NEW TECHNIQUES TO CROSS-EXAMINE

THE EXPERT WITNESS

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Shane Read is a multiple award-winning author of litigation textbooks and an adjunct professor at SMU Dedman School of Law since 1998. His textbooks have won the Association of Continuing Legal Education's top honor for Professional Excellence. He is the only author to win this award twice.

His upcoming textbook, *Winning at Cross-Examination*, challenges the conventional wisdom and explains a modern approach for depositions and trials.

He is a graduate of both Yale and the University of Texas School of Law, and is an Assistant U.S. Attorney in Dallas where he has been in both the civil and criminal sections. He also teaches seminars to lawyers throughout the USA.

REBECCA PETEREIT

Rebecca's practice focuses on all aspects of restructuring and reorganization work, including the representation of debtors, lenders, creditors, landlords, and trustees. She also has significant experience representing clients in contested matters and adversary proceedings before both the federal bankruptcy and district courts. Prior to joining Vinson & Elkins, Rebecca practiced at another international law firm in a variety of areas, including complex commercial litigation.

Experience Highlights

- Magnum Hunter Resources, an E&P company with extensive properties in Marcellus and Utica; represent Eureka pipeline system, an entity that provides gathering, transportation and processing services to one of the debtors in Magnum Hunter's chapter 11 case filed in Delaware
- Chapter 11 trustee in the successful prosecution of fraudulent transfers to insiders and denial of the principal shareholder's claimed exemptions and discharge; first chaired jury trial of a $31 million fraudulent transfer action in federal district court
- Liquidating trustee of a bankrupt financial services firm in litigation against former officers and directors
- Chapter 11 trustee of corporate debtors providing cross-border telecommunication services; representation included numerous adversary proceedings, contested matters, and appeals (including several successful appeals at Third Circuit level), as well as sales of substantially all of the debtors' assets for consideration in excess of $250 million
- The administrative agent for syndicated secured lenders owed approximately $7 billion in a Chapter 11 case of one of the largest publishers of yellow pages directories in the United States; representation included: (a) the successful negotiation and court approval of a $250 million adequate protection payment for the client within a week of the petition date; (b) discovery and complex multiparty litigation concerning trademark and copyright issues with

regard to the secured lenders' liens, including the successful exclusion of the opposing side's key expert witness; and (c) despite such litigation, and over objection, confirmation of a favorable restructuring plan in less than 9 months

- Second lien lenders in a Chapter 11 case of oil & gas company Harvest Oil & Gas, LLC; representation included extensive discovery and multiparty litigation of complex valuation and confirmation issues

Education

- University of California at Los Angeles School of Law, J.D., 2005
- University of Delaware, B.S. *magna cum laude*, 2002
- Admitted to practice: California; Texas

Recognition

- IWIRC, Rising Star Award Semi-finalist, 2014
- Selected to the Texas Rising Stars list, *Super Lawyers* (Thomson Reuters), 2014 and 2015

Activities

- Board Member: International Women's Insolvency & Reorganization Confederation (IWIRC), 2010, 2011, and 2013 – 2016 (2016 Chair); Turnaround Management Association (TMA), 2018
- Committee Member: Turnaround Management Network of Women (NOW)
- Philanthropy Committee: Texas Wall Street Women (2015 & 2016 Committee Co-Chair)
- Member: Attorneys Serving the Community; State Bar of Texas Young Lawyers Committee; Turnaround Management Association (TMA)
- Bar Association Member: American Bar Association; Dallas Bar Association; Dallas Association of Young Bankruptcy Lawyers

CHAPTER FOUR: THE EXPERT WITNESS[1]

Truth is ever to be found in the simplicity, and not in the multiplicity and confusion of things.
—Isaac Newton

At first glance, taking an expert witness's deposition or cross-examining her at trial can appear very challenging. The two main reasons are that you will almost certainly have less expertise than the expert, and the expert is usually a professional witness who has learned how to defend her positions from having been cross-examined by other attorneys. Don't be overwhelmed. There are a few easy tricks to master that will guarantee success. However, before we learn these secrets, let's look at one preliminary issue: How does a witness get accepted by the court to give expert testimony?

4.1 REQUIREMENTS OF THE DAUBERT STANDARD

In order to testify at trial, an expert must meet the criteria set forth in the Daubert standard, which is a rule of evidence regarding the admissibility of an expert witness's scientific testimony; it is based in part on the U.S. Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Federal judges and many state judges use this determination to decide whether an expert's opinion is trustworthy. A judge uses the following criteria: whether a theory or technique can be (and has been) tested, whether it has been subjected to peer review and publication, the known or potential rate of error, and whether the theory or technique is generally accepted.

There is no need to get caught up in the *Daubert* criteria since most experts will satisfy them. But, if you believe that an expert does not meet the criteria, you must make an objection (usually before trial), and then the court will hold a hearing before trial or outside the presence of the jury during trial (known as a *Daubert* hearing). Attorney David Boies made just such a challenge in the Proposition 8 trial, which we will analyze in Chapter Nine.

CHAPTER ROAD MAP

1. Learn unique topics to cross an expert on.
2. Learn from a famous trial example how to cross an expert on his lack of qualifications.
3. Learn from the Zimmerman trial how to undermine an expert's credibility by pointing out what he has failed to do.

[1] This is a review copy of Chapter Four from the upcoming book, *Winning at Cross-Examination: A Modern Approach to Trials and Depositions* (Westway 2019) by Shane Read. Because it has not been finalized in book format, it has some formatting inconsistencies. It is copyrighted. Please do not duplicate.

4.2 DISCOVERY QUESTIONS TO ASK AT A DEPOSITION

You can win at trial by asking a series of specific questions at deposition—not cross-examination questions, but rather deposition questions that will help you develop a successful cross-examination for trial.

First, ask the expert to explain the methodology she used in formulating her opinion. An expert's report will discuss in summary fashion her opinion and the reasons for it. However, a deposition is critical in helping to understand the details behind the reasons for the opinion. You need the details for two reasons: 1) when she tries to explain the reasons for her opinion in detail, you might find that the expert used flawed reasoning; 2) the explanations will help your side's expert develop better counterarguments for her deposition or trial testimony.

