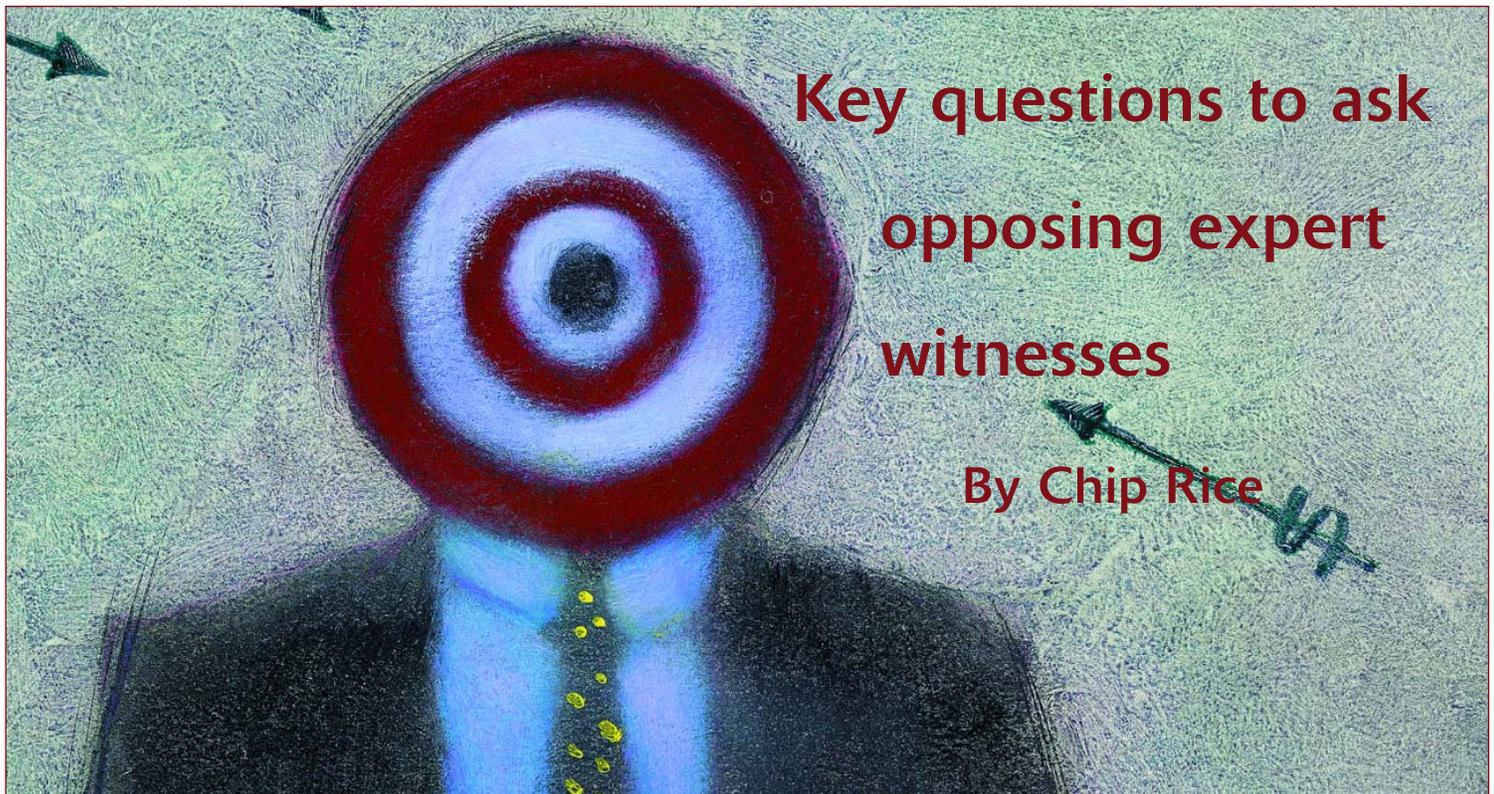


Litigation

Expert Advice



Key questions to ask
opposing expert
witnesses

By Chip Rice

Complex litigation often comes down to a battle of expert witnesses. When the facts are hard to understand, a judge, jury or arbitrator will be heavily influenced by anyone who can guide them through the fog.

If you are not careful, an opposing expert can sound like a dispassionate voice of wisdom that rises above the squabbling lawyers. All the more reason for you to cross-examine opposing experts in a calm, clear and thorough way that shows that they

are merely mortal and that their opinions depend on faulty assumptions or a one-sided view of the evidence.

Expert witnesses, however, are often notoriously difficult to cross-examine because of their intelligence and experience. Indeed, successful experts may have more trial experience than you. They have developed good answers to the usual tough questions about their qualifications or compensation, and they have good instincts when it comes to giving ground or fighting back. You can't afford to wing it. To conduct a good cross-examination, you need a thorough deposition that establishes the weaknesses of the expert's opinions.

Don't let yourself be intimidated by the witness's expertise. Make sure that your own experts provide you with a tutorial — and don't be afraid to ask dumb questions. All of this preparation will also help your own experts later when they are explaining their opinions to the judge and jury.

Start with a little general reading to give yourself an introduction to the field, and then read whatever the opposing expert has written that relates to the opinion. Don't stop with the publications listed on his or her resume. Instead, search the Internet and elsewhere for other relevant statements or background data. Think of this as "profiling" ex-

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pert witnesses in order to find out as much as possible about the way they think. That knowledge can be crucial when it comes to engaging the witness and obtaining admissions or other testimony helpful to your client's side of the case.

There are certain questions that you should ask at every expert deposition, no matter what the area. The answers are often predictable but you still have to make sure.

