



Engineering Sciences Section – 2011

C9 So You Think You Can Testify? Cross- Examination for Expert Witnesses

Betty Layne DesPortes, JD*, and Steven D. Benjamin, JD*, Benjamin & DesPortes, PC, PO Box 2464, Richmond, VA 23218-2464

The goal of this presentation is to assist experts in understanding the purposes and goals of cross-examination and will illustrate topics about which they are likely to be questioned. For attorneys, this presentation will outline the issues they should include in their research, trial preparation, and cross-examination in order to better elicit the facts relevant to determining reliability.

The presentation will impact the forensic science community by explaining the purpose and nature of cross-examination and will assist the forensic science community to present reliable results with credible testimony in criminal cases.

Expert witnesses—particularly in the criminal justice system—often complain that attorneys fail to “focus on the science” or ignore reliable results in favor of personal attacks. Attorneys, on the other hand, complain that experts wrap questionable opinions in an undeserved aura of science, but fail to confront experts in a meaningful and probative way.

In the wake of the United States Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), more forensic scientists and other expert witnesses are being called to testify in criminal cases. Expert witnesses can no longer rely on their written reports being admitted into evidence without their testimony and attorneys now must confront live witnesses instead of documents at trial. The purpose of testimony is to present reliable evidence to the trier of fact (judge or jury) for consideration in reaching judgment. The specific purpose of cross-examination is to ensure the reliability of the evidence presented by full disclosure of all relevant facts—a purpose so integral to

our system of justice that “the very integrity of the judicial system and public confidence in the system” depend on the right to cross-examination. *United States v. Nixon*, 418 U.S. 683, 709 (1974).

The reliability of scientific evidence not only depends upon the forensic science method or technology used, but also upon the expert. The trier of fact cannot determine the reliability of the evidence presented without assessing the reliability of the method or technology and the reliability of the expert who determined the results. The reliability of the science and the reliability of the expert witness are both areas that must be explored on cross-examination.

To assess the reliability of the science, relevant areas for inquiry include: (1) the extent to which a particular discipline is founded on reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings, and, (2) the extent to which practitioners in a particular discipline rely on human interpretation that could be tainted by error, bias, or the absence of sound operational procedures and robust performance standards. The case-specific areas of inquiry include the capabilities or limitations of the specific laboratory facilities, evidence handlers, and technicians, including the potential for contamination.

To assess the reliability of the expert, relevant areas include education, training, professional associations, certifications of competence, proficiency testing, unexpected result incidents, and, as with all witnesses, potential bias or motivation.

The assessment of reliability, while necessarily personal because the expert’s own work is at issue, should not be conducted or viewed as a personal attack. The reliability of evidence, including the reliability of the science and the expert witness, is a fundamental issue in our system of justice. The purpose of cross-examination is not to discredit a witness; it is to separate truth from fiction and exaggeration from accuracy. Cross-examination seeks the full disclosure of all facts necessary for the judge or jury to be able to assess the reliability of the evidence and to determine at the truth of the case.

Expert Witness, Cross-Examination, Reliability