



CROSS COUNTRY

BY LARRY POZNER

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You should have been told.

When shown in cross-examination to be incorrect, experts will try to deny any impact on their opinions. However, there are techniques that offer them a way to concede their errors while protecting their self-image by blaming others. One such technique can be thought of as “You should have been told...” The technique:

1. Establish the expert’s high standards.

Using leading questions, we anchor the expert’s duties to as high a standard of conduct as the expert will accept. We show that the expert demands of himself or herself great factual diligence and objectivity in carrying out the assignment in this case. This is easy, as experts want to describe themselves as having very high standards for their own work.

2. Define only the fact-sets considered into which an omitted fact belongs.

Using the types of facts for which we will show an error or omission, we demonstrate that the expert’s consideration of these types of facts was of critical importance to her opinion. Our voice remains matter of fact. We can ensure agreement as long as we confine our questions to the types of facts that were considered and would have to be considered in order to carry out the expert’s assignment.

3. Put into evidence the undisclosed facts.

We expose the facts of importance not considered because those facts were not provided. Our strongest position is if the omitted facts are found in a document capable of introduction. However, lacking a document, we may need to show through a prosecution witness that the prosecutor or other law enforcement agent knew of a fact or situation that would fit into the type of facts the expert was considering. We enhance the impact of the unconsidered facts using phrases such as **“You are just now learning”** or **“Today is the first time you ever heard of.”** Our tone need not

be redolent of “Gotcha” but can be low key. I find that the less experienced the expert, the more he or she is rattled by in-trial revelations. Conversely, experienced experts adopt the pose of the Monty Python knight with his arms and legs cut off, willing to call it a draw.¹ For such witnesses, we use a tone from Sergeant Joe Friday: “Just the facts, ma’am.”² Do not try to push the expert to a conclusion that such information would cause a change in his opinion. We just need a concession of logic: the missing information fits into any type or bucket of information the expert should and would have considered had he known.

4. Place fault with the prosecution or its witnesses.

Create for the expert the face-saving out: these facts were not considered because the prosecution or law enforcement never revealed them. The power of this cross comes from the logic plus the in-trial disclosure. Our points are best made without resort to theatrics, loud voice, scorn, or sarcasm. Our quiet repetition of “You did not know” will be tolerated longer and to greater effect than a tone that implies we are accusing our opponent of cheating. The witness’s lack of knowledge of relevant facts does the damage.

Q: The State alleged that the law firm had improperly billed \$50 for a service called a Certificate of Qualified Holder (CQH)?

Q: You had the professional obligation to be diligent and fair in arriving at your opinion?

Q: Your method was to count every time the law firm billed a client \$50?

Q: That total became your expert opinion of the alleged “overcharges” for providing CQH?

Q: But you did not know there were other legal services the law firm provided for which it charged \$50?

Q: For example, let me show you Exhibit 369, lines 117, 158, 194, and 213. All for \$50.

Q: When you now read these lines, you can see on the descriptions that these are all \$50 charges for legal services other than CQH?

Q: All wrongly included in your expert opinion of overcharging?

Q: You don’t know how many more of these \$50 charges you wrongly included?

Q: The prosecution never alerted you that there were other different legal services charged at \$50?

Q: If you had been alerted to these other forms of \$50 fees, you never would have counted them?

Q: Today, while we are in trial, after nine months and after having been paid more than \$125,000, you are finding this out for the first time?

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Notes

1. The Black Knight is a character in the movie “Monty Python and the Holy Grail.”

2. “Dagnet,” the television series, but sadly Joe Friday never said those exact words. But Dan Aykroyd did in “Dagnet — The Movie.” ■

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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