



CROSS COUNTRY

BY LARRY POZNER

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Noncompliance with a Subpoena Duces Tecum as a Subject of Cross

Situation: We have served a subpoena on an expert requiring the production before trial of specified documents relating to the expert's report or opinions. In trial we discover that the expert has not produced all the required documents.

Cross on the failures to obey the subpoena attacks the expert's credibility, bias, and professionalism. Such chapters will shake the expert's confidence throughout our cross. Therefore, if we elect to cross on this conduct, we should do so as soon as we discover the noncompliance.

These chapters come at an expert from an angle they did not anticipate. In response the flustered expert often offers further evasions. The standard evasion is, "That does not change my opinions." That is not a fruitful area of cross.

Independently, the contents of the withheld material may lead to chapters that factually undermine the expert's opinions. If so, our chapters on the withholding of documents, performed first, have more impact as they support an inference that the withholding was designed to protect the opinions. Avoid a cross on motives. The jurors can make that connection.

Below are abbreviated chapters for this technique as well as potential responses to other predictable evasions.

Chapter 1: Make the subpoena important.

- Q:** You have been an expert before?
- Q:** You understand the meaning of a subpoena for documents?
- Q:** You understood that a subpoena is a Court order?
- Q:** The language is, "You are commanded to make available the documents ..."

Chapter 2: Make the expert accept professional responsibility to comply.

- Q:** You understood it was your personal obligation to go through Exhibit D. 17, the subpoena duces tecum,

and produce all the evidence required by that subpoena?

- Q:** You understood full compliance was your legal obligation?
- Q:** As an expert you also understood it was your professional obligation to fully comply?
- A:** *[Evasion]: I don't know what you mean by "professional obligation."*
- Q:** This is not your first time being ordered by a subpoena to produce documents?
- Q:** You knew that failure to fully comply with the subpoena would be unacceptable conduct that you yourself would brand as beneath your personal standards?

(If the answer is Yes, we can push for more.)

- Q:** Conduct beneath the standards of an expert witness?
- A:** *[Evasion]: That would depend on the importance of the undisclosed material.*

- Q:** Is it your testimony that you can pick which parts of a Court Order you will obey?
- Q:** Is your attitude that you will decide what evidence the defense can look at?
- Q:** Are you testifying that as an expert witness, you can withhold evidence if you decide it is not important?

Chapter 3: Show the portion of the subpoena that called for the undisclosed documents. If possible, refer to these documents as "evidence in this case."

- Q:** In the subpoena Exhibit D. 17, Request for Production Number 3, you were ordered to "Produce all

written communications in whatever form, between you and the District Attorney's employees.?"

- Q:** You knew this was some of the evidence of what you and the prosecutors discussed?
- Q:** You knew that such communications can be used as evidence in the trial?

Chapter 4: Discuss the existence of documents the expert failed to produce.

- Q:** But you did not "Produce all written communications between you and the District Attorney's employees.?"
- A:** *[Evasion]: None of which changes my report or opinions.*
- Q:** Is it your position that you could withhold evidence if you believed the evidence would not change your opinion?

- Q:** My question concerns your disobedience to the Order.
- Q:** You had notes and emails?
- Q:** You did not give us the notes and emails?

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About the Author

NACDL LIFE MEMBER Larry Pozner is recognized as America's authority on modern cross-examination. His book is *Cross-Examination: Science and Techniques* (Lexis, 3d edition, by Pozner and Dodd.) Pozner's lecture schedule can be found at <https://store.lexisnexis.com/site/poznerdodd#pozner>.

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