Whether considering the damages suffered from an alleged contractual breach, the cause of plaintiff’s injuries, or a professional’s compliance with applicable standards, testimony by “expert” witnesses frequently is a requisite in the trial process. Many times, the success of a litigant’s entire case is grounded upon the assumption that the jury will accept the conclusions offered by an expert. This means opposing counsel’s ability to effectively discredit an expert on cross-examination can often determine the outcome of the trial. Notwithstanding this critical role of expert interrogation, many lawyers focus their cross-examination on pointing out three things that are true for nearly all experts:

1) That the expert is biased because he or she is being paid.

2) That the opinions offered rely, to a greater or lesser extent, on information supplied by others; and

3) That other qualified individuals disagree with the expert’s conclusions.

This approach is quite often ineffectual. Worse, this method of cross-examination frequently affords the expert witness an opportunity to expand on his or her insights and conclusions.
This article offers one straightforward strategy designed to aid the cross-examiner in sheparding opposing counsel’s expert through an examination that focuses the jury’s attention on damaging contradictions or analytical defects. While the method described is not the only way to properly conduct expert cross-examination, if followed carefully, it provides the examiner with maximum witness control. Such control over opposing experts increases the likelihood of predictable and favorable results.

The offered strategy is simple. It has only three steps, yet it avoids experiences with cross-examination that are fairly viewed as disastrous. These three steps are: 1) gathering trial ammunition (i.e. damaging and admissible writings or witness statements (referred to below as testimony “trapdoors”)) through the discovery process; 2) at trial, establishing witness control and setting the stage for discrediting the expert; and 3) springing open the trapdoors in a manner that ensures effective and dramatic exposure of the weaknesses in the expert’s conclusions.

**The Goal of Expert Testimony and Cross-examination**

Initially, it is helpful to note what the proponent is trying to accomplish by offering expert evidence. Almost always, it is the desire to convince the jury that the expert:

1) is qualified, thoughtful and thorough;  
2) is likeable and honest;  
3) has been fairly compensated for the work done, but is unbiased; and  
4) is offering both helpful and persuasive opinions.

Stated differently, the proponent wants the jurors to think: “This expert was well-qualified, and although paid for his or her time, had integrity. I understood what was said and it made sense.”

Opposing counsel is aware of this goal well before trial. Accordingly he or she envisions that, following a Perry Mason-like cross, the jurors will instead conclude: “The expert was hired gun and really didn’t know anything about the issues important to this case. In any event, all of the testimony was either scientific jargon or logically flawed.” The best way to convince jurors to adopt this latter line of reasoning is not to dwell on the fact that the opponent relied on information provided by others or that other qualified practitioners disagree with his or her conclusions. Rather, the cross-examiner should focus on demonstrating that the expert:

1) is not qualified;  
2) came to conclusions that don’t make sense or are unreliable; or  
3) although qualified and using a valid means of analysis, employed improper methods or relied on erroneous assumptions in forming opinions.

As mentioned earlier, many believe that it is important to highlight during cross-examination the remuneration being paid to the expert. Perhaps this sways some jurors, but its effect is not nearly as beneficial to the cross-examiner as an admission that the witness’ opinions are flawed, or that his or her analytical methods have been rejected by prestigious professional groups or peers. How does a lawyer, not schooled in the relevant scientific or technical areas, expose the fatal defects and opinions given by crafty, experienced expert witnesses? One way is to adhere to the following three-step strategy.

**Step 1: Discovering Trapdoors**

The first step in discrediting experts requires careful focus on preparing for the witness’ deposition. As in any deposition encounter, the examiner should be looking primarily for sound bites that undercut the witness’ credibility or at least some of his or her conclusions. Although sometimes difficult to obtain, these trapdoors often exist in the form of contradictory sworn statements or writings by the expert that show the expert’s views contradict his or her prior opinions or established scientific or technical principles. Acquire this damaging data by depositing the expert after:

1) Making sure you have forced the exchange of disclosure materials, including a summary of the expert’s anticipated testimony and the content of any reports;  
2) Preparing an exhaustive outline (with questions cross-referenced to relevant documents) with the help of your own expert. He or she can assist in crafting questions that deal with the science. If technical matters are important, insist that your expert attend the deposition; and  
3) Ensuring that you will be in command of the relevant facts (especially the contents of documents) on the day of the examination. Although this type of preparation will aid generally in conducting discovery, its primary purpose is to allow the examiner to control the expert’s deposition.

