

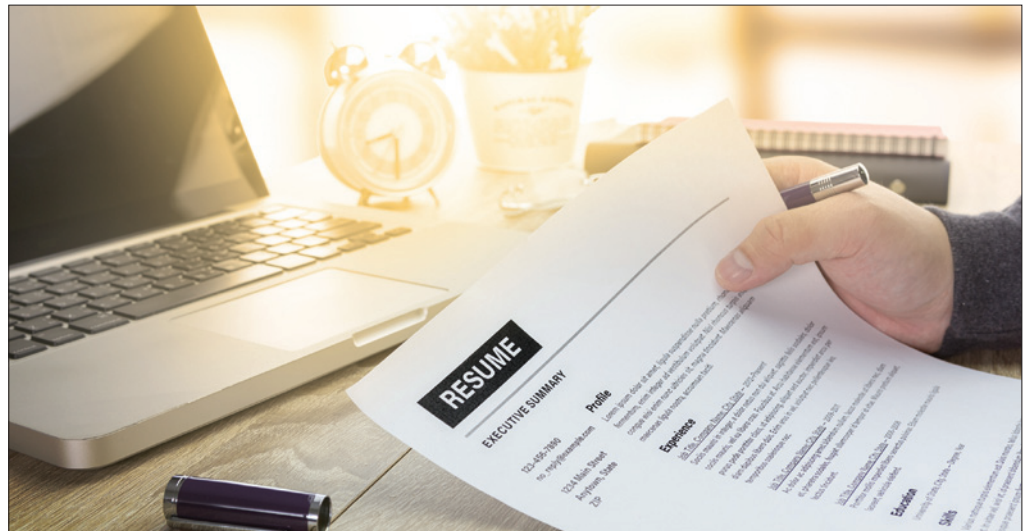
Digging Deep: Practical Tips To ‘Bury’ an Expert Witness on Cross-Examination

BY DIANE P. SULLIVAN
AND JED P. WINER

So much of litigation and trial work these days comes down to the proverbial “battle of the experts.” While the prospect of cross-examining a well-credentialed expert may seem daunting at first, there are basic steps you can—and should—take to give yourself an edge. These include digging up as much fodder as possible for cross-examination on topics that do not necessarily attack the actual substance of the expert’s opinions themselves. Such points are often far more “jury friendly” than the minutiae of the expert’s scientific or technical opinions. The non-exhaustive list of suggestions herein can be summed up with a two-word phrase: “Dig deep.”

In no particular order, here are some ways to “dig deep” and uncover points to help “bury” an opposing expert on cross.

DIANE P. SULLIVAN is a partner in the litigation department of Weil, Gotshal & Manges, where she specializes in trial of high stakes cases across practice areas. JED P. WINER is counsel in the department, focusing on complex commercial and mass tort/product liability litigation.



SHUTTERSTOCK

Closely Examine the Expert CV

Review all published articles and their citations. In one instance, an opposing expert published an article where he cited a publication by our expert. It was nice to highlight for the jury that, outside the courtroom, the opposing expert found our expert sufficiently reliable to cite in a peer-reviewed journal article. In addition, research the journals where the expert has published. Are they reputable? Does the expert frequently have the same co-authors? Are any of them expert witnesses in litigation? Who funded the expert’s research? Was there adequate disclosure of any conflicts of interest?

Check all professional organizations.

Experts frequently claim membership in a host of professional organizations on their CV. Do all of the organizations still exist? In one instance, an expert claimed membership in a professional organization that did not exist. For those that exist, what are the membership requirements? Sometimes an organization is open to anyone who is willing to pay the membership fee, an uncomfortable fact for an expert to have to admit on the stand.

Research all presentations and lectures. Often, an expert will use a PowerPoint or other written materials when delivering a presentation or

lecture. Ask the other side to produce these materials and/or search online for them. There are a number of web sites that contain search engines allowing you to search millions of presentations by keyword. You may find helpful cross-examination points by reviewing an expert's publicly available course or presentation materials.

Dig deep to uncover any publications not listed on the CV. Effort should be made to obtain publications going back as far as possible. In one case, we were able to locate an expert's Ph.D. thesis online and, strikingly, the expert's litigation opinions were dramatically inconsistent with the statements he made in his thesis.

Research job changes. Examine the reasons for leaving one University for another. Was the expert fired? Were there other concerns or scandals?

Obtain prior versions of the expert's CV. Check to see if the expert no longer lists particular items on his or her CV. Sometimes experts "forget" to include things that are not helpful for their current opinions.

Review Prior Testimony and Reports

Often, a witness' prior testimony and/or expert reports—or at least portions of them—are available on Westlaw or Lexis. If there is testimony that you know exists, but is not available online, research the law firms involved in the case. If there are no confidentiality issues, you can often obtain transcripts and expert reports through contacts at other law firms. And don't limit yourself to traditional testimony in court; often, an expert has testified in other forums (e.g., before Congress). In addition to

finding potential impeachment material in prior testimony, you may also discover such things as the expert frequently "copies and pastes" from one expert report to the next and/or frequently appears for one side or one firm.

Search Global News Databases

Research tools such as *Factiva* can locate any reference to the expert in a wide variety of media, including articles where the expert is quoted.

Google, Google Again, and Then Google Some More

The power of Google cannot be overstated. Broad searches should be run, and then repeated periodically

Experts frequently claim membership in a host of professional organizations on their CV. **Do all of the organizations still exist?**

over time. It is also helpful to set up a "Google alert" with the expert's name, so that you are promptly notified of any article referencing the expert.

Check Out the Expert's Employer

Employers often have detailed rules about when an employee may serve as an expert witness and what disclosures need to be made. Some require that it be clear that the expert is not speaking on the employer's behalf, and must not use the employer's letterhead for reports or correspondence. Some employers, such as public universities or hospitals, post these rules online in a publicly facing website. Check to see if the expert complied with the requirements of his or her own employer.

Review the Expert's Website in Detail

Often, the expert has his or her own website, or is employed by a company or institution that does. Carefully review the website for any inconsistent statement or position. Use an Internet web page archive such as the "*Way-back Machine*" to review changes that were made to the website over time, including during the course of litigation. Check to see if the expert advertises for expert work in litigation.

Review any biography page. How does the expert hold himself or herself out to the public? In what areas of expertise?

Check All Licenses and Accreditations

Depending on the expert's field, there may be licensing requirements or various accreditations, such as laboratory accreditations. Check to see if all licenses and accreditations are valid and up to date. See if there was ever any disciplinary action taken against the expert.

* * *

As mentioned at the outset, this list is by no means exhaustive. But hopefully it will serve as a practical starting point to begin developing creative points for an effective cross-examination of the other side's expert.