A simple way to do this is to show the expert her report at the deposition and have her go through each paragraph and explain her conclusions.

> Practice Tip
> Every expert has to make assumptions, and when they do, you can show that if the assumptions were different, the conclusions would be different.

In order to ensure that the expert does not add important details later, pin her down on her opinions. Ask the following to ensure there are no surprises at trial: 1) "Have you stated all the reasons for your opinion in your report and in this deposition?" and 2) "Have you relied on any authorities other than those mentioned in your report and in this deposition?" This way, if the witness tries to give additional reasons or authorities at trial that support her opinion, she will look disingenuous.

Second, ask the expert witness, "Why do you disagree with [name of your expert]?" One of the most important things you can accomplish at the deposition is to find out exactly which points the expert disagrees with and the reasons why. Show the witness your expert's report. Go through the important paragraphs and ask the witness why she agrees or disagrees with your expert's findings. This question will prevent any surprises at trial.

Third, ask the expert how frequently she has been hired by plaintiffs or defendants. Determine how often the expert testifies for the plaintiff or defendant. Usually, the expert will say that she testifies about 60–40 for one side over the other. Upon closer investigation, the facts often show that the expert clearly is hired much more often by one side than the other. For that same reason, don't take your own expert's word for it that she testifies similarly. You will be unpleasantly surprised when she testifies differently at her deposition.

PRACTICE TIP
Ask the adverse expert what percentage of her income is derived from being a paid expert. Often, a majority of an expert's livelihood is dependent on being hired as an expert and this reveals her bias.

Fourth, near the end of the deposition, ask the expert the following: "Are you going to testify at trial to any opinions you have not given here today? Are there any assumptions or reasons that support your opinions that you are going to testify at trial that you have not stated here today?" If she answers yes, explore what those opinions are and what the reasons are. These questions will help you nail down the extent of the expert's opinions.

Experts are always trying to add to their opinions at trial. For example, they may come up with additional reasons to support their conclusion or give an alternative conclusion for the first time at trial. Since most judges will not allow an expert to go beyond her opinions set forth in her expert report, you need to make sure in the deposition that the expert states clearly all the opinions she is rendering and her reasons for them.

Sometimes the expert will hedge and say that she may change her opinion depending on other depositions or facts that come to light. That is why you should generally take an expert's deposition at the end of the discovery. That way, she can't hedge her conclusions and you can be certain she won't have a good reason to change her opinion.

4.3 PREPARING FOR CROSS-EXAMINATION

The most efficient way to prepare for cross is to ask *your* expert to tell you what questions you need to ask the *opposing* expert. After all, the subject area will be difficult to grasp and only by talking to your expert can you make the deposition or trial a level playing field. Have your expert teach you what you need to know so that you can ask intelligent questions and understand the opposing expert's answers. Specifically, ask your expert to go through the opposing expert's written report with you and explain its strengths and weaknesses, sentence by sentence. Then, have your expert review the opposing expert's curriculum vitae and again review its strengths and weaknesses with you.

Gather all the key information you can about the opposing expert. A good place to start is Westlaw or LexisNexis. For example, LexisNexis has "Expert Research on Demand," formerly known as IDEX, which provides information regarding Daubert challenges, deposition transcripts, trial testimony, verdicts, settlements, and other valuable information.

Scour the Internet for information about the opposing expert. Is there anything on Facebook or LinkedIn that reveals he belongs to groups that might undercut his credibility? Has the board his specialty is certified by taken any adverse action against him? For many kinds of doctors, there are various websites that have patient reviews.

Look into specialized litigation groups that have their own databases, such as the Defense

Research Institute (DRI), a large international organization of defense attorneys an in-house counsel, and the American Association for Justice (AAJ), an organization of plaintiff's trial attorneys. Finally, a lot of experts have their own websites, and it is shocking to see the kinds of proclamations they put on them. You can use these proclamations to undercut their credibility.

Also, collect an expert's previous depositions and trial testimonies. Under Federal Rule 26(a)(2)(B), an expert must disclose in his report a list of all cases in which he has testified during the previous four years, either at deposition or trial. Contact the attorneys who took the expert's deposition in the cases listed. The attorneys often respond by sending you trial or deposition transcripts in which they were involved. This step is important because it can help you determine if the expert has testified significantly differently before on the same issue that is in your current trial case. Don't forget to ask the attorney what he thought of the expert. He may gladly turn over his entire investigative file to help you out.

The opposing expert must also provide a list of his own publications. Have your expert review those publications to determine how good they are. Those publications are often not directly on point to the subject matter of the expert's opinion. Such information can be used to undercut his authority for arriving at opinions that hurt your case. In addition, check the sources the expert refers to in his report. Many times the articles or treatises the expert refers to are not credible.

Finally, when you send out your notice of deposition, use a subpoena *duces tecum* to request that the expert bring to the deposition the articles he has relied on. Simply state in your notice to the expert that the notice includes a subpoena *duces tecum* and list on a separate page in the notice the documents you wish the expert to bring. The reason to do this is that some of the articles that your expert needs to review may be difficult for him to find.

> "An expert is a person hired to divorce yourself from your common sense."
> —Mark Twain

<u>Experts are hard to pin down</u>

The first thing you will learn about an expert is that he can be very hard to pin down. Indeed, it can be very difficult to get him to commit to anything other than his ultimate (final) conclusion. For example, if you ask him if today is Monday, he will probably say, "It depends what part of the world you are in." An expert will emphatically declare his final opinion but less strongly how he got there. The reason is that an expert never wants to get boxed in by assumptions that—if later changed—would force him to alter his opinion. The expert is getting paid a lot of money to help the other side, and he will do everything he can to come through on his commitment.

Let's look at an example from the Microsoft antitrust trial where an expert admitted to an assumption only after being confronted with his own sworn testimony in a prior lawsuit. In the trial where this cross took place, the Department of Justice and several states sued Microsoft for antitrust violations, alleging that Microsoft bundled its web browsing software, Internet Explorer, with its Windows operating system. The plaintiffs claimed that this bundling resulted in Microsoft's stifling competition and suppressing innovation, since Windows users had free access to Internet Explorer as opposed to other browsers, such as Netscape, that had to be

purchased at a store. Microsoft stated that the bundling of Microsoft Windows and Internet Explorer was the result of innovation that met consumers' needs.

