

CROSS-EXAMINATION

Have you ever wondered why your attorney is so pleasant, while under cross-examination, the opposing attorney seems to be on your side, but is really trying to discredit you. If an attorney cannot get you disqualified as an expert, he or she will attack your credibility. Don't open yourself up to vigorous cross-examination by the opposing counsel.

All experts or treating doctors (aka fact witness) need to be qualified in order to testify in court. The use of the Federal Daubert Rule and individual states that still use the Frye standards. The use of the Daubert or Frye tests, allow attorneys the chance to disqualify your report and testimony. If the challenge is successful, you may not be allowed to testify. If you are testifying in court, be prepared to have your report reviewed to see if it meets the qualifications under Federal Rule 26. (Article: September 2004 in Chiropractic Products).

The opposing attorney will do his homework in preparation for trial, you should do the same. Proper preparation is essential requirement in order to excel under cross-examination. Proper preparation includes meeting with your attorney prior to trial. The opposing attorney will carefully review your CV (resume), your education, and experience. He will also look at any prior testimony you conducted in the courts, conduct internet searches on you, review any websites you have, and find any weaknesses he can attack during cross-examination. Remember the opposing attorney is going to try to elicit admissions, concessions and facts from you to support his case. He will try to place a question doubt in the jury's mind concerning your credibility. In a trial, the jury decides whether to believe your testimony. They usually make decisions by relating your testimony on their own experiences. If you make sense and you are consistent in your testimony, the jury will tend to believe you. When testifying, **always** direct your answers to the jury, and always tell the truth. Proper preparation on your part will minimize the ammunition the opposing counsel has to use against you. Here are some simple guidelines:

1. Prepare, Prepare and Prepare
2. Don't be arrogant, but be confident
3. Do not be evasive,
4. Dress properly
5. Don't be afraid to say "I don't know" and ask counsel to clarify any question
6. Don't argue with counsel
7. Pause and think before you answer any question from any counsel
8. Speak simply and directly, remember that juries are lay people and don't understand technical medical terms.
9. Don't get distracted, but remain on the theme of the case.
10. Prior to your testimony get a read on opposing counsel, jury and the judge.
11. Anticipate difficult questions and be prepared to answer them
12. Carefully organize and review your case file
13. If you were deposed, re-read your deposition as opposing counsel will use it to discredit you.
14. Do not bring anything to the stand with you as it may be used against you.
15. Always finish your answer to the question even if you are interrupted.

16. Admit mistakes
17. Point out any incorrect facts used by opposing counsel
18. Give explanation first, then answers.
19. Keep cool and don't freeze
20. Stand by your expertise and your opinion, but be able to defend them

You should consider the likely areas of cross-examination you will face. Your attorney can help you with that. Potential trouble area may be:

1. Your relationship with insurance companies in evaluation other cases.
2. Any ongoing relationship with your attorney
3. Is your testimony considered a "hired gun"?
4. How much are you paid for your testimony?
5. Do you actively practice in your profession?
6. Any affiliations with biased organizations
7. Any out of court statements you make concerning the case.
8. Any false or misleading information on your CV (resume).
9. Any overstated information on your CV that may lead the reader to believe you are an expert in many areas, when in fact you are not.
10. Membership in organizations
11. Any publications on your CV that may not be factual
12. Don't use terms like "internationally, nationally known as these are self-serving Characterizations of your qualifications
13. Missing dates of employment
14. Any missing certifications on your CV
15. Lack of formal education or degrees

One of the most critical areas you will be cross-examined on is your opinion, and how you arrived at your opinion and conclusions. This is where most doctors fail in their testimony. Your opinion should be based upon a methodology that will ensure a Daubert challenge. Is your theory tested? Is it generally accepted in the relevant scientific community, and has your opinion and conclusion been subject to peer review or publication. And finally, the known potential error rate in your methodology that used to reach your opinion and conclusion. What factual assumption have you made in reaching your opinion? Does your opinion conflict with other experts or publication? What references did you use in reaching your opinion and conclusion? Did you consider all information in reaching your opinion? Most records that I have reviewed do not include the records of other doctors or facilities. Make sure you get **all** the records of past treatment(s) of the patient. How much time did you spend on the case? What degree of certainty did the expert maintain when expressing your assumptions?

These are all questions that may require you to answer. In addition, there may be a direct assault on your credibility. Be prepared to answer tough questions in this area. Some questions that may be asked:

1. Do you have any criminal convictions?
2. Any violations of any court orders any where
3. Any past board actions?
4. Any malpractice cases against you, now or in the past?

