

CROSS-EXAMINING THE EXPERT WITNESS

Presented By: Natasha Hastings
Special Counsel- Children's Division

AGENDA

- Cross-Examination Overview
- Preparation for Cross-Examination
- Drafting the Cross-Examination
- Experts in Certification Hearings
- Preparing your experts for Cross-Examination

CROSS-EXAMINATION OVERVIEW

- What did Johnny Depp's attorney do well?
- What could Johnny Depp's attorney have done better?
- What did the expert witness do well?
- What could the expert witness have done better?



Skip was becoming increasingly annoyed at opposing counsel scoring his cross-examination.

CROSS-EXAMINATION OVERVIEW



CROSS-EXAMINATION OVERVIEW

- Purposes- bring out additional facts or impeach the witness
- Impeachment- process of attacking the credibility of a witness
- Can be impeached on:
 - Accuracy of recollection
 - Capacity to observe
 - Impartiality
 - Prior inconsistent statements

Source: *Making and Meeting Objections II*, By: Judge Robert Wenke

490.065. Expert witness, opinion testimony admissible, requirements for certain actions. 1. In actions brought under [chapter 451](#), [452](#), [453](#), [454](#), or [455](#) or in actions adjudicated in juvenile courts under [chapter 211](#) or in family courts under [chapter 487](#), or in all proceedings before the probate division of the circuit court, or in all actions or proceedings in which there is no right to a jury trial

(1) 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 an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise;

(2) Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact;

(3) The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable;

(4) If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

2. In all actions except those to which subsection 1 of this section applies:

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case;

490.065. Expert witness, opinion testimony admissible, requirements for certain actions.

.....

(2) An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;

(3) (a) An opinion is not objectionable just because it embraces an ultimate issue.

(b) In a criminal case, an expert witness shall not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone;

(4) Unless the court orders otherwise, an expert may state an opinion and give the reasons for it without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

3. The provisions of this section shall not prevent a person, partnership, association, or corporation, as owner, from testifying as to the reasonable market value of the owner's land.

THE EXPERT

Qualification during Direct

QUALIFYING OF AN EXPERT WITNESS

- Education
- Specialized Training
- Work experience
- Current employment
- Previous testimony as an Expert
- Once qualified, expert witnesses testify as to their opinion based on their experience, knowledge, skills and expert methodologies

CROSS-EXAMINATION OF THE EXPERT WITNESS

The Preparation Process

“

By failing to prepare, you are preparing to fail.

”



-Benjamin Franklin

PREPARATION PROCESS

- Request Expert's CV and Report
- Review Expert's CV
- Review Expert's Report
- Consult with your resources
- Research the Expert Witness
- Draft the Cross-Examination Questions

REQUEST

THE EXPERT'S CV AND REPORT

REQUEST THE EXPERT'S CV AND REPORT

- Utilize Pre-Trial Orders, Subpoena Duces Tecum or Depositions
- File Request for Disclosure in Delinquency Cases
 - **Rule 25.05. Misdemeanors or Felonies - Disclosure by Defendant to State Without Court Order**
 - (a) Except as otherwise provided in these Rules as to protective orders, and subject to constitutional limitations, on written request by the state, defendant shall disclose to counsel for the state part or all of the following material or information within defendant's possession or control designated in such request:
 - (1) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, which the defense intends to introduce into evidence at a hearing or trial, except that those portions of any of the above containing statements made by defendant shall not be disclosed;

REVIEW

THE EXPERT'S CV

REVIEW THE EXPERT'S CV

- Review
 - Qualifications
 - Presentations
 - Trials
 - Length of CV
 - Subject matter of CV

Dr. Jane Smith, M.D.
1236 Bluebird Lane
Odessa, DE 19730

Certifications

Board Certified in Child Psychiatry, American Board of Psychiatry and Neurology

Medical Licensure

Delaware

Professional Experience

Moot Court Judge, Odessa High School- June 2006

Moot Court Judge, Odessa High School- June 2005

Moot Court Judge, Odessa High School- June 2004

Room Parent- Odessa Elementary School- 2004

Room Parent- Odessa Elementary School- 2003

Room Parent- Odessa Elementary School- 2002

Presentations

Speaker- "Why it's not always abuse." Presented: June 2022

Speaker- "Abusive Head Trauma." Presented: June 2022

Speaker- "Why it's not always abuse." Presented: May 2022

Speaker- "The Pediatric Patient." Presented: April 2022

Speaker- "Why it's not always abuse." Presented: March 2022

Speaker- "Why it's not always abuse." Presented: July 2021

Speaker- "Why it's not always abuse." Presented: December 2020

Speaker- "Why it's not always abuse." Presented: June 2022

Speaker- "Why it's not always abuse." Presented: November 2019

Miscellaneous

Lifelong resident of Delaware, Testified in over 100 trials

REVIEW

THE EXPERT'S REPORT

REVIEW THE EXPERT'S REPORT

- Review thoroughly several times on your own
 - Review for:
 - Errors
 - Documents reviewed
 - Documents not reviewed
 - Witnesses interviewed and length of time of interviews
 - Witnesses not interviewed
 - Questions
 - Avoiding rendering an opinion on certain topics/criteria