The trial started on May 18, 1998, in Washington, D.C. A witness for the plaintiffs claimed that a Microsoft vice-president declared that it was Microsoft's goal to extinguish Netscape (a rival browser) by giving away Internet Explorer with Windows. Judge Jackson issued his findings on November 5, 1999, stating that Microsoft had a monopoly of the personal computer operating systems market and that Microsoft had smothered the competition, including Apple, Java, and Netscape. The case was settled after an appeal.

Example: Cross-examination of Dean Schmalensee (*U.S. v. Microsoft*)

In this example, David Boies tries to get Microsoft's expert, Dean Schmalensee, to admit to a simple type of methodology that even a layperson would understand and agree with. However, the expert—as is true with most experts—does not want to give an inch in the deposition for fear of letting down his client by making any concessions at all.

*Q. Now, would you also agree that **the standard way** of approaching that question, that is, the question as to whether a firm has monopoly power, is to first define a relevant market and then look at what the share of that market is, and then if the share is sufficiently high, to look at conditions of entry?*

A. That is, as Professor Fisher [a government expert] indicated in his testimony, one approach. It provides some information. Market share, particularly in areas where market boundaries are difficult to draw or fluid, is not terribly informative. That is **an approach**. It is useful in some circumstances. **[The expert will only concede that it is "an approach," not that it is the standard way.]**

Q. Well, more than being an approach, would you agree that that is the traditional and most common approach?

A. I haven't done a survey. I have, of course, written on its utility for the last 20 years or so, and there are some circumstances in which it is not particularly informative, as Professor Fisher has said, and somewhere it is. It is **an approach** that has been used for a long time. **[Again, the expert will only admit that it is "an approach."]**

Q. Let me put before you and offer in evidence plaintiffs' exhibit 1526, which are excerpts from testimony that you gave in the Bristol case [another lawsuit] that you referred to. . . . Let me direct your attention, Dean Schmalensee to page 541 and lines 11 through 19, and the question and answer there, which I will read . . . [reading]: "Question: how does an economist such as yourself go about determining whether a seller of a product has monopoly power in a given product market?

*Answer: there are a number of approaches depending on the availability of data. The **traditional and most common approach** in an instance where one can define a relevant market in the antitrust sense, is to first look at shares of that market and then if shares are large, to move on to consider conditions of entry."*

*Now, recognizing that there may be cases in which you want to take a different approach, **would you agree that the traditional and most common approach** is the approach that you have identified here?*

A. When, as that indicates, one can define a relevant market in an antitrust sense, **yes**.

In the example, only after being confronted with his prior sworn statement does the witness admit the obvious: the starting point for determining if there is a monopoly is to first determine

the relevant market. This expert would not have admitted this fact if he had not been confronted with his prior sworn statement. Why would the expert not admit such a simple fact, particularly if he had said so under oath in the past?

Experts often won't give up an inch of ground in certain areas, even if the inch doesn't really matter. As seen below in the section on "confirm favorable facts," an expert will sometimes have to concede the truth of certain favorable facts to your side or else he will look foolish. Your job at a deposition is to determine which facts the expert will concede so that you can use those facts to support your case at settlement or later at trial.

Style of questioning at a deposition

Most experts are arrogant. They also enjoy spouting off their opinions. This combination works perfectly for the examiner who is respectful and sincerely interested in the opinion the expert is so proud of. The examiner should also mix in a dose of feigned ignorance if necessary. The more respect you show and the more you encourage him to explain his reasoning to you, the more you will get him to talk. Time after time, questions such as "I don't understand, will you explain this to me?" are met with a free-flowing response from the expert.

If you have ammunition to use against the witness, use it after you have gained all the favorable information you need. On the other hand, you might want to start off attacking the witness if he is clearly unqualified or has made a key mistake in his report. You can put the expert on the defensive early. Such an attack may cause him to back away from some of his conclusions before he is able to regain his footing later in the deposition.

4.4 KEYS TO ATTACKING AN EXPERT EFFECTIVELY

Now that we have seen how difficult it can be to get experts to answer simple questions, let's look at some techniques that you can use to be successful at a deposition (and at trial). First, you must choose your style of confrontation. Are you going to try and battle wits with the expert? I recommend that you don't, but with two caveats that I will get to in a moment.

> "Assume that an expert called against you has come prepared to do all the harm he can, and will avail himself of every opportunity to do so which you may inadvertently give him."
> —Francis L. Wellman, *The Art of Cross-Examination*

The Irish playwright George Bernard Shaw once said, "I learned long ago, never to wrestle with a pig. You get dirty, and besides, the pig likes it." This is the perfect analogy for trying to match wits with an expert witness. By definition, he has expertise in an area that you probably do not. In addition, he likely has post-graduate degrees and may have published articles or even books on his specialty. Why in the world would you want to pretend that you could wrestle with him in court on his turf and win?

For example, if you are cross-examining an expert who is a surgeon, there is likely no

way you can carry on a scientific discussion with her about the intricate details of a surgery. As soon as the surgeon saw that you were gaining ground, she could defend herself by using medical terms or discussing procedures you were unfamiliar with. Then, you would be lost and the jury would see the witness as the truth-teller.

If you need convincing from someone other than George Bernard Shaw, you can find guidance from Isaac Newton in the quote at the beginning of this chapter. To get to the truth, your goal should be to simplify ideas on cross, not make them more confusing. There is a great danger that you and the jury will get lost in the details. Instead, make the expert battle you on your turf by choosing simple topics that you know you can win on. I call this the Shaw approach.

Here are the two caveats I mentioned earlier. First, if you are regularly involved in the same type of cases, such as defective product cases, you could certainly gain the knowledge required to become a competent expert who could challenge the expert witness on his turf. The second caveat is that you may just be unusually smart and able to learn the subject matter well enough to become an expert no matter what type of case you are trying. However, those kinds of attorneys are few and far between.

Using the Shaw approach, go through your CROSS analysis to determine the expert's weaknesses. Credibility rarely fails to be a productive line of attack. Questioning the opposing expert about his education, experience, and the number of times he has testified for plaintiffs or defendants should be fruitful. Since your expert, just like the other side's, is getting paid, there is no point in cross-examining the expert on the issue that he "is being paid for his testimony."

