

The 21 Golden Rules for Testifying on Cross-Examination

By **James J. Mangraviti, Esq., Steven Babitsky, Esq., and Nadine Nasser Donovan, Esq.**

This white paper provides succinct advice for expert witnesses on how to excel during cross examination. It is designed for both novice and experienced expert witnesses. This information has been adapted from material in the cross -examination chapter in the text, *How to Be a Successful Expert Witness: SEAK's A-Z Guide to Expert Witnessing*, which will be published by SEAK in early 2015.

1. An expert witness should tell the truth and make concessions where called for.

Telling the truth is a legal and ethical duty. Experts should not be evasive. If a witness appears evasive, he will lose credibility with the jury. A good trial lawyer will be persistent and eventually get at the information she seeks. Evasiveness will only serve to highlight this information to the jury. Remember that it's the lawyer's case not yours. Don't act like you have a dog in the hunt; make concessions where appropriate.

2. An expert witness should stay within his true area of expertise.

The further a witness strays "out of his sandbox," the more vulnerable he becomes to cross-examination and to successful attacks on his credibility. Early in the case, an expert should tell retaining counsel the areas in which he will be offering an expert opinion. Questions by counsel for either side that attempt to push an expert beyond his comfort zone can and should be answered, "I can't answer that question. It is beyond my area of expertise."

3. If an expert doesn't know an answer, the appropriate answer is, "I don't know."

There is nothing wrong with this response. Even the most educated people in the world do not know the answer to everything. An expert witness should not let her ego get in the way of giving this response. She should not be tricked by counsel who asks a series of questions that the expert is forced to answer, "I don't know." Counsel is just trying to rattle the expert or trying to force her to make a mistake.

4. An expert witness should meticulously prepare for cross-examination.

This includes studying the file in detail, a mock cross-examination with retaining counsel, and preparing in advance answers to the most likely questions the expert will be asked during cross-examination. The expert can also consider 1-1 preparation by an outside consultant.¹ Preparation is a crucial key to effectiveness while testifying.

5. An expert witness should not argue with counsel.

Arguing with counsel will detract from an expert's credibility because she will no longer appear to be impartial. However, when appropriate, one can and should disagree with counsel.

6. An expert witness should not be arrogant, hostile, or condescending.

Such behavior can and will destroy rapport with the fact finder or jury. It will thus lessen the expert's persuasiveness.

7. An expert witness should pause before responding to a question.

This gives the expert time to consider the question carefully. It also gives the witness's retaining attorney an opportunity to object if necessary. Even so, an expert witness should not overdo this pausing as it can be a distraction, appear phony, and adversely impact one's credibility.

8. An expert witness should not exaggerate, speculate, or guess.

An expert who is willing to overstate her opinion or venture into guesswork loses credibility with the fact finder or jury. This type of testimony is objectionable and will invite additional cross-examination.

9. An expert witness should remain cool, calm, and collected.

If a witness loses his cool, he is likely to blurt out a response that has not been considered carefully. This type of behavior is unprofessional, and can also give the impression that the witness is biased or partial. For these reasons, an expert should maintain a professional demeanor and composure at all times.

¹ See www.testifyingtraining.com

10. An expert witness should actively listen to the question.

The majority of the battle in cross examination involves hearing exactly what was asked, understanding what wasn't asked, and appreciating the subtext of what was asked. The witness should answer the question he was asked, not the question he anticipated or that he should have been asked.

11. Get all facts and data straight before taking the stand.

When a witness is unprepared or doesn't have a command of the facts or data of the case, it shows on the stand. This negatively affects a witness's credibility. Also, a thorough knowledge of the facts can be used to point out the fallacy in the lawyer's questions. The facts should be your ally if you are testifying honestly and correctly. Know them and use them.

12. An expert witness should use an accepted methodology.

If an expert's methodology is suspect, her credibility can be challenged. Opposing counsel may even be able to have her opinion excluded from evidence in its entirety. Using a reliable methodology increases an expert's credibility and minimizes the prospect that her opinion will be challenged.

13. If interrupted, an expert witness should finish his answers.

Expert witnesses should assert themselves and not let counsel cut off their answers.

14. If questioned about a document, an expert witness should ask to see it.

An expert witness should never comment on a document without asking to see it. Counsel may very well be mischaracterizing what the document states. Experienced experts take whatever time is necessary to read documents carefully before commenting on them.

15. An expert witness should not use slang.

This type of informality is not appropriate for a testifying expert and detracts from one's expertise and one's credibility.

16. Prevention is 95% of the battle.

The best experts realize that the way to avoid many tough questions on bias, investigations, qualifications, etc. is to deny opposing counsel ammunition to inquire into these areas. For example, to deny counsel questions on past testimony, the expert should try to testify for both plaintiffs and defendants. To prevent successful questioning on methodology, the expert should use an accepted methodology. To prevent successful questioning on qualifications, the expert should only testify in cases where the expert is truly qualified. The easiest questions to answer are the ones that are never asked. Expert witnesses should, wherever possible, deny opposing counsel ammunition such as:

- A poorly prepared or thought out CV
- Appearing biased
- Being sloppy or doing shoddy work
- Expressing opinions where you didn't have time to do a good job
- Giving opinions outside of your area of expertise
- Projecting an unfavorable image
- Saying something ill-advised in your marketing materials or on your web site
- Taking positions that are difficult to defend
- Using an unreliable methodology²
- Writing something in your report or elsewhere that is problematic

17. Be prepared to strike if opposing counsel makes a mistake.

Opposing counsel usually strives to control the information flowing to the jury by only asking leading questions to which she knows the answers. The idea is to present to the jury only facts favorable to that attorney's clients. The best experts are ready to seize on any mistake provided by an open-ended question by offering devastating facts and explanations.

² For further information on how an expert can bulletproof himself and his opinions, please see Babitsky and Mangraviti, *How to Become a Dangerous Expert Witness* (SEAK 2005).

18. Recognize and dispute mischaracterizations.

Effective experts employ active listening skills to recognize mischaracterizations. Experts should not implicitly accept a characterization that they don't 100% agree with.

19. Do not be defensive.

Nobody is perfect. Everybody has vulnerable points. When counsel hits on or close to a nerve, do not be defensive. Defensiveness makes things worse by emphasizing the point in question to the jury and making it look as though you feel guilty.

20. If you don't understand the question, say so.

Do not answer any questions you do not understand. If you don't understand a question, say so. Do not guess as to what counsel meant, or worse, suggest the wording for what counsel should have asked.

21. Don't volunteer damaging information.

The expert is obligated to truthfully and completely answer the questions he is asked. The expert is not obligated, however, to volunteer information that was not called for in the question. Remember, cross-examination is an interrogation, not a conversation.

Additional Resources from SEAK, Inc. – The Expert Witness Training Company

- For more detailed information on how to excel during cross-examination, please consult SEAK's highly-acclaimed text, [How to Become a Dangerous Expert Witness](#) by **[James J. Mangraviti, Esq., and Steven Babitsky, Esq.](#)**
- SEAK has been conducting regularly scheduled [training seminars for expert witnesses](#) since 1990.
- For those seeking the highest level of assistance SEAK also offers [1-1 cross examination preparation and assistance](#). For more information, please call Jim Mangraviti at 978-276-1234 or email him at jim@seak.com.