Expert Cross Exam Prep: *Kick It Up a Notch*

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One of the hallmarks of contemporary litigation is the ubiquity of expert witness testimony. Lawyers hire experts with the same frequency as Manhattanites hail cabs. They do so in large measure because proving the components of a claim or defense is often impossible without expert opinions. Even when an expert's opinion is not an imperative, lawyers often seek out an expert capable of weaving the facts and science into a persuasive presentation to manufacture a *de facto* summation dropped into the trial's evidentiary phase.

The importance of expert testimony demands a commensurate devotion of considerable time and thought on how to cross examine the experts. The following suggestions hopefully will further your efforts to neutralize an opposing expert.

Cross Exam Goals

Any cross exam plan should include eliciting of favorable testimony from the witness. In some respects, this goal is more readily obtainable with an expert than with a fact witness. Certain fundamental principles of science will be conceded by an expert that will advance your position. More significantly, expert opinions rest upon assumed facts. Simply changing up the facts assumed by the expert can produce opinions favoring your client.

One impediment to eliciting helpful opinions is that the cross exam is limited to matters elicited on direct examination. *See Smith v. Irving*, 268 Va. 496, 501, 604

S.E.2d 62, 65 (2004). Your plan should anticipate a "beyond the scope" objection by developing an argument linking the question to the direct exam or the witness's credibility.

Let's now shift to the goals for dealing with the unfavorable opinion itself. Your goal is simply to plant enough doubt about the expert's opinion to cause the trier of fact to disregard it. Only three avenues of attack are available to you:

- The expert.
- The methodology of the expert.
- The expert's science.

Scrutinizing the expert consists of several components. Does the expert possess the requisite training and experience to render opinions on the subject Although in some instances, a litigant will urge the court not to qualify an expert, I am referring here to bringing forth on cross exam evidence showing the expert is not the best source for reliable opinions on the subject. The other aspect of attacking the expert is use of evidence of bias, relationship or anything else to show the expert is not a trusted source of information due to a lack of objectivity or independence. Use of other traditional tools to attack witness credibility should be considered: prior inconsistent statements being the most common and, on rare occasions, bad reputation for truth telling and conviction of a crime. In sum, the goal would be to convince a jury that if they wanted to hire an expert on the subject, the witness would not be the right person for the job.

Methodology of the expert includes both the facts relied upon by the expert and the research, calculations, and testing utilized by the expert. The most fruitful area of attack will be the facts relied upon and the critical corollary, facts not relied upon. Although the

expert usually occupies the high ground on the science, you are likely to be more fluent in the facts of the case than the expert and the jury is just as capable as the expert in comprehending the underlying facts.

Attacking the principles of science and the validity of the bottom line conclusion of the expert has the lowest rate of success on cross exam. Why is the expert going to suddenly concede in response to a lawyer's leading question that the lawyer is right and the expert is wrong on the science? Such questioning has its place (e.g., reminding the jury about what your eminently qualified expert concluded) but more frequently, it just gives the witness a chance to restate and expand upon their adverse opinion. As discussed below, use of reliable authorities *may in certain instances* facilitate an attack on the expert's "science" itself.

All case preparation should be done with an awareness of these tenets and their application to the facts and data available for use during the cross exam.

Start Early

Start preparing to cross examine opposing experts when you open the file and don't wait for their identification. How is this possible? Anticipate what opinions will be advanced by an opposing expert to defeat your claim. Doing so is important for at least two reasons:

- It is a tight time window between Defense Designation of Experts and trial (usually 60 days per uniform scheduling order).
- Expert opinions are based upon facts. During fact discovery, you must elicit the facts necessary to close escape routes and undercut the opinions of an opposing expert.

When you are engaged in initial discussions with your expert, always pose the question “if you were hired by the defense, what advice would you give the defense about how to defend this case.” But you cannot count on your expert alone to spot the opinions used to defend the case. What seems so unequivocally clear to your expert will not necessarily be accepted by a defense expert. As I tell experts who are amazed by the outlandish opinions of the defense experts, courtroom medicine and science are akin to the distorted view of reality shown in a funhouse mirror.