Let's return to the Microsoft trial to examine the trial testimony of one of the Department of Justice's technical experts, John Weadock, and see how, Microsoft's attorney, Rick Pepperman, attacks his testimony.

1. Support Your Case (the second S of CROSS)

Like with other witnesses, it is best to get the cross-examination witness to confirm favorable facts before you challenge him. In the questions below, Pepperman tries to get the government's expert to admit that Microsoft was not trying to create a monopoly by having its Internet Explorer accessible through Windows 98, but rather that it tried to provide convenience for its customers by linking the browser to its Windows 98 operating system. The Department of Justice contended that Microsoft should not have put its browser, Internet Explorer, on computers with the Windows 98 operating system, or it should have given consumers a choice of other Internet browsers to use. Microsoft contended it was easier for customers to browse the Internet or Intranet by having Internet Explorer imbedded in Windows.

By taking a focused deposition, Pepperman was able to ask questions at trial with the comfort of knowing that he already knew the answers because they had been provided at the deposition.

Q. And I think you agree with me that the number of organizations that want no Internet access and intranet access is decreasing?

A. Yeah, I think that's probably a fair statement.

Q. At the bottom of page 16 [of direct testimony][2], you list as one of the reasons why an organization might want to have no web-browsing software on its computer is to, quote, make it more difficult for certain employees to access the public Internet in order to reduce the amount of unproductive time employees spend surfing the net on subjects unrelated to their jobs. Do you see that, sir?*

. . . .

A. OK, I see it.

Q. Again, sir, web-browsing software might be needed so that employees can access a private intranet; is that correct?

A. Yeah, that's correct. . . .

Q. So, there are companies, sir, you would agree, that don't want their employees accessing the public Internet but still may want web-browsing software [such as Internet Explorer] on their computers so that their employees can access a private intranet?

A. Yes.

. . . .

Q. And would you also consider as another potential advantage that a user who has experience with the public Internet can use a private intranet without learning an entirely new user interface?

A. Yes, I would agree with that.

Q. And that is because he or she could use the same user interface to browse an intranet that is used to browse the Internet; correct?

A. Supposing for the sake of this discussion that they used the same web browser in both cases, yes, that would be a benefit.

Q. And you agree, don't you, sir, that the number of users who have experience with the Internet is growing rapidly over time?

A. I do.

Q. And isn't it also true, sir, that organizations that want to make it difficult—make it more difficult for certain employees to access the Internet can do so by a variety of means other than by not installing web-browsing software on those employees' computers?

A. Yes, they have several choices.

Practice Tip:
You will always succeed at trial by cross-examining an expert on facts that are helpful to your case that he must agree with or else look foolish.

[*] Since this was not a jury trial, the judge accepted a written statement of the expert as direct testimony that was submitted earlier in the proceedings. At trial, the witness swore that the statement was truthful, and it was admitted as evidence. Then, the cross-examination began.

At the deposition, get the expert to confirm as many of your favorable facts as possible. This tactic succeeds because an expert has to admit the truth of at least some undisputed facts or he will look like a fool. However, he will fight you to the death on the interpretation of the facts. So, ask about facts, but don't ask about his interpretation of the facts or go too far and try to get the expert to admit to facts that are in dispute.

Q1. Does Microsoft, to your knowledge, prohibit those end users from removing the Internet Explorer icon from the Windows desktop?

A. Generally, no, no, they don't . . . .

Q2. And Microsoft also doesn't prohibit end users from removing the entry for Internet Explorer on the start menu; correct?

A. That's correct.

Q3. And Microsoft does not prohibit end users from removing the Internet Explorer option on the quick launch menu; correct?

A. That is also correct.

*Q4. And in fact, **you're not aware of anything** that Microsoft does to restrict organizations' ability to remove the most commonly used means of accessing Internet Explorer; correct?*

A. Absolutely not correct. Absolutely not.

In Q4, Pepperman goes too far. There is no way the expert is going to admit that Microsoft does not do "anything" to restrict a customer's ability to remove its web browser, Internet Explorer. That was a central issue in the case. If one could have easily removed Internet Explorer with the click of a button, it certainly would have weakened the government's case that Microsoft was trying to monopolize the browser market by bundling its Windows operating system with a web browser.

2. Credibility (Lack of Expertise)

There is almost always room to attack an expert's credibility (the C of CROSS) through his lack of qualifications. Oftentimes, the expert has exaggerated accomplishments on his curriculum vitae (resume). Other times, he has simply listed accomplishments that look better on paper than they really are. Or he may have been more proficient in the past but has no recent experience.

Q. And the plaintiffs have identified you in court papers as one of their technical experts, correct?

A. I believe that that's the case, although I am not sure I can recall a particular document that uses those terms. But I think that is true.

*Q. You do not, however, consider yourself, sir, to be an expert in the **design** of operating system software, do you?*

A. No, I do not.

*Q. And you have never worked on the **development** of an operating system, have you?*

A. No. That is correct.

Based on his deposition, the attorney highlights for the judge that the expert lacks expertise in areas that are central to two issues at trial: the design and development of Microsoft's Windows operating system.

Pepperman continues to hammer the theme of inexperience:

Q. If you could turn to your direct testimony on the second page, paragraph 2, you write, "I am a seminar developer, seminar instructor, author of computer books and videos, and computer consultant." do you see that, sir?
A. I do.

*Q. You have, however, never provided consulting services to a software company concerning the **design or development** of operating software, have you, sir?*
A. No. That's correct. There's lots of different kinds of computer consulting.

Q. And the subject of which features should or should not be included in an operating system has never been the primary focus of any of the books, articles, or videos you have written, correct?
A. That is correct.

Q. And, similarly, that subject has never been the primary focus of any of the seminars you have developed or taught, correct, sir?
A. It has never been the primary focus. The issue of what operating systems look like and what vendors, with particular respect to Windows, include with their operating systems is a subject that comes up in my seminars, but it's not a primary focus, I think was your question.

Q. That was my question, sir.
Q. And it's true, isn't it, sir, that you have never written anything about Windows 98 that has been published in a peer-review journal or publication?
A. In a peer-review—no, that is certainly correct . . . .