5. Any false statements on your CV?
6. At any time has your testimony been excluded in any court proceedings?

Remember, attorneys are given a wide latitude in cross-examination of your testimony. Any questions asked during cross-examination are at the discretion of the judge. Usually, the scope of cross-examination will only be overturned on appeal for abuse by the judge. Keep in mind there are limits to cross-examination:

1. Irrelevant questions
2. Questions that are unfair and prejudice or misleading to the jury
3. Harassment type questions that cause embarrassment to the expert and are not part of the case
4. Questions that violate privilege

Answer all questions, but watch the trick questions. Quick questions are questions with unestablished facts assume a false premise, unreasonable limitations and ask questions outside your expertise. Be prepared for these types of questions. Remember the opposing attorney will do a detailed investigation on and use the information obtained to find your weakness during cross-examination and exploit those weaknesses.

In your case, again proper preparation is essential. Almost all your ability to excel in cross-examination is through preparation. Treat your preparation as your final examination as you did in order to obtain your license to practice Chiropractic. Your Proper preparation will present will with opposing counsel and the jury. Testify with confidence, based upon relevant facts to the case. Jurors hear facts from both sides, than have to make a decision based upon the facts of the case. If you testify, you must know and understand what the jury wants. The following is essential to portray to the jury:

1. Relevant and believable testimony
2. Keep interested in the case
3. Simple terms they can understand, don't try to show them how smart you are
4. Explain the case in a story format
5. Use visual aids, don't be afraid to put on a dog and pony show. You are allowed to get up and use the aids.
6. Teach the jury and don't lecture them
7. Show confidence and explain your evidence so they understand it.
8. Maintain eye contact with the jury, not opposing counsel
9. Use analogies
10. Stay with the theme of the case.
11. Tell them a believable story

Prepare and prevent are essential elements in cross-examination. How you prepare will directly have an affect on your testimony and the outcome of the case. Take preventative action before you take the stand on potential problem areas. Your credibility, qualification, opinions, conclusions, and the basis for your opinions and conclusions, your CV (resume) any bias's, prior testimony, writings and statements and where you obtained your authority for any conclusions and opinions you made in your report. These are critical areas you can expect vigorous cross-examination on. Be prepared!!

Develop and use your own style in dealing with cross-examination. Listening to every word in the questions opposing counsel will ask you, is key. Do as much of a complete investigation of the facts in the case as you can. Be prepared to defend your investigation of the facts and accuracy of the information in the case. In addition make sure you get and review **all** relevant records for the case to determine all the facts prior to your testimony. Do not use the term “degree of medical certainty”. Reasoning is; What degree are you certain? Counsel will ask to what degree you are certain. If you assign a number like 80% than that implies there is a 20% chance you are wrong. Use the following instead: Based on my education, training, experience, review of records and analysis, it is my opinion that Ms. Jones has suffered a permanent injury. Don’t play the numbers game with opposing counsel; it will be a losing proposition for you, which is a big trap for testifying doctors. Learn to recognize cross-examination tactics, understand them and how they work. A truly dangerous expert witness is one who is very resistant to cross-examination and turns the tables of opposing counsel. Here are some key points:

1. Tell the truth
2. Prepare thoroughly and prevent problem areas before they happen
3. Use proven cross-examination techniques
4. Anticipate tough questions and answer them with confidence
5. Be able to defend you position
6. Employ powerful and simple language for your cases
7. Talk to the jury, not opposing counsel
8. Correct opposing counsel’s mistakes about the facts of the case.
9. Focus on key issues of the case.
10. Research opposing counsel
11. Dangerous experts are valuable and high in demand.

Keep in mind that your CV (resume) needs to be accurate and don’t put things on the CV that are not factually true. Be able to defend your opinions and conclusions and the references you used to reach those opinions and conclusions. Jurors evaluate your testimony as a result of your cross-examination. This can be in a trial setting or a deposition prior to trial that will be used in trial. As I mentioned earlier, jurors are lay persons and for the most part don’t have the expertise to evaluate information outside their knowledge. What they relay on is factual common sense information that is complete, and consistent with the testifying person. Make a good first impression with opposing counsel and the jury. Maintain contact with the jury, and speak clearly, simply and directly. Keep to the theme of the case, and always show a proper demeanor in court or depositions.