The World War I French Premier Clemanceau said “War is too important a matter to be left to the generals.” So too is the science of your case too important for you to simply rely upon your experts. Once you accept representation, you must learn the science. One of the reasons for doing so is to spot the defense expert’s contentions about why there was no breach of the standard of care, if there was negligence, it did not cause the injury, etc.

This means Google searches, study of treatises, journal articles and consensus standards. For medical subjects, searches using the free databases of the National Library of Medicine, http://www.nlm.nih.gov/, (“NLM”) are an imperative. Run searches calculated to spot what the defense expert will use. For example, take conditions and medications in the medical history of your client and combine them with the injury to ascertain whether an expert would have something to use for an alternative explanation for the injury. Simply reading the titles of the articles on the resulting bibliography will educate you on what may be coming your way in a defense expert designation.

Don't limit yourself to Google. There are proprietary databases on a host of technical and scientific subjects which are not indexed by Google. For example, Engineering Village[1] offers 35 million records contained in 12 separate databases.

Google and NLM both offer alerts to run and update your searches periodically. Avail yourself of this free resource to keep current about the science of your case during the march to trial.

Defense Expert Designation Arrives: What Now?

Once your opponent identifies experts and their opinions, the cross examination plan starts to gel. You Google the expert, network with other lawyers using listserves and search the databases of Trialsmith, Westlaw and Lexis. You share the designated opinions with your experts. You focus your science research now on the specific topics germane to the experts' opinions.

But what else can be done to gather information about the experts and their opinions and the bases of their opinions? Examine very carefully the *curriculum vitae* and other biographical information available on the expert. Of course you will get all the publications authored by the expert but let's throw the net wider to catch more fish.

Learn who trained the expert, where the expert trained and where and with whom the expert has worked. Obtain information about these related individuals including publications, committee and organizational service. If you have an expert who has been hired not because of true scientific expertise but because of forensic aptitude or a relationship with the party or counsel, find out with whom the expert works and trained under who possesses superior credentials on the germane subject matter.

[1] For a complete description of this database, go tohttp://www.elsevierforindustry.com/products/ev.shtml.

Investigate each institution or organization with whom the expert is or has been affiliated for helpful information. Often hospital protocols, manuals used by medical residents and organizational guidelines can be located.[2] These can be quite helpful in wringing concessions out of an expert.

In certain instances, consider retaining a nurse or similar person employed by the place the expert works and who can give you insight into about the customs and practices at the expert's workplace.

To Depose or Not To Depose

After reading the expert designation, whether to depose an opposing expert must be determined. Many thoughts come to mind. Can the litigant (or the litigant's lawyer in most contingent fee cases) afford to depose the expert, a calculus ever more demanding on the purse. The crumbling of the expert or his opinions on deposition may enhance the odds of a favorable settlement.

Whether or not a deposition significantly furthers the goal of a successful cross exam at trial is the transcendent question. In many instances, a deposition will result in a less effective cross exam. When you take a deposition you are likely to learn things but so will the deposed expert and opposing counsel. A good general rule is the first cross exam is the most effective cross exam.

Consider what you have for cross exam before taking the expert's deposition. Upon study of a signed report of the expert or an expert designation, you may find

[2] Some examples are:

- *The Johns Hopkins Manual of Gynecology and Obstetrics*. If you have a ob-gyn expert who trained or was on faculty at Johns Hopkins, this publication may prove helpful.
- *Micromedex*, a database used by clinicians for quick reference for drug information. Many clinicians will use this database or a comparable resource on smart phones in decision making for patient care.

enough materials for a great cross exam. Experts who get the facts wrong or ignore facts in a report are quite vulnerable. Extrinsic information such as trial testimony or deposition in other litigation is a rich source of cross examination material.

What are some reasons to depose the expert? Designations leave unsaid statements an expert will make helpful to your cause. Depositions often ferret out information learned by the expert or research done by the expert otherwise unknown. Depositions can produce a wealth of information about the expert's background, experience and knowledge (or lack of knowledge). In some instances, the deposition will reveal the Designation represents lawyer work product with which the expert has only passing familiarity and may not be endorsed by an expert closely examined under oath.