CONSULT

WITH YOUR RESOURCES

CONSULT WITH YOUR RESOURCES

- Your expert or fact witness
- Other professionals within your office
- Colleagues
- Contact Catherine Vannier- Special Victims Resource Prosecutor
 - Catherine.Vannier@prosecutors.mo.gov

RESEARCH

THE EXPERT WITNESS

RESEARCH THE EXPERT



RESEARCH THE EXPERT

- Review qualifications and prior experience
- Review prior presentations
- Attend upcoming presentations as participants/moderators
- Review prior testimony
 - Colleagues or Casenet Appeals
- Review the internet for information on the expert



DRAFT

THE CROSS EXAMINATION OF THE EXPERT
WITNESS

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT

- Review your research
- Review qualifications and prior experience
- Decide approach(es)
- Yes or No guided questions, Why questions
- Show, don't tell
- Prepare for impeachment

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT

- Ensure judge can follow line of questioning
- Use transitional sentences
- Organize in clear and concise manner:
 1. Bias/Credentials questions
 2. Investigation
 3. Review of Report
 4. Opinion Questions



DRAFTING THE CROSS- EXAMINATION OF AN EXPERT

- CROSS EXAMINATION OF

- INTRO/BIAS QUESTIONS

- 1. _____, correct?
- 2. _____, right?

- REPORT- INVESTIGATION

- 3. _____, correct?
- 4. _____, right?

- REPORT- ERRORS, QUESTIONS, CLARIFICATION

- 5. _____, correct?
- 6. _____, right?

- OPINION

- 7. _____, correct?
- 8. _____, right?

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {BIAS QUESTIONS}

- **Credentials**

- “You have not received any formal training in ____?”
- “You are not a Certified Child Abuse Pediatrician/_____?”
- “You have not attend law school?”

- **Distance**

- “You are employed in the state of _____?”
- “Your office is approximately 449 miles from here, correct?”
- “Which makes your office approximately 6 hours, 50 minutes from here?”



DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {BIAS QUESTIONS}

- **Career Testifier/Affiliation Bias**

- “You have been retained by Opposing Counsel to provide your opinion on this case?”
- “You agree with Opposing Counsel’s position that _____?”
- “You’ve been retained by Opposing Counsel on other cases before, right?”
- “You’ve testified in the past for Opposing Counsel, correct?”
- “How many times have you recommended certification? So your testimony has always opined that a juvenile should not be certified, correct?”
- “Despite living in Ohio, you are planning to testify for Opposing Counsel this Thursday as well in St. Louis County, isn’t that correct? So you are testifying on their behalf twice this week alone, right?”
- “You have presented as co-hosts for presentations before with Opposing Counsel, correct?”

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {BIAS QUESTIONS}

- **Financial**
 - “You’re being paid to be here today, correct?”
 - “What is your retainer fee?”
 - “What is your hourly rate?”
 - “How much are you being paid?”



DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {INVESTIGATION QUESTIONS}

- **Information provided**

- “In order to draft your report, in terms of documentation, you only reviewed the information provided by Opposing Counsel, correct?”
- “You were not provided ____?”
- “Your opinion is only as good as the information you receive, correct?”

- **Information from Juvenile**

- “When you met with the juvenile, he admitted to you he was selling marijuana, right?”
- “And the juvenile also disclosed to you he frequently carried a gun?”

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {INVESTIGATION QUESTIONS}

- **Information obtained**

- “The only person you spoke to in order to gain information was the juvenile?”
- “You only met with the juvenile for 75 minutes, correct?”
- “You are relying on the facts that were provided to you mainly by the juvenile then, aren’t you?”
- “Wouldn’t you agree that the juvenile has bias in this case as he does not want to be certified?”
- “You didn’t meet with _____?”
- “If any of the information was incorrect, it could change the basis on your opinion, correct?”
- “If any of the information was missing, it could change the basis of your opinion?”

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {REPORT QUESTIONS}

- **Excluding records reviewed**

- “You also reference that you reviewed “multiple St. Louis Metropolitan Police Incident and Supplemental Reports, by multiple officers, dated June 2016-2020”, correct?”
- “What specific police reports did you review?”
- “What were the allegations in each of those police reports?”
- “Wouldn’t you agree it would be best practice to list the police reports that you reviewed so it was clear what police reports you actually reviewed?”

- **Oversights/errors**

- “Was this just an oversight?”
- “What other oversights are contained in your report?”
- “Under Family Psychiatric History, you include, ‘the juvenile did not report any family psychiatric history?’ But you didn’t verify this with his mother or any other family member, did you?”

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {REPORT QUESTIONS}

- **Incomplete report**

- “You are aware that the juvenile is 17 years, 8 months old, correct?”
- “But, looking at page 6, the Substance Abuse History page, your history stops at age 15, correct?”
- “You completed your interview of the juvenile in June 2021, at which time he was 17 years, 7 months, correct?”
- “Which would mean your Substance Abuse History section is incomplete by at least two years, right?”
- “Wouldn’t you agree that a Substance Abuse History is not complete if it does not cover the entire lifetime of the person, including up to their present age?”