By having detailed, cross-referenced notes, the examiner is free to concentrate on the witnesses’ statements. When the witness tries to give non-responsive answers, he or she can be forced to focus and respond properly by being referred to cross-referenced documents that are relevant to the pending question. This process permits the examiner to convince the witness that counsel is going to conduct an exhaustive examination and that the overall deal will be less painful if the expert simply answers the questions asked.

During the examination, counsel will explore areas that expose trapdoors. Often the witnesses will say something (usually in passing) that is contradictory to his or her opinions, report, etc. When this happens, the following alternative courses are available to the examiner:
1) Ask the question again to make sure it is clear: “Doctor, did you just say that the lawyer who hired you dictated the conclusions for you to use in your report?”

2) Break the question into segments so that the examiner can get the maximum benefit from the admission; or

3) Continue with the planned examination on the same topic as if nothing unusual occurred.

While sometimes alternative three is acceptable, if what you heard truly is a trapdoor you run the risk that the witness, or his or her lawyer, will realize an admission has been made and attempt to explain away what you just heard.

A better tactic than any of these three alternatives is to ask a question immediately that is totally unrelated to the trapdoor. one that causes everyone to focus on a new set of issues. If, in the heat of the moment, you need a minute to devise a different line of questions, ask a fluff question (e.g. “Doctor, in what year did you receive your Ph.D.?”. “Doctor, do you understand that your dissertation did not deal with the study of any field related to the issues in this case?”). The goal is to move the discussion so that there is a segregated section of the transcript that leaves the trapdoor intact and undisturbed.

**Step 2: Set the Stage at Trial**

At trial, it is important that cross-examination proceed by way of a series of short, precise leading questions that permit the examiner to establish control of the witness. This is vital for a number of reasons, including the need to comply with the sage trial commandment that directs the cross-examiner not to permit the witness to repeat damaging testimony during cross.

To achieve this goal, counsel needs to hold a tight leash. The following example illustrates how to both establish control and notify the witness (and trial judge) that you are giving fair warning that you may have to seek judicial assistance to guarantee cross-examination proceeds as intended (and permitted by the rules of evidence):

“Now Doctor, I need to focus the jury’s attention on portions of your testimony that I want to make sure they understand.

I have a number of issues that we need to get through and I don’t wish to waste your time or the jury’s. I have reviewed your report, your opinions, and your prior sworn statements, and I have a series of questions for you that will permit us all to scrutinize your findings a little more closely. I believe each of these questions can be answered simply yes or no, but to avoid any conflict between us, and to make certain that I am fair, please answer all of my questions with one of the following responses: Yes; No; or I can’t answer yes or no.

Do you understand?”

You have now portrayed yourself to the jury in a positive light and have set up your ability to seek a judicial instruction to force the witness to play by your rules. This is crucial because effective cross-examination of an opposing party’s expert consists of what is, in essence, testimony of the examiner in the form of foundational questions that are generally offensive to the witness, followed by quotes from transcripts, exhibits, learned treatises, etc.

As the cross-examination proceeds, the examiner needs to adhere to these instructions and not allow the witness to explain anything. This means never asking for clarification of any answer. Every response from the witness to a substantive question that is not a simple “yes” should cause the examiner to halt while the examiner “testsifies” via prior statements or quotes from exhibits or deposition transcripts. A note of caution is necessary here: Those trying the method for the first time should keep in mind that even those who believe they employ this technique correctly find themselves frustrated when not prepared.

To avoid any frustration, make duplicate copies of the exhibits that are cross-referenced in your examination outline and triple-check your deposition cites (which should serve as annotations to each important question). It should only take a few references to damaging quotations before the witness will realize that any answer to a posed question (other than “yes”) results in an exercise that causes the expert to lose credibility. Moreover, if the witness does not realize that “getting to yes” is the best alternative, the cross-examination may cast even more doubt on the witness’ credibility and conclusions.