If you contemplate a trial cross examination that goes into the weeds of the science, contemporary trial practice favors deposing the expert. The shortened time granted for a trial leaves little space or judicial tolerance for the half day cross examination. A deposition allows you to spend as much time as necessary to wring concessions from an obfuscating expert and to slowly work through a step by step deconstruction of the scientific opinions and contentions of an expert. Having a deposition giving you the concession in one Q and A is a much better bet at trial than lengthy colloquy seeking such a concession.

Using literature in a deposition can often be more effective than at trial. In a case whether the expert has authored something helpful, you can confront the expert at deposition and obtain an admission what was previously written is true and then, at trial

use the deposition Q and A to avoid emphasizing to the jury that this expert is an acknowledged authority who has been invited to publish.

Literature which the expert will not acknowledge to be a reliable authority can still be used to procure deposition concessions. You need not in a deposition get such a concession from the expert before inquiring whether the expert agrees with a statement. The expert need not even be asked to agree with a particular author or treatise, but simply let the expert know from what source you derived the question and then asked a leading question seeking a yes answer on the truth of the statement itself.[3] An expert often will in the course of a compelled discussion about the statements in a respected publication give testimony conceding in whole or in part the validity of the statements.

Preparing The Cross Exam Outline

Discovery is complete and it is now time to prepare the cross exam plan. We return to the three avenues of attack.

The Expert

Is the expert someone most people would select if they had a medical, scientific or engineering problem to solve? Since most cases are a battle of the experts, compare your expert to the opposing expert. The jury will be choosing which expert to believe. If you are fortunate, you can construct a plausible argument that your expert is the better one because of more experience (could be research, clinical or "hands on" "real world"), better credentials, and more recognition. The cross exam can highlight the strengths of your comparison.

[3] No element of surprise is lost since, unless the expert concedes the publication is a reliable authority, the statements from the publication would have to be identified at least 30 days prior to trial if your expert on direct exam would be used to lay the "reliable authority" foundation. *See Budd v. Punyanitya,* 273 Va. 583, 643 S.E.2d 180 (2007); Va. Code Ann. § 8.01-401.1

Bias, interest and relationship can be potent evidence to diminish expert credibility. Great judicial leeway is granted in permitting the exercise of the right of the cross examiner to establish facts and circumstances tending to show interest, bias or prejudice of an expert. *See Lombard v. Rohrbaugh,* 262 Va. 484, 551 S.E.2d 349 (2001).

In most instances, I will start out the cross exam by re-introducing the expert to the jury by eliciting evidence of credential weakness and bias to engender some skepticism about the expert as a reliable source of information. Some exceptions come to mind. I may jump on some very clear (usually factual) error in the expert's direct testimony which will have the same effect of creating doubt about the source. If the expert is someone who will concede much of what I want, I may "make nice" with the expert as we work through all the areas of agreement and defer the bias etc. information until the end when it is softly touched upon.

As *Lombard* made clear, money made is fair game. Don't fall in love with the money thing and view it as a miracle antidote for adverse opinions. Proving up the financial benefits works best with an expert with less than sterling credentials. If the expert is a truly top tier expert, the money thing may not mean so much to a jury. Juries expect superstars to make a lot of money.

The Expert's Methods

Scrutinize carefully what the expert has done and not done in preparing the opinions. This inquiry examines factual data, testing, calculations and modeling and literature research.

You are in a ball park where you can compete effectively with the most sophisticated of experts. You (and your jury) will be just as or more conversant with the facts as a well prepared expert. An expert, who due to arrogance or a lack of time, has not learned the minutiae of the case, will be at distinct disadvantage to you. The power of a concession that something was not done, not reviewed or not considered should not be underestimated. Similarly, an expert who cannot square the opinion with some portion of the evidence may not be embraced by the jury.