- **Information provided**

- “You did not review _____?”
- “Your opinion is only as good as the information you receive, correct?”

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {OPINION QUESTIONS}

- Ask questions about the facts that call their opinion into question
 - “You are aware the juvenile received his first referral at age 13, correct?”
 - “And you are also aware the juvenile has had 16 referrals to the Juvenile Office, right? Yet your legal history section is a mere three sentences, correct?”
 - “You are aware the juvenile is being charged with _____?”
 - “And you are also aware the juvenile has been on Informal Supervision, Formal Supervision, and has been committed to DYS already? Despite this, you still maintain your opinion that the juvenile is not beyond the scope and services of the juvenile system and that he can be rehabilitated in the juvenile justice system?”

DRAFTING THE CROSS- EXAMINATION OF AN EXPERT {OPINION QUESTIONS}

- Ask clarification questions strategically- both from report and direct
 - “You also indicate in your report that you reviewed multiple legal records including _____, yet none of these reports or charges are contained in your legal history section correction? “
 - “In fact, despite your review of all these legal records, your entire legal history section is based on information as relayed to you by the juvenile? And this legal history section was a basis for your opinion, right?”
 - “What do you mean by _____”
 - “What does _____ (legal term) mean to you?”

Cross-Examination

OF THE EXPERT WITNESS

THE CROSS-EXAMINATION -ENSURE YOU HAVE REALISTIC EXPECTATIONS



CROSS-EXAMINATION OF THE EXPERT WITNESS

- Listen
- Stay calm
- Control the witness
- You are the expert on the facts, not in the field
- If tensions get high, reign them back in
- Don't annoy the judge

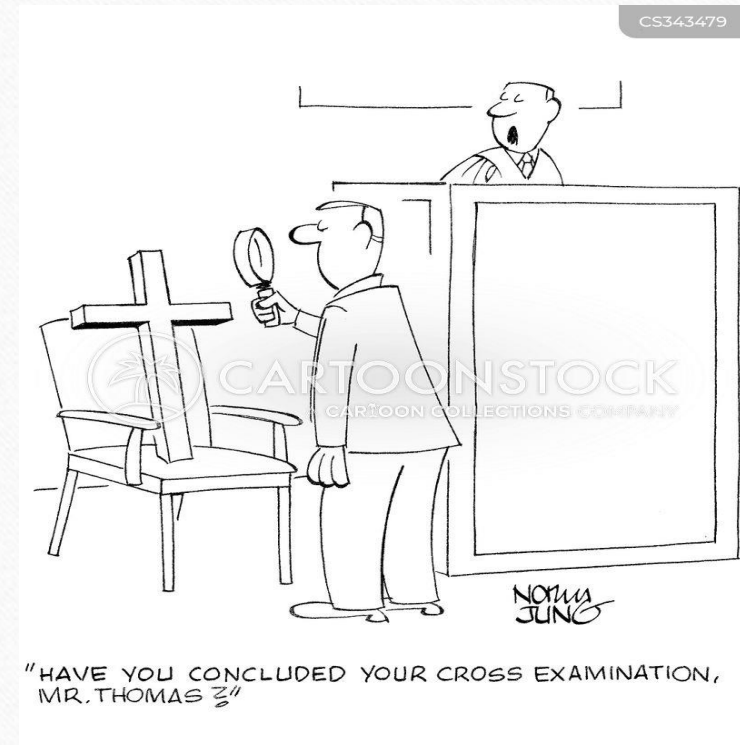
In cross examination, as in fishing, nothing is more ungainly than a fisherman pulled into the water by his catch.

Louis Nizer


www.idlehearts.com

CROSS-EXAMINATION OF THE EXPERT WITNESS

- Don't give up
- Do not interrupt when making a mistake
- Modify questions as needed
- Yes or No questions, sometimes "why"
- "You were not present for _____?"
- Elicit concessions and omissions/errors/oversights



CERTIFICATION HEARINGS

THE EXPERT WITNESS IN CERTIFICATION
HEARINGS

THE EXPERT WITNESS IN CERTIFICATION HEARINGS

- Many expert witnesses are not from Missouri
- Inquire:
 - As to the facts- services offered to juvenile, record and history of juvenile
 - Programs and facilities available to juvenile through Juvenile Court jurisdiction
 - Programs, services and facilities available through DYS

PREPARING

YOUR EXPERT WITNESS FOR CROSS-EXAMINATION

PREPARING YOUR EXPERT WITNESS FOR CROSS-EXAMINATION

- Be prepared.
- Be courteous.
- Don't show frustration.
- Don't guess.
- Be consistent, don't give in.
- Listen to the question carefully.
- Beware of "isn't it possible" questions?
- Be confident of thorough and professional review

Any other tips? Tricks?

Contact

Natasha.Hastings@dss.mo.gov

314-877-2560