

DIANNE SAXE

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Preparing an Expert Witness

for

Cross Examination

I. What is the other lawyer doing?

1. Why do you cross-examine an expert?
 - a. This is an opportunity for opposing counsel to: attack your qualifications, expertise and credibility; discredit your evidence; try to get you to alter your opinion from that stated in your report or on direct examination; and, to try to find support for their case and their expert's opinion.
2. What is she trying to prove?
 - a. Theory of the case
 - b. Hearings v. court
 - c. Civil v. criminal
3. Will he attack me? my qualifications /impartiality?
 - a. Maybe
4. Will she contradict my evidence?
 - a. rule on contradiction without cross
5. How will he prepare?
 - a. Opposite counsel will review your reports. They may also obtain the assistance of their own experts, as well as general literature and principles, guidelines and standards of your profession. They may also review any materials produced by you on the subject at issue.

II. Preparing for Cross-Examination

6. What is basic prep?
 - a. Read over your own CV and publications

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- b. Understand your lawyer's theory of the case, and how your evidence relates to it. Read over every document that you will likely be asked about.
 - c. Ask your lawyer about the defence theory
7. Do I need to know the rest of the case?
- a. The expert needs to know more than just his or her part of the case. The expert needs to know and understand the entire legal case, including the expert reports of *all* parties. The expert should clearly understand how his/her part fits in with the rest of the case.
8. How can I practice?
- a. Q&A with a friend or colleague
 - b. With your lawyer
 - c. In front of a mirror
 - d. Videotape
9. Preparing weak points?
- a. Be honest with your lawyer. Identify and address any weaknesses in your report and/or your theory in advance and develop an approach for dealing with them. If you have made a mistake or were ambiguous in your report, correct and explain the error as soon as you discover it.
10. Should I talk to you before testifying?
- a. Rules during exams
 - b. No property in a witness
 - c. Personal style

III. What happens during Cross-Ex?

11. How is cross-ex different from teaching?
- a. Control
 - b. Purpose
 - c. Formality
 - d. Direction: One-way discussion, different-way focus

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- e. Rules of evidence
 - f. Onus of proof
 - g. Hypothetical questions
 - h. Etiquette and choreography
12. How is cross-ex different from exam-in-chief?
- a. Purpose
 - b. Control
 - c. “Leading questions”, which are short questions that suggest a specific answer.
13. How can I answer effectively?
- a. Cooperate, tell the truth, be responsive and respectful, stay calm, and never lose your temper. Take the time to think before you answer.
 - b. Speak plain English. Be as clear and simple as possible, use basic language, explain basic principles, and avoid professional jargon and technical explanations. It is often helpful to use analogies or examples. Speak slowly.
 - c. Visual aids
 - d. Remember, you’re not the lawyer
14. Can I correct a mistake?
- a. Admit the error and explain your position clearly. It will preserve or even enhance your credibility.
15. What help can I have?
- a. Time to check documents, with permission.
 - b. A break, with permission (but no discussion)

IV. Tricks and Traps

16. Unclear questions?

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- a. Listen very carefully to the question asked and be sure that you understand it before answering. If the question is unclear, always ask for clarification. Only answer the specific question asked, never volunteer further information.

17. Unfair questions?

- a. "when did you stop beating your wife?" "yes or no?"
- b. Do not refuse to answer. Identify false assumptions. Say that you do not agree with the assumption and respond.
- c. where is your lawyer?

18. Outside your expertise?

- a. Don't go there.

19. Varying hypotheticals?

- a. You're an expert, not an advocate. Give your best professional opinion.
- b. You cannot refuse to answer

20. Repeated questions?

- a. Keep cool and answer
- b. Try to be consistent
- c. Refer to previous answer.

V. **Recovery and Redirect**

21. Was I a good witness?

- a. credibility/ competence / likeability
- b. impartiality
- c. clarity
- d. relevance to theory

22. If the judge has questions?

- a. The most important questions of the day

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23. What can be fixed on redirect?
- a. Matters first raised in cross
 - b. Confusion
 - c. Rules not always enforced
24. Can I ask to explain?
- a. You can ask.
25. Will the judge comment about me?
- a. Maybe.

Dianne Saxe

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