1999). Thus, experts must be qualified in their field, must use reliable data, must apply reliable reasoning and methodology to form their underlying opinions, and must present a reliable application of the underlying reasoning and methodology. An expert's opinion is not reliable if the conclusion is inconstant with the facts of the case. *Bogosian v. Mercedes-Benz of N. Am. Inc.*, 104 F.3d 472 (1st Cir. 1997); *Tyger Constr. Co. v. Pensacola Constr. Co.*, 29 F.3d 137 (4th Cir. 1994). The client is well served when counsel spends time breaking down the expert's report as soon as it is first tendered as well as all documents associated with the report. Counsel should also make a note of how much time the "testifying" expert spent in developing the report itself.

In addition to making certain that the opinion is within the witness' field of expertise, counsel should ensure that the report is based on the facts as they will be developed at trial. Lawyers should not allow the pace at which a case is progressing to allow time-honored discovery methods to be forgotten. Interrogatories of experts and a request for production of documents, more than once if needed, are essential when attempting to understand an expert's opinion fully and determining whether the expert is qualified under the rules. Through such interrogatories and requests for production of documents, counsel can effectively narrow the scope of the expert's testimony and, at the very least, can be better prepared for the expert's deposition. Beyond reading the expert's prior depositions, lawyers should *research* the expert's credentials. One technique is to request that the expert provide a signed authorization releasing transcripts from institutions of higher learning. A refusal to provide the release of transcripts can result in an effective—and probably amusing—cross-examination. Counsel should read the articles cited in the expert's résumé, find out what references the expert keeps in his or her office, and learn about the topic or the expert accordingly. Gems regarding an expert's chosen methodology can be unearthed when a lawyer properly analyzes the research an expert has previously relied upon in publications and can undermine a more limited approach taken by the expert in an opinion expressed in a case that has been litigated.

The Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), breaks down these fundamental principles and teaches lawyers how to apply them. *Daubert* concerned the admissibility of the testimony of eight experts—all of whom had impressive credentials—that the drug Benedectin® can cause birth defects. Because all the experts had proven credentials, the question centered on the reliability of the methodology and the reliability of its application to the facts of the case. As counsel tests an expert's report, it is good to

remember *Daubert* and its progeny—specifically, the following factors derived from the decisional law:

- whether the theory or technique has been tested;
- whether the theory or technique has been the subject of peer review and publication;
- the known or potential rate of error of the method used and the existence and maintenance of standards controlling the operation of the techniques that were used;
- whether the theory or method has been generally accepted by the scientific community;
- whether the matters to be presented were developed for litigation or developed from the expert's research; and
- whether the expert considered possible alternative explanations, then ruled them out.

When cross-examining an expert witness, practitioners are well served to ensure that the opposing expert is able to give an adequate explanation of the significance of his or her opinion within the confines of the factual circumstances of the particular case. (The trial lawyer must also make sure that the client's chosen expert is able to do so as well.) Based on the plain language of Rule 702(3), expert testimony that fails to apply "the principles and methods reliably to the facts of the case" is inherently unreliable and therefore inadmissible. At the deposition stage, counsel should put the expert to the test on this factor, and, if the deposition testimony shows that the expert has not adequately applied the facts of the case to his or her analysis, counsel should file a motion in limine and seek to prevent the expert from taking the stand. It is important to remember that, in case counsel is on the losing end of such a motion in limine, they should always request that the court allow them an extension of time or continuation of the trial so that counsel can engage another expert or to have his or her expert refine the analysis that has been provided. The court might deny the relief, but trial lawyers will never know what courts will grant unless they ask. Moreover, the court's failure to grant such relief may create a solid point for appeal.

In many respects, Rule 702 is basically an exception to the hearsay rule because it permits experts to give opinions on matters about which they do not have personal knowledge. Experts can—and often do—rely on hearsay in reaching their opinions. Generally, the hearsay on which experts rely is inadmissible. *Engbretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721 (6th Cir. 1994). Similarly, the expert's report as well as the otherwise inadmissible hearsay data contained in the report are inadmissible. Alternatively, to the extent that a portion of a report or data are allowed into evidence, the opposing party should be entitled to a limiting instruction. *Paddack v. Dave Christensen Inc.*, 745 F.2d 1254 (9th Cir 1984); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir 1988); *Eaves v. United States*, 2009 U.S. Dist. Lexis 102890 (W.D. Ky. 2009); *Osborne v. Pinsonneault*, 2009 U.S. Dist Lexis 33957 (W.D. Ky. 2009). The exclusion of an expert's report or the limiting instruction to a jury with regard to the expert's report are powerful tools that can be used in cross-examining an expert and

should not be overlooked. If the expert's explanation of the basis for his or her opinion through exclusion of the hearsay is limited or the expert is otherwise not permitted to show the report to the jury, he or she may feel less comfortable on the witness stand, thus giving counsel a tactical advantage. Taking an expert out of his or her comfort zone allows the trial lawyer to control the examination despite the disparate knowledge base occasioned by the expert's specialized training and knowledge.

In their opening statements, lawyers should take advantage of the concept of primacy, remembering that people are more likely to believe the first message they hear. Once a particular belief is established, the mind resists changing the belief, and this influences the way individuals process information that is subsequently presented. Counsel should tell the jury—or the judge in a bench trial—how they should perceive the opinion rendered by the opponent's expert. In addition, counsel should explain any limitations that have been obtained in regard of the testimony. In this way, counsel can begin to level the playing field before the expert ever makes it to the courthouse.

Quite simply, the best time to begin cross-examining an expert witness is long before the witness takes the stand. By taking advantage of the opportunities available in the discovery process, precise and targeted motion practice, and the opening statement, lawyers can place themselves in the best position to engage in a successful cross-examination of an expert witness. **TFL**

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