1. Does the expert's written report contain all of the opinions that he or she plans to give at trial?

It is supposed to do so in both federal and California practice, but you never know how flexible your trial judge will be about letting the expert give new opinions on direct examination. At the very least, you want to have a nice sound bite from the deposition that you can use on cross-examination in order to show the jury that you have been sandbagged. If the witness waffles on this question at the deposition, state on the record that you object to the witness giving any opinions at trial that are not in the written report.

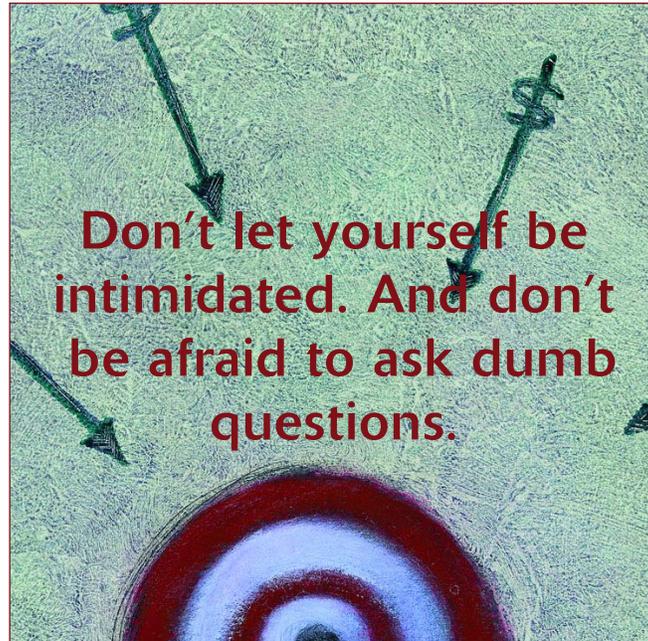
2. Does the expert plan to do any additional work before trial?

If the answer is no, you have some protection if they end up doing so. If the answer is yes, you need to find out what and why and object to the witness testifying at trial about any work that is not in the report.

3. Has the expert done all the work considered necessary to reach the conclusions in his or her report?

Ask this one early in the deposition, before you expose any shortcomings in

that work. For example, suppose you know that an accounting expert did not look at a key financial document before reaching his or her conclusions and you plan to establish that later in the deposition. Get the expert to testify that he has made a professional judgment that he knows enough to give his opinion before you show that he didn't. That will provide



you with additional protection if the expert later modifies that opinion in light of what you showed him at the deposition.

4. What has the expert discussed with counsel?

In most jurisdictions, once an expert is designated to testify, his communications with the attorneys who retained him are no longer protected from your discovery. Find out everything you can about what the witness was asked to do. In particular, any discussions about the scope of the opinion will show where the opposing party thinks there is a weakness.

5. Were any limitations placed on the expert's work?

Most experts are too cagey to remember any. So, as is the case with most important deposition questions, you should ask this in several different ways. Did the expert decide not to do anything that she had considered? Did counsel ask the expert not to do anything? Did the expert review any information or material that seemed inconsistent or difficult to recon-

port prepared? Did the expert have any help from the parties, counsel or his own staff? What did the expert handle personally? Does the expert still have any drafts or notes? Did he review any information or material that is not mentioned in the report? Did he talk to anyone else about the report? Are any of his conclusions based on any conversations with anyone else?

9. Is the expert's resume complete and accurate?

Try not to waste time on particular degrees or jobs. Most experts love to talk about themselves, so you will get excruciatingly long and irrelevant anecdotes if you are not careful. Instead, it's better to ask more general questions about what parts of their experience — whether educational, occupational or other — support the opinions given and why.

Has the expert previously served as an expert witness?

Find out whether the expert has ever been found to be qualified to testify as an expert in any previous proceeding and, if so, in what area? You should also ask if the expert has ever been deposed or given a declaration and whether you can have a copy.

The conventional wisdom about deposing expert witnesses (and even percipient witnesses) used to be that you should save the "good stuff" that will impeach their testimony. Otherwise, the reasoning went, the witness would be alerted to the problem and have a chance to come up with a better answer at the trial.

I don't agree with this deferred gratification approach. Because a lot of things can

cile with any of her conclusions?

6. How much time has the expert spent on this matter?

Get the expert to break this down so that you know how much time was spent in meeting with counsel, doing research, writing, etc.

7. How much is the expert being paid?

Ask for the hourly and/or daily rate and the amount billed to date. You should also ask if the expert is receiving any other compensation or benefit from testifying and if their compensation will be affected by the outcome. (Hint: it is not supposed to be.)

8. How was the expert's re-

happen between the deposition and trial, including summary judgment and settlement negotiations, I hate to lose the opportunity to influence those events with admissions or other deposition testimony from an opposing expert.

So if an expert has gone out on a limb that might be able to be cut off, I prefer to bring my saw to the deposition instead of keeping it for the trial. For example, if an expert has reached a conclusion without reading a key document that is obviously relevant, I try to estab-

lish that at the deposition. The other side can then try to clean up the mistake but they can't hide the fact that a mistake was made. Also, every effort to correct deposition testimony at trial will erode the expert's overall credibility in front of the judge and jury.

I also think it is worthwhile to try engaging experts in an honest Socratic dialogue about the bases for their opinions. If you have done your profiling work in advance, you should have a pretty good sense of what the expert will

either have to admit or look bad denying. It helps to make up a wish list of the admissions that you think you can get. Once the deposition begins, of course, you have to listen carefully and keep asking follow-up questions that probe the expert's assumptions and the limits and qualifications of their opinion.

In the process, you can often crystallize the key weaknesses of the expert's opinion so that the judge or jury will later find it easier to understand why they should reject that opinion. ■