Notice how Pepperman dissects the expert's qualifications. While on paper, it may look impressive that the expert is a consultant, lectures at seminars, and has written books—even some that have been widely read—such "expertise" is really not relevant to the issue at hand regarding operating systems.

> **Practice Tip:**
> Don't be intimidated by an expert's publications. Many times, the articles are either not focused on the topic in dispute or have not been subject to peer review (i.e., scientific journals).

Pepperman continues to humble this expert:

Q. You also state, sir, in paragraph 2 on page 2 of your direct testimony, the last sentence of that paragraph, that you are the, quote, "president of Independent Software, Inc." Do you see that, sir?
A. There are no quotes. You added that.

Q. I was quoting from it, sir. Do you see where I am referring?

A. Yes, I do.

Q. You are also the one and only employee of Independent Software, aren't you, sir?
A. That's correct.

In a few series of questions, Pepperman has established that this "expert" is not an expert in the design of operating software systems, has never written anything on this topic subject to peer review, and is the president of a company that employs one person—himself.

3. Credibility (Meaningless Memberships and Organizations)

Always question the expert about the organizations he brags about in his curriculum vitae (CV). Without fail, experts throw in the kitchen sink and list everything they belong to in order to bolster their perceived expertise. However, many of the organizations do nothing to establish expertise—but they look good on paper.

Q. The last sentence of that paragraph reads, "My current professional memberships include the American Society for training and development and the association for computing machinery."
Do you see that, sir?
A. I do.

Q. I notice that you use the verb "include" in that sentence. Those two organizations are, in fact, the only organizations to which you currently belong, correct?
A. The only professional organizations—

Q. Yes, sir.
A. —or organization of any kind?

Q. Professional associations.
A. That's right.

. . . .
Q. Now, isn't it true that there are no specific requirements or certification procedures for joining either of the two organizations that you've listed in your direct testimony?
A. Yes, that is true.

Q. And leaving aside the general presumption that applicants for these organizations are probably people who work in the industry, all that someone needs to do to join these two organizations is send in a check, correct, sir?
A. That is true.

4. Credibility (Irrelevant Education)

In addition to an expert's memberships, his training often is an area of weakness to explore. For example, an expert's educational background may be impressive but not relevant to his claimed expertise.

Q. And you received from Stanford a bachelor's of science degree in general engineering; is that correct?
A. That is correct.

Q. And since graduating from Stanford, you have not received any graduate degrees from any formal universities; is that correct, sir?
A. That is correct.

Q. No master's degrees?
A. I think that was encompassed in your earlier question. **[Expert gets defensive.]**

Q. And no doctorate degrees, correct, sir?
A. Again, same answer.

. . . .
Q. Isn't it true, sir, that you took only two computer science courses at Stanford?
A. I think that's correct.

Q. And one of those two courses was a basic introductory course, something like programming 101?
A. That is correct.

5. Lack of Preparation for Deposition or Trial

An expert's opinion can also be affected by how much or how little work he put into preparing his expert report, preparing himself for the deposition, and preparing himself for trial. This lack of preparation is something you should attack at trial, but be careful about exploring it at a deposition, because if you point out omissions the expert has made at the deposition, he may be able to correct them prior to trial and thus be better prepared when it counts.

Let's look at another example from the Weadock cross at the Microsoft trial. Below, the expert's failure to read only one deposition undercuts his credibility.

*Q. The next to last bullet point [of his expert report] reads, "my **review of documents and deposition testimony** [of Microsoft employees and other witnesses]in the months prior to this trial." Do you see that?*
A. I do.

*Q. Now, at the time you submitted your expert report in this case on September 3, 1998, isn't it true that you had at that time **read only one of the 98 depositions** that had been taken in this case?*
. . . .
A. I think that may be true.

Q. And that one deposition was the deposition of Jim Allchin, a Microsoft employee?
A. Right.

6. Biased Investigation

You should also determine what tests and kinds of investigations the expert conducted in formulating his opinions and attack them if there is any bias. In the example we have been looking at, Weadock interviewed several companies. Pepperman wanted to find out if the expert's opinion was completely objective or if it had been influenced by the companies he had interviewed because the companies did not like Microsoft. The following is an exchange where Pepperman showed that one such interviewed company was, indeed, biased against Microsoft:

Q. You also interviewed the Sabre Group, correct?
A. Yes, that's correct.

Q. Now, the Sabre Group offers an online reservation service called Travelocity; is that right?
A. That is correct, yes.

Q. And that online service competes with Microsoft's Expedia service, correct?
A. That's my understanding.

*Q. And the Sabre group is also an **outspoken critic of Microsoft**; isn't that right?*
A. I don't know if they are outspoken or not.

*Q. Were you aware that the Sabre group **is a member of Procomp, an anti-Microsoft lobbying group** here in Washington, D.C.?*
A. No, I wasn't.

*Q. Were you — were you aware that the CEO of the Sabre group, **Mr. Michael Durham, publicly criticized Microsoft** on April 30, 1998 in testimony before the House Commerce Committee?*
A. Gosh, Mr. Pepperman. Lots and lots of people publicly criticize Microsoft. I am not aware of all of them.

Q. A lot of them made up your focus group, didn't they, sir?
A. I wouldn't call it a focus group. These are illustrative examples—companies that I had conversation with—one of 10 areas that I relied upon in my testimony.

*Q. Well, it's true, isn't it, that one of the representatives of the Sabre group, whom you interviewed, told you that, as a matter of company policy, if there is a product available that is comparable to a Microsoft product, **the Sabre group always uses the non-Microsoft product**, correct?*
A. That is correct.

7. Two Areas Not Worth Exploring

Finally, let's look at two areas that are a waste of time to explore with an expert. Although questions about an expert's compensation should be asked at a deposition if it is not already known through a discovery disclosure, there is no point in bringing it out at trial since your expert likely will also be compensated. That is, since your expert is also getting paid, you are not going to get much mileage out of the fact that the fact finder should not believe the opposing party's expert because he is getting paid. However, this is a mistake that many attorneys make at trial.

Q. The Department of Justice is compensating you for your services at the rate of $100 per hour, correct?
A. That's correct.

