

CRIMINAL BAR ASSOCIATION CONFERENCE

EXCELLENCE IN ADVOCACY

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The Effective Questioning of

Expert Witnesses

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1. I have been asked to provide an overview of the general techniques involved in examination-in-chief of an expert and the cross-examination of an opposing expert.
2. However, no talk on the subject of the questioning of an expert can be complete without understanding the necessary preparation that underlies the questioning of an expert, whether in chief or in cross-examination.
3. I am consequently going to split my talk into two parts: (1) meeting the expert and (2) his evidence.

(1) Meeting the expert

Before the conference

- a) Determine whether the expert's expertise is in the appropriate field for which he is being called (it may be obvious in some fields but not so in other new and developing fields).
- b) Ensure that he is not providing any opinion going

beyond his discipline.

- c) Ensure he has been provided with the appropriate material, and has been asked to consider the right questions.
- d) See whether he has made reference to any relevant guidance affecting his field, and has had it in mind when preparing the report.
- e) Satisfy yourself that the report has complied with rule 33.4 of the Criminal Procedure Rules, as amended in 2014 (content of expert's report).

The conference

- a) Ascertain the level and extent of the expert's past experience of giving evidence, including in which area, and whether he has acted for either or both prosecution and defence.
- b) Ensure there is someone present taking a good note of the conference, so that anything that arises for consideration of disclosure is properly recorded.
- c) Discover if he has had any expert witness training, and if so how extensive.
- d) If it is not obvious from his report, discover whether he is familiar with relevant guidance on acting as an expert e.g. the CPS "Guidance Booklet for Experts" (or other

regulatory guidance).

- e) Discuss how the case is to be presented and ensure he approves, and is familiar with, any presentational aids you propose using to assist his evidence.
- f) Discuss with the expert any evidence you intend not to adduce (either because it is irrelevant and/or inadmissible).
- g) Where the expert has made many reports or statements ensure you discuss and agree the order in which you intend adducing his evidence (in statement/report order or topic order, which may mean jumping from statement to statement).
- h) If you are prosecuting, ask the police for the expert's report/s in original format rather than HOLMES format; it is not going to be the HOLMES format that the expert will be working from but invariably from his original formatted report; if you don't have the original formatted report you may find yourself working with different page references. Ask for it in advance.
- i) Ask to see any file notes and diagrams and ensure the expert brings his file/s along to court for inspection and use.

(2) The expert's evidence

Pre-trial preparation

- a) The meeting with your expert will have helped focus and direction, but you still need to fine-tune your preparation in advance of your calling the expert.
- b) Know your way through the reports/statements; annotate them with all relevant bundle and presentational aid references so the presentation of the evidence is, or at least appears, seamless.
- c) Make the evidence work for you: be sure that you know the original source of all exhibits to which reference is made by the expert, so that when you come to ask about exhibit "BA/1" you are able to remind the court (if the evidence has already been adduced) that BA/1 was e.g. a right trainer found at such and such a location. If the evidence hasn't yet been adduced, you can inform the court that this will appear in the agreed facts.
- d) One way to deal with such issues, especially where the expert evidence is complex or lengthy, and if everyone agrees, is to produce a working schedule for the court covering each exhibit about which you intend adducing the expert's evidence, and use it as you go through the evidence as a crib so that the jury can follow it. Include in your schedule e.g. columns for the exhibit reference, its description, the relevant result and page references [see for

an example Appendix 1]. Decide what will work best in the particular case: expert report order, exhibit reference order, in a multi-hander defendant order.

Examination-in-chief

- a) Before calling the expert, do have a meeting outside court with him before he comes in. Remember when programming experts to ask for the expert to be at court at a time when you can see him for a decent discussion.
- b) If need be ask for time. If you find yourself asking for time in front of a jury to speak to the expert witness, make sure the jury understands that it is permissible and customary, so that they don't run away with the idea something unethical is about to occur.
- c) Inevitably things will have changed between the pre-trial conference and now, so you need at all events to update the expert on the evidence you intend to adduce and that which you are discarding, and you need to seek answers to questions that were not previously foreseeable.
- d) If any issue of disclosure arises, keep that well in mind before being forced by the court to call the witness on. It is good practice to record, date and serve any such disclosure in writing.
- e) On the other hand, what your expert has said may require a further short statement, which may have to be produced immediately before the expert is called so that all parties and the court are on notice of what he is likely to say. Inform the

court if timetabling problems arise.

- f) If one expert is to follow another expert into the witness box, (especially where their topics overlap) it is a good idea to ask him to come into court, if nothing else, to gauge the atmosphere in advance of his own evidence.
- g) Once your expert is in the witness box, establish for the court that the witness is an expert in the field and his particular expertise; ask him for his formal qualifications, and ask about any area of speciality that is germane to the evidence he is to give.
- h) To establish impartiality, discover beforehand, and only then ask him if you know the answer, whether he gives evidence both for the prosecution and defence and, if it is helpful, the ratio between them.
- i) Adduce the practical aspects of the expert's career that establish his credentials and his level of seniority such as his years of experience.
- j) If the opposing party has served a report, it will be wise to establish that the expert has seen the other party's report and has considered it in advance of giving his evidence (so there is no appearance of avoidance).
- k) It is dangerous to assume that what the expert tells you in conference will be what he says in the witness box, so expect the unexpected.
- l) Forensic scientists tend to produce in their reports a pro

forma section on the techniques they use and how they evaluate and interpret their findings; only ask the expert about those sections of the report that apply to the analysis of items and findings that are relevant to the evidence in your case; and then only ask for a thumbnail sketch – you can ask for more technical explanation later.

