



A Primer on Preparing for the Prosecution's Expert

Despite the fact that experts have always played a prominent role in both civil and criminal trials, many lawyers fail to challenge experts utilized by the prosecution. Challenges are rarely brought despite the fact that some so-called “experts” are unqualified or poorly trained. There are steps that must be taken in any case when the government retains an expert. Successfully attacking a prosecution expert is a goal within the reach of any prepared trial lawyer.

Ten Steps

1. Obtain the expert's resume or CV (*curriculum vitae*).

Make sure everything listed is accurate. Many experts are simply not qualified in the fields in which they testify. Experts exaggerate their qualifications, including their education. Some testify in areas well beyond their expertise. Many simply lie on the CV; some never even attended the schools listed.

Occasionally experts lie about their publications or contributed little, if anything, to the publications listed. When an expert's resume indicates that she is board certified, should the defense be impressed? Investigate the organization through which she claims certification. Does the organization administer a test for individuals seeking board certification? Is it a written test or an oral test? What does the test entail? Some organizations will allow anyone to become board certified in exchange for payment of a fee.

2. Examine all writings of the expert.

Experts, especially those in the academic field, have written on a variety of subjects. From time to time experts forget what they wrote many years ago, or even just one or two years previously.

3. Use legal resources to locate cases in which the expert previously testified.

Westlaw and Lexis will provide some of this information. The “experts database” at www.nacdl.org is a good source.

4. Obtain the expert's past testimony or transcripts.

Experts that faced cross-examination have probably testified in ways that they may later regret. Past testimony might indicate that the expert is in agreement with the testimony the defendant's expert will give in the present case. If nothing else, transcripts will give defense counsel a true flavor for the way experts present themselves, and talking to the lawyers who have examined these experts will fill in the gaps.

BY RICHARD S. JAFFE

5. Research the labs with which the experts are associated.

Many labs are unaccredited or have been cited numerous times by government oversight agencies and private watchdogs. This kind of information can lead to very fertile cross-examination questions and answers.

6. Subpoena all underlying raw data upon which the experts relied, and subpoena laboratory procedure manuals.

Defense counsel's motion for data should be specific and seek every scrap of paper, including emails and handwritten notes. Many scientists do not follow their own lab procedures; some scientists are not aware of the procedures.

7. Conduct a one-on-one interview with the prosecution's expert whenever possible.

In theory, the government's expert is neutral, but every defense attorney knows this is not true. Although government experts are biased, they will meet with defense attorneys. An interview will allow the defense attorney to assess the expert as well as the opinions the expert will provide at trial. For example, meeting with a forensic pathologist and reviewing the case with her can show defense counsel that the defense needs its own pathologist.

8. Expose any hidden bias on the part of the expert.

Many of the prosecution's forensic experts are obviously biased. This bias might simply result from the fact that they work so closely with law enforcement officers and prosecutors and only testify for them. The bias can result from correspondence sent by the police or prosecutors that includes prejudicial information. Of course, if the prosecution retains an independent expert, the financial arrangements involved are admissible on cross-examination.

9. Use 'learned treatises' in preparation for cross-examination of the government's expert.

Rule 803(18) of the Federal Rules of Evidence, if it is utilized correctly, has the potential to enable a defense attorney to effectively call a witness (that could cost thousands of dollars) without ever calling him to the witness stand; the witness could even be dead. Previously published work that qualifies as a learned treatise can be acknowledged by

the defense's expert or the prosecution's expert and thus be used to undercut the opposing expert's opinion at trial. Thus, a previously published work acknowledged as a learned treatise can be utilized to impeach the testimony of the prosecution's expert. This is particularly effective if the prosecution's expert has testified to facts contrary to what is stated in a learned treatise authored by someone the prosecution's expert (or the defense's expert) has acknowledged as authoritative in the field. Note, however, that while excerpts can be read to the jury during cross-examination, they cannot be admitted as substantive evidence.

10. Insist that the prosecutor follow Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure.

Sometimes prosecutors disclose limited information regarding their experts. Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, at the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. The summary must describe the qualifications of the witness, the opinions of the witness, and the bases and reasons for those opinions. At a minimum, defense counsel should request the expert's CV. From the CV the attorney can obtain fodder for cross-examination. Defense counsel needs to vigorously hold the prosecution's feet to the fire as it relates to complying with federal Rule 16 by filing motions and, when necessary, litigating the prosecution's non-compliance with the rule. Unfortunately, many states do not have a rule as strong as the federal rule.

Lying Liars and Their Lies

With apologies to Al Franken, "lying liars and their lies" is the perfect way to describe a subject that deserves at least passing mention. Some experts lie. They are not mistaken, and they do not misinterpret the information given to them. Instead, they simply make up the data and conclusions necessary to help their side prevail. It behooves defense counsel to identify and expose these liars at every opportunity because they pose an ongoing threat not only to defendants but to the credibility of the court system.

An awareness of the past problems is crucial to identifying potential labo-

ratory fraud. This is the reason every criminal defense practitioner should regularly check the following two websites: http://www.corpus-delicti.com/forensic_fraud.html and <http://www.truthinjustice.org/junk.htm>. They provide a running commentary on most instances of laboratory fraud. Understanding the methods used by discredited experts will better prepare defense lawyers to spot potential fraud in their cases.

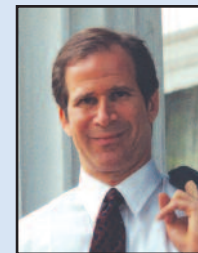
Level the Playing Field; Gain an Advantage

Like other witnesses, expert witnesses have weaknesses and vulnerabilities. Investigating the expert and the subject matter will provide opportunities not only to level the playing field, but also to gain an advantage. The science may be vulnerable, the expert may have credibility gaps, and the bias may be exposable. Almost any expert witness is vulnerable to attack or neutralization.

The fear of embarrassment and humiliation is a concern for many witnesses — but even more so with experts. It is important to remember, however, that many experts have been trained in the presentation of testimony, and this training instills confidence in them. Nonetheless, a prepared and tenacious lawyer, with developed cross-examination skills, still has the advantage because the courtroom is the lawyer's home. The expert is a visitor. If the expert is the lawyer's adversary, the expert is an intruder. ■

About the Author

Richard S. Jaffe specializes in the areas of white collar criminal defense and criminal litigation in the federal and state courts. He has been certified as a Criminal Trial Specialist by the National Board of Trial Advocates since 1984. He has handled over 60 capital cases and is the author of *Quest for Justice: Defending the Damned*.



Richard S. Jaffe
Jaffe & Drennan, P.C.
2320 Arlington Avenue South
Birmingham, AL 35205
205-930-9800
Fax 205-930-9809
E-MAIL rjaffe@rjaffelaw.com