Q. And that is your normal consulting rate, correct?
A. Yes, sir.

Another mistake at trial is trying to get the expert to admit that he would slant his opinion in favor of the side that hired him. No expert is ever going to admit this (remember Myth 1 discussed at the beginning of chapter 2). In the next exchange, notice how well the expert handles such questions:

Q. Mr. Weadock, do you know who Michael Wilson is?
A. Yes, I do.

Q. Who is Mr. Wilson?
A. He's one of the people who works with the Department of Justice. . . .

Q. Have you had discussions with Mr. Wilson?
A. Yes.

Q. Do you know who "wanpt" [the initials on an email] is?

A. I would guess it's Pauline Wan.

Q. Have you ever had discussions with Ms. Wan?
A. Yes.

Q. About midway through the e-mail, Mr. Wilson includes a parenthetical that reads, "I also think he wants to teach b/c he hinted that the teaching course is more prompt at paying his invoices. He hasn't received payment for his February bill for January work — ***we need to keep Glenn happy because he's the most efficient, articulate, and flexible expert we have."***

Q. The "Glenn" referred to in that parenthetical is you, Mr. Weadock?
A. I am pleased to say that it appears to be.

Q. And has Mr. Wilson ever described you in your presence as the Department of Justice's most flexible expert?
A. Not in my presence. And I think if you look at the context of this memo, he is talking about scheduling.

Q. But Mr. Wilson is—

A. I would hope that Mr. Wilson doesn't mean that I'm flexible in my opinions. Anybody who knows me very well knows that my opinions are generally my own and not easily influenced.

*Q. Mr. Wilson notes in this e-mail that you actually have a scheduling conflict for a meeting that was being scheduled, correct****? [The attorney tries to backpedal from accusing the witness of slanting his opinion for monetary gain to soften the failure of his attack.]***
A. Yeah, I think so.

Q. So in the context of saying you have a scheduling conflict, he's saying that you have the most flexible schedule, correct? That's your understanding? ***[The attorney has now completely backpedalled.]***
A. I mean, we'd have to ask him exactly what he means, but that's the way I take his memo.

Most important, notice that the attorney made the mistake of not asking such questions at the deposition. If he had, he would have known that the witness had a good explanation for the e-mail. By doing so, the attorney would have avoided the embarrassment of trying to make the witness look overreaching and then having that backfire on him because it was the attorney who was overreaching.

Instead of trying to get the witness to confess that he is biased (see Myth 1 of "The Four Myths about Cross-Examination" in chapter 2), your goal should be to undermine his credibility (the C of CROSS). The correct way to conduct such a cross is illustrated below in this hypothetical example:

Example: Cross-Examination Regarding Bias of Plaintiff's Expert Doctor

Q. Doctor, you were hired by the plaintiff in this case?
A. Yes.

Q. How many times have you testified in court?
A. Fifteen times.

Q. Of those 15 times, how many have been for a plaintiff?
A. Fourteen times.

Q. So, out of all the times you have ever testified in court, only once have you testified for the defense?
A. Yes.

Q. In truth, when you have testified in court, almost 95 percent of the time it has been for a plaintiff?
A. Yes.

This cross-examination clearly establishes that the witness must have some bias—although he will never admit it on the stand—since he testifies so often for a plaintiff. Given that this is often a good line of cross-examination, make sure your expert has a history of testifying for both sides, or that he is very well qualified but has only rarely testified in court.

8. Attack the expert's assumptions

Another tactic for successfully cross-examining an expert witness is to challenge his assumptions. By virtue of being an expert—and not an eyewitness—the expert has necessarily made assumptions. Experts have a marked tendency to slant their argument to the side that hired them and to discount the value of alternative assumptions that might help the other side. Show the jury that the expert is unwilling to consider reasonable alternatives. Would the expert's opinion change if he had different assumptions? The expert won't admit he used the wrong assumptions, but by showing his unwillingness to consider reasonable assumptions that are different, the jury will see his bias.

Example: Cross-Examination of Plaintiff's Economist

In this example, the plaintiff has called an economist to calculate his damages. Like all experts, he has necessarily made assumptions.

Q. Let's show the jury the assumptions you have made in this case. In order to calculate the damages for the plaintiff, you had to make certain assumptions, true?
A. Yes. But they were all reasonable assumptions that anyone would make.

Q. Well, let's see if that is correct or if I can convince you differently. You made assumptions about the plaintiff's life expectancy?
A. Yes.

Q. One assumption I disagree with you on is your calculation that the plaintiff will live 11 years longer than the average male?
A. He's health is fine.

Q. I understand that is your claim, but my question is, you assume that the plaintiff will live 11 years longer than the average?
A. Yes.

Q. You would certainly agree that if you based your assumption on the average life expectancy, you would have calculated a significantly lower damages number?
A. My calculations are accurate.

Q. It is a simple question. If you based your assumptions on average life expectancy, your number would have been significantly lower?
A. Yes.

Q. Another assumption you made is that the plaintiff would continue to work seven years longer than the average male?
A. Yes.

Q. You also make some assumptions about inflation?
A. Yes.

Q. For example, the rate you assume is much higher. . . .

Instead of making his calculations based on averages, the expert has increased his damages calculations by making assumptions that favor the plaintiff. He also reveals his bias by not answering simple questions.

9. Restrict the expert's damaging testimony

Another successful tactic is to restrict (the R of the CROSS acronym) the damaging testimony of the expert, because there is always something the expert has not done. This line of attack is even more powerful against an expert witness than a lay witness because the expert witness claims to be the ultimate authority. Consequently, when you can show the jury that the other side's expert has failed to do something, it not only undercuts that witness, but it undercuts their entire case.

Restricting the testimony always works because no human can possibly have done everything to prepare for trial. More important, experts often are overly confident and will prepare less for trial because they think jurors will just be wowed by their qualifications.

Here are some examples of areas where you can attack an expert for things he has not done, which will undercut the effect of his ultimate opinion in the minds of the jury:

First, you can find reputable treatises, articles, or textbooks that the expert has not read that support your own expert's conclusion. There is no way anyone can read everything.