- m) In cases where the expert (typically scientists) lists at length the items he has received, from whom and when (in order to establish continuity), do not ask him to go through the whole list; you only need ask the scientist about the relevant exhibit and finding as and when you come to it and he deals with it in his report.
- n) There will be cases where continuity of an item/s is an issue. If so deal with it at a logical moment during the evidence, such as when you come to deal with the expert's examination of the particular item and his findings.
- o) Adduce all the relevant evidence methodically and fully.
- p) Use the presentational aids and any diagrams from the expert's file, which can aid comprehension.
- q) Sweep up the evidence at the end with the expert's conclusions, as well as any further questions that may go to issues that have arisen in the case (but ensure you have put your opponent on notice of the questions and the answers in advance to avoid objection).
- r) If your expert has answered in writing criticisms in the opposing party's report, deal with any differences in chief;

don't wait for the cross-examination.

- s) Re-examine only where you have to firm up a conclusion the expert has previously given or where he has in cross-examination weakened a view previously firmly expressed in chief.

Cross-examination

- a) Often when the defence seeks to call an expert, the arrangement that is often made is to call the experts back to back. It has the advantage that the evidence is fresh in everyone's mind, and the defence expert can sit in court when the prosecution expert is in the witness box and vice-versa and it is convenient because they don't have to return on another occasion.
- b) In the past such arrangements have tended to require the prosecution's consent, but the landscape has changed. There will be cases where the prosecution view will be overruled where a judge exercising his case management function feels that hearing the experts back to back is sensible for reasons of cost, timetabling or any other good reason in keeping with the "overriding objective".
- c) There may be occasions when the arrangement, however convenient or sensible it may be, is properly objectionable, where for instance, the expert's evidence might be used as a substitute for a defendant's evidence or it might impact on whether the defendant gives evidence or not. Each case will have to be judged on its own merits.

- d) The approach of the cross-examination of a defence expert will from a prosecutor's perspective depend on a number of factors:
- Whether some or all of the qualifications or claimed expertise of the defence expert are suspect.
 - Whether he has overreached himself in providing opinion evidence beyond his field of expertise.
 - Whether there is evidence of partiality.
 - Whether there is a substantial area of disagreement between the prosecution expert and the defence expert's findings and opinions.
- e) All are fertile areas for the cross-examiner. Whether you embark on all or any of them depends on the judgment you make about their necessity.
- f) If the evidence has been given back to back with your expert then you will have had your expert sit behind you who can provide fruitful lines of questioning. But before embarking on any of them, do ensure that you have understood what you are being told. There is nothing worse than cross-examining an expert when you think you have understood the issue when clearly you have not. So take the time to understand what you are being told.
- g) Also, whichever side you are on, beware being used as a mouthpiece by your expert to undermine the professionalism of the other party's expert simply due to

some pre-existing competition or rivalry between them. Be robust.

- h) As for the style of the cross-examination, that too depends on your judgment of the reception the particular expert is receiving and whether it is possible the jury think they were being assisted by a true expert and someone who was a leader in his field, or whether they were being hoodwinked by a rent-a-witness charlatan. The approach will inevitably be different between the two extremes.

Appendix 1

Exhibit	Description	Result	Scientist stat page	Ex ref source stat page
STAFFORD- ALLEN (LGC) 25/1/13 948-1000 15/3/13				
REF SAMPLES				
	Various		8	
LUKE FITZPATRICK				
SMP/9	Psoas muscle	STR for LF	12-13	Poole 706
HNP/1	Face swab	Full STR for LF Poss small contrib. BF		
HNP/2	Left hand swab			
HNP/3	Right hand swab	Full STR for LF		
HNP/4	Blood swab (pool of blood)	Full STR for LF		
BURTON				
GJS/1	Denim jeans	Full STR for Burton from bloodstains	13-14	Smith 153
GJS/2	Blue hooded top	No blood		
GJS/3	R Nike trainer	No blood		
GJS/4	L Nike trainer	No blood		
GJS/5	Belt			
MJC/1	Grey Nike T-shirt	Full STR for Burton from bloodstain	14	Coad
MJC/3	Black duffle coat	Full STR for Burton from bloodstains Wearer DNA Burton		
MJC/4	White & grey T-shirt	Full STR for UKP 21 from bloodstain Wearer DNA 5 individuals including UKP 21		
MJC/5	Yellow Chelsea shirt	No blood		
MJC/7	Green/yellow Green Bay Packers cap	No blood		
TSB/62	T-shirt	Weak and partial STR with poss presence of DNA from 2 people	15	Bains 136

		Wearer DNA for Burton		
TSB/69	Grey hooded top	No blood		
TSB/86	R grey/white Nike Air (KM+)	No blood		
TSB/87	L grey/white Nike Air	No blood		
TSB/59†	White T-shirt	ditto	16	
TSB/78†	R grey Nike trainer	ditto		
TSB/83†	L white trainer	ditto		
TSB/89†	R black/white Nike Air	ditto		
TSB/91†	R grey/blue/black/white Nike Max Air	ditto		
TSB/93†	L black/grey Nike Air	ditto		