What about the expert who refuses to play by the rules and uses every question as an opportunity to expand the opinions stated on direct? You must abruptly cut the witness off and explain:

“Now Doctor, your last statement was not responsive to my question as to whether you examined the manufacturing plant on January 5. I infer from your answer that is because you could not answer my question yes or no, or perhaps because you did not remember the date. That’s fair, and I am happy to provide you with evidence that will establish the date, but I am entitled to have the questions I ask answered, and the next time I will have to ask the judge to strike your response. So please answer yes, no, or that you can’t answer yes or no. Do you understand?”

You then pull out the deposition transcript or other exhibit and establish the disputed fact strictly following the technique described below.
Step 3: Springing Your Trapdoor

Once you have laid your foundation and have control of the witness, it is time to let him or her fall through your trapdoors. This is best accomplished by having the witness deny those propositions for which there is the most proof. This means that the examiner must draft advocative paraphrases of the propositions supported by the trapdoors. Use characterizations that the jury will believe are fairly supported, but that opposing counsel and the witness will find totally objectionable. This will focus the jury’s attention on the relevant point. Some examples:

1. During the cross-examination of plaintiff’s expert doctor:
   “Doctor, isn’t it true that it has been your strongly held opinion that patients exhibiting the symptoms you and the plaintiff described to the jury cannot, to any degree of medical certainty, be fairly diagnosed as experiencing pain resulting from trauma suffered by auto accidents such as that at issue here?”

2. A series of cross-examination questions of a valuation expert:
   “Mr. Witness, your education and experience have caused you to become familiar with both the legitimate and invalid methods for valuing various types of properties, isn’t that true?
   “The professional organizations to which you belong publish guidelines as to the proper principles and formulas that are to be used to determine the fair market value of these various types of properties?
   “And these pronouncements are authoritative? They can be relied on?
   “Isn’t it true that prior to being hired to give your opinion as to value in this case, you were aware that the most authoritative publication in the area of determining land values (published by the body that provided you with your certificate of qualification as an expert appraiser) declared that the valuation methods used and relied upon by you in rendering your opinions in this case were unreliable and
produce inaccurate results?"

The point is you want the questions to be narrative and polite, but objectionable to the witness. Although you don’t expect the expert to agree with you, you proceed in the same fashion no matter which of the three permitted responses you get (you ignore or politely move to strike any others). You should focus solely on your opportunity to testify using the other side’s materials.

Very often, lawyers proceed competently to the point where they are ready use their trapdoors, only to let the expert escape because the examiner did not adhere to the following rule:

When impeaching a witness (expert or lay) by reading the contents of a transcript, learned treatise or other document, the only proper non-foundational question to be posed to the witness comes in the form of the following trigger question, which is posed after the examiner recites the damaging data: “Mr. [Ms.] Witness, did I read that passage correctly?” Use of any other inquiry risks unpredictable results.

The mechanics for springing open a trapdoor are simple. For example, when using written materials, simply:

1. Make certain to have a copy of the deposition or other document for the witness to look at while the examiner reads;

2. Announce the process: “We have previously discussed your April 14, 1999 deposition at which you gave sworn testimony about the issues you discussed here today. With the Court’s permission I am handing you a copy of the transcript of that examination. Please turn to page 222, line 12. Are you with me? Please note that my only question to you after I read a few lines is going to be whether I accurately read the sworn testimony you previously gave. Do you understand? Please follow along so that the jury will know that you and I agree on the words that are in the transcript”; and

3. After you have highlighted the trapdoor you ask, “Doctor, I read your sworn testimony correctly, didn’t I?”
This process works equally well with prior publications by this witness or any other trial exhibit. The key is to never let the witness speak other than to agree or disagree with the foundational questions.

While no system is foolproof, by adhering to the method outlined here, most lawyers will improve their cross-examination performances while decreasing the risk of permitting damaging testimony to be revisited during cross. Moreover, the jury will be far more interested in watching the expert fall through your trapdoors than by learning that the opposing expert is being paid or is relying on information provided by others. 

**Hon. Eddward P. Ballinger, Jr.** is a Maricopa County Superior Court Judge.