Second, you can attack the limits of the investigation. There is not enough time or money to conduct every test or review every document before trial. For example, an expert accident reconstructionist often forms her opinions from data obtained from an accident, but she may not have taken the time to actually visit the scene where the accident occurred. On cross, the expert may try to explain that there was no need to visit the scene of the accident, but if your expert has, the opposing expert will be hard-pressed to explain to the jury why she hasn't.

In medical malpractice cases, a successful line of questioning for a plaintiff's attorney might center on the defense expert's failure to see the patient during the questioned treatment. By necessity, all the defense expert can do is review medical records. He wasn't in the operating room and did not have to make the tough choices in the heat of the moment. A "hindsight is 20-20" theme on cross is a theme to which the jury can relate.

Practice Tip:
Have an objective that is reasonable and attainable.

4.5 CROSS OF AN EXPERT IN ZIMMERMAN TRIAL

Several examples of cross-examinations of expert witnesses are presented throughout this book, including Tom Girardi's cross of William Squires in chapter 5 and David Boies' cross of David Blankenhorn in chapter 9. But for now, let's look at a cross-examination from the State v. Zimmerman trial, which was also discussed in chapter 1. Zimmerman's defense to the charge that he murdered Trayvon Martin was that Martin had pushed him down and was straddling him and violently punching him in the head when Zimmerman pulled his gun and shot him in self-defense. The defense called Dennis Root, who was a self-defense expert. One of the prosecutors, John Guy, conducted a cross-examination that nicely illustrates use of the R of the CROSS acronym ("Restrict the damaging testimony"). See if you think he is successful in conveying to the jury that the "expert" failed to do a lot of things he should have done, thereby undercutting his conclusion that Zimmerman acted in self-defense.

Q. But you would agree with me that the only person that you interviewed who had first-hand information on this event from the start to the finish was the defendant, right?
A. Yes sir. He was the only one that I actually spoke to in person outside of Mr. Pollock. I did interview Mr. Pollock, but unfortunately our schedules were such that I had to do it over the phone. I called him and spoke to him over the phone.

Right off the bat, the prosecutor shows the jury that the expert's source of information is limited to the defendant and one other person, effectively tainting his entire testimony. There were several neighbors who saw and heard the fight. If Root were trying to present an unbiased opinion, he should have interviewed all the people who had knowledge about the fight. His failure to do so immediately undercuts the strength of his opinion.

***

Q. And your conversation with the defendant, he described this whole event to you, right?
A. Yes, sir.

Q. OK, but you didn't have him mark on a diagram where he claimed, or an aerial photograph where he claimed the confrontation began?
A. No sir.

Q. And you didn't have him mark how it progressed from where he claimed it started to where it ended?
A. I didn't require Mr. Zimmerman to create any kind of drawings or mark on any kind of pictures or anything.

The prosecutor points out that the expert's failed to have the defendant explain, by using a diagram or drawing a picture, what happened. By doing this, the jury can infer that his failure to take this step would negatively affect his ability to understand what happened.

***

Q. You didn't ask the defendant what hand Trayvon Martin used to punch him right?
A. No, sir.

Q. You didn't ask him how long it was between the time he had got punched, as he claims, and the time you went to the ground?

A. I didn't ask him for specific times, and again I—... Asked him to tell me what took place.

Q. And you didn't ask the defendant whether or not he tried to strike Trayvon Martin.
A. No, again, I didn't spend a lot of time asking him a lot of things.

This last statement is golden. The prosecutor has used the theme of "what you did not do" to get the witness to become very defensive and then admit, "I didn't spend a lot of time asking him a lot of things."

Q. The defendant never told you, did he, what he was doing with his hands once it was going on.
A. No, sir. I don't recall him saying anything.

Q. So you went to the scene to try to get an idea of the lighting, and the sun had not gone down?
A. Correct, it was not completely set.

Q. Right. So you didn't wait until it had set?
A. No sir.

Q. And you didn't go back?
A. No.

Q. When it was dark some other day?
A. No.

The prosecutor ends with the fact that the expert went to the scene of the fight during the daytime, rather than at nighttime, which is when the fight took place. If he had gone at night, he could have given a better opinion about where the fight occurred according to what Zimmerman and the neighbors said. He also would have been in a better position to corroborate or dispute what Zimmerman claimed to have seen in the dark before and during the fight. Zimmerman's perceptions are obviously crucial to determining his belief of whether he was in imminent danger of serious bodily injury or death when he shot Trayvon.

This good cross could have been made even better with a list showing the jury what the expert did not do in his investigation. The way to execute it would be to start by telling the jury: "Mr. Root, I want to talk to you first about the things you did not do." As you tell the jury this, write at the top of a sheet of paper on an ELMO, "Things Expert Did Not Do." Then, after each helpful answer you get, write that information in a list.

Here is what it would look like:

THINGS EXPERT DID NOT DO

1. No interviews of eyewitness other than Zimmerman and Pollack
2. No diagram of scene
3. No questions about what hand Trayvon used to punch Zimmerman
4. No questions about whether Zimmerman struck Trayvon
5. No questions about timing of sequence of events
6. "I did not spend a lot of time asking him a lot of things."
7. Did not visit scene at night, which is when fight took place.

To emphasize how damaging the admission is in number six, you should underline it after you write it.

4.6 **MARK LANIER CROSS-EXAMINES AN EXPERT**

In chapter 6, we will examine Mark Lanier's skills in-depth, but for now, let's take a quick look at his cross-examination of an expert witness in the Johnson & Johnson (J&J) baby powder litigation. In the video clip that can be found at winningatcross.com under the title "J&J Needle in a Hay Stack," Lanier explains how he cross-examined an expert for J&J who told the jury that J&J's baby powder did not contain asbestos and therefore could not have caused ovarian cancer in the plaintiffs that Lanier represented. In 2018, Lanier would win a $4.69 billion verdict for 22 women and their families in this trial. Before you watch the video, read the rest of this section.

Here was Lanier's problem. Johnson & Johnson had hundreds of tests that showed that its baby powder did not have asbestos. These tests had used polarized light microscopy to test for the presence of asbestos. However, the technique could only find the presence of asbestos if it was present in a quantity of greater than .01 percent. Lanier had the challenge of explaining why the tests his expert conducted found asbestos in contrast to the ones J&J conducted. Before you look at the video, ask yourself how you could visually explain to the jury that J&J equipment's was not sensitive enough to detect asbestos while the equipment that Lanier's expert used was.

