



B124 Cross-Examination: Is It an Adequate Remedy for Incompetent or Dishonest Expert Testimony? — Personal Reflections

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After attending this presentation, attendees will consider the difficulties in dealing with incompetent or dishonest expert testimony.

This presentation will impact the forensic community and/or humanity by pointing out the dangers and problems of dealing with improper expert testimony.

Traditionally, cross-examination has been regarded as the remedy to protect against an inaccurate or dishonest witness. It evolved for this purpose with lay witnesses. Even after the advent and gradual increase in the frequency of occurrence of expert testimony, the reliance on cross-examination for utilization with experts appears to have continued seamlessly with little demonstrable thought being given to its appropriateness and effectiveness with expert witnesses. It seems to be an article of faith on the part of many lawyers and judges that cross-examination is an effective remedy for use with incompetent or dishonest experts. In general, based on 45 years of observations, which are admittedly anecdotal rather than scientific, the author finds that untested belief in the efficacy of cross-examination of such experts to be illusory.

Incompetent or dishonest experts who have been qualified as experts numerous times by scientifically naive judges are unlikely to be excluded as expert witnesses by the next court they encounter. Once one is deemed "court qualified" it seems that one has earned a lifetime pass. Those who are incompetent but have survived multiple appearances as expert witnesses and are still sought by counsel are unlikely to be discredited on the basis of an additional cross-examination. The process of bootstrapping can continue for many years. Most attorneys, no matter how much trial experience they have, do not know enough science, let alone forensic science, to be effective with such an expert. Although it may not guarantee that the dishonest or incompetent "expert" will be discredited, the assistance of an experienced criminalist can be of great help. The criminalist can prepare ideas for cross-examination questions well in advance of the anticipated expert testimony. These ideas should then be discussed with the attorney doing the cross-examination to assure that the purpose of each question idea is understood before it is transformed by the attorney into the series of questions to be asked. The discussion should include anticipated answers. This is necessary so that questions capable of probing to several levels of depth will be available. On rare occasions the consulting criminalist may sit at counsel table to provide more immediate assistance. This may have certain drawbacks and needs to be a very carefully considered tactical decision made by the attorney.

In addition to cross-examination, additional protection against incompetent "experts" may be gained through a *voir dire* on qualifications. Again the assistance of a criminalist should be utilized. Unfortunately, exposing an experienced but incompetent expert is not as easy as it should be. Here and with the cross-examination itself, having the finder of fact understand the subtleties of the appropriateness or inappropriateness of the qualifications of the "expert" for giving the opinions proffered is essential, but often difficult to accomplish. In short, attorneys should not be overconfident about being able to prevent incompetent experts from testifying or relying on an unassisted cross-examination to discredit them when they do. Help should be sought.

Without identifying cases or experts, the authors will illustrate the thesis with case examples. This area is in need of more study and research. Traditional beliefs and blind faith are no substitute for knowledge.

Cross-Examination, Expert Testimony, Ethics