There could be any number of ways to demonstrate the different sensitivities of the tests: graphs, charts, or tables. But Lanier found the best one. As he explains in the video, the testing procedure J&J used and the science behind it is very complicated. It was a near certainty that very few on the jury would understand the process. Instead of using graphs or charts, Lanier used a bathroom scale, a jeweler's scale, some needles, and a bale of hay to prove his point. After you

watch the video, read the next paragraphs:

There are so many things that make Lanier's points clear and memorable. First, he could have put anything on the bathroom scale to demonstrate whether it was sensitive enough to find asbestos. But, Lanier uses a needle because asbestos is shaped in the form of a needle. It is the perfect metaphor. After he puts onto a scale many needles and other objects that that scale is not sensitive enough to weigh, he then tells the witness that it is a "rigged test," which is one of his themes for cross-examination.

Lanier then uses a jeweler's scale, which is able to measure the weight of the first needle he puts on it. He makes his point that J&J did not find asbestos because it did not use the right equipment.

J&J's response to this argument was that it had also used transmission electron microscopy, which was a very sensitive technique, and it had not found any asbestos either. The science behind the transmission electron microscopy was complex and would also be nearly impossible to explain to a jury. To rebut this technique, Lanier had to show that J&J had not used a big enough sample size to determine if there was asbestos.

So, he brought out a bale of hay from underneath his counsel table at trial and suggested to the witness that the technique of using transmission electron microscopy to detect asbestos was literally like looking for a needle in a haystack. To make his point crystal clear, Lanier stuck a needle in the haystack on counsel table.

He then tore a piece of hay from the haystack and suggested to the witness that J&J had only tested an "itsy, bitsy" sample. When the witness denied that it was too small of a sample, Lanier showed how well prepared he can be for his cross-examinations. He had done the math and proved to the jury that based on J&J's protocol for testing, it would take 600,000 years to test an entire jar of baby powder. His point? J&J tested such a small sample of powder that the company was never going to have a chance of finding asbestos.

Lanier then argued to the witness that the proper testing procedure was the pre-concentration method. He then went back to the bale of hay to explain how that test worked. First, a piece of the bale of hay would be broken off and put it in a tub a water. Then, all the hay would float to the top, and if there were any needles, they would sink to the bottom. Then, you would scrape the bottom of the tub and put the residue under a microscope to reveal any asbestos needles.

That is the test that Lanier's expert used, and he found asbestos in 70 percent of the baby powder bottles. Then, Lanier combined this demonstration with a damaging document that he showed to the jury. That document stated that in 1973, the Colorado School of Mines had told J&J that the pre-concentration test was the only way to find the proverbial "needle in a haystack"— that is, determine if asbestos was present. J&J decided not to use that test.

4.7 CHAPTER CHECKLIST

1. For an expert witness to be able to testify, the Supreme Court in *Daubert* required courts to inquire as follows: whether a theory or technique can be (and has been) tested, whether it has been subjected to peer review and publication, the known or potential rate of error, and whether the theory or technique is generally accepted.
2. Do the following to prepare for cross: 1) have your expert review the opposing expert's report and curriculum vitae (CV) so he can suggest questions for you, 2) collect information about the opposing expert from LexisNexis expert databases, 3) scour the internet for damaging information, 4) collect prior deposition and trial testimony to find inconsistent opinions, and 5) determine what assumptions the opposing expert has made and how his opinions might change if different assumptions were made.
3. So you won't be surprised at trial, ask the following discovery questions at deposition: 1) ask the opposing expert to explain the reasons that support his opinion, 2) confirm that he has stated all his reasons, 3) ask why the opposing expert disagrees with your expert, 4) ask how frequently he has testified for plaintiffs and then also for defendants, and 5) ask what assumptions he has made.
4. Every expert has to make assumptions, and when they do, you can show that if their assumptions were different, their conclusions would be different as well.
5. The Irish playwright George Bernard Shaw once said, "I learned long ago, never to wrestle with a pig. You get dirty, and besides, the pig likes it." This is the perfect analogy for trying to match wits with an expert witness. Don't do it.
6. You will always have success at trial by cross-examining an expert on facts that he must agree with—or else look foolish—that are helpful to your case.
7. Don't be intimidated by an expert's publications. Many times, the articles are either not directly on the topic in dispute or have not been subject to peer review (i.e., scientific journals).
8. Always question the expert about the organizations he brags about in his CV. Without fail, experts throw in the kitchen sink and list every organization to which they belong in order to bolster their perceived expertise. However, many of the organizations do nothing to establish expertise—they just look good on paper.
9. In addition to exploring an expert's memberships, his training is often an area of weakness to explore. For example, an expert's educational background may be impressive but not relevant to his claimed expertise.
10. An expert's opinion can also be affected by how much or how little work he has done in preparing his expert report, preparing for the deposition, or preparing for trial. This is an area that you should attack at trial, but be careful about exploring it at a deposition, because if you point out omissions the expert has made at the deposition, he may be able to correct them prior to trial and be better prepared when it counts.
11. You should also determine what investigation the expert has conducted in formulating his

opinions and attack them if there is any bias.

12. There is no point in bringing out at trial that the expert is being paid, since your expert will also be compensated.
13. Another successful topic is using the "R" of the CROSS acronym to "restrict" the damaging testimony of the expert because there is always something the expert has not done. Consequently, when you can show the jury that the other side's expert has failed to do something, it not only undercuts that witness, but it undercuts their entire case.
14. In the Zimmerman case, the prosecution was able to show the jury that the self-defense expert: 1) did not conduct interviews of eyewitness other than Zimmerman and Pollack, 2) did not create a diagram of scene, 3) did not ask questions about what hand Trayvon used to punch Zimmerman, 4) did not ask questions about whether Zimmerman struck Trayvon, 5) did not ask questions about timing of sequence of events, 6) stated, "I did not spend a lot of time asking him a lot of things," and 7) did not visit scene at night, which is when the fight took place.
15. Think creatively about how you can transform the complicated into the simple. Lanier uses a bathroom scale, a jeweler's scale, needles, and a bale of hay to explain to jurors the complex science of testing a product to see if it contains asbestos.