Think about how to play the reliance game with the expert. An expert may be cross examined on the facts, circumstances or data relied upon in forming an opinion or drawing inferences. *Holmes v. Levine*, 273 Va. 150, 164-65, 639 S.E.2d 235, 242-43 (2007). Some experts will attempt to dodge the inconvenient fact by simply stating it was not relied upon. First, be prepared to argue to the judge that an expert who parses records unreasonably is trying to "split the atom" and there is reliance in fact notwithstanding a claim to the contrary. *Holmes* addressed an attempt to cross examine an expert on an opinion in the records not admitted into evidence (cause of death on a death certificate). Take steps to introduce the item into evidence (for example, in the scenario of *Holmes* introducing the testimony of the physician signing the death certificate to prove up the opinion). Doing so will make the lack of reliance a

dangerous place to hide because the expert will be examined about the evidence which does not fit into the expert's paradigm of the case.

When the expert uses "lack of reliance" as a cross exam shield, the expert becomes vulnerable to cross exam on the failure to rely upon available data. As noted by *Holmes*, its holding does not mean that the cross examiner is "precluded from cross-examining [the expert] about whether he relied on [a specific piece of data] in formulating his opinions and, if not, why he discounted the information contained in the [piece of data]." *Id.*

Another recurring tussle on cross exam is the expert's review of or failure to review the literature. If the expert has reviewed and is relying upon literature, study meticulously the literature. Compare the facts and circumstances of the study upon which the literature is based with the facts of the case. Retrieve other publications written by the authors of the publication. Read the publications cited by the publication on the points salient to the case. You may find information adverse to the expert's opinion.

Statements in the literature relied upon by the opposing expert can and should be subjected to the same level of scrutiny as opinions of a testifying expert. The

"absent" expert who authored the publication must be cross examined if necessary.[4] Be prepared to attack the credibility of the source relied upon by the expert. An industry standard sometimes represents a pact among members of the guild to water down safety requirements of a product. In medicine, there is a big difference between a peer reviewed article in a respected journal and something published in a "throw away" journal or posted on a website with no prior peer review.

An expert who fails to review or rely upon literature can be portrayed effectively as ill prepared or out of the mainstream especially if your expert's testimony has referenced reliable authorities.

Cross examination on methods will often come down to a recital of omissions. A litany of "I don't know" and "I did not do that" responses to your questions chips away at the confidence level attained by the expert on direct exam.

The Expert's Science.

The heaviest lift for the cross examiner is an attack on the scientific principles expressed by the expert. Focusing on the expert's innate flaws and deficiencies in the methodology may be the most prudent approach. Challenging the expert on the science may take several forms when you decide to go there.

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[4] The Supreme Court of Virginia has repeatedly expressed its concern about the danger posed expert hearsay opinions:

> The admission of hearsay expert opinion without the testing safeguard of cross-examination is fraught with overwhelming unfairness to the opposing party. No litigant in our judicial system is required to contend with the opinions of absent 'experts' whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and whose pronouncements are immune from cross-examination .

Bostic v. About Women OB/GYN, P.C., 275 Va. 567, 575, 659 S.E.2d 290, 294 (2008) (citations omitted). The Virginia Rules of Evidence endorse impeachment of an absent witness whose hearsay statements have been admitted into evidence. *See Va. R. Ev.* 2:806.

A jury usually relies upon its collective experience and "common sense" to resolve evidentiary conflicts. Painting the "science" of the opposing expert as inconsistent with what intuitively makes sense may be effective.

If you believe in the superiority of your expert, use testimonial leading questions to remind the jury of what your expert told them. Proponents of this approach really don't care how the expert answers the question so long as the jury hears and understand the message embodied in the question.

Use of reliable authorities harbors great potential in challenging the expert's science on cross examination. If your expert has established a publication to be a reliable authority, the statements in the publication relevant to the action may be read to the expert during cross examination per Va. Code § 8.01-401.1.[5]

If the reliable authority foundation has not been established by other witnesses, you must gain foundational testimony from the cross examined expert to green light the reading of the statement. This requires testimony from the expert that the expert is familiar with the publication[6] and concedes enough facts for the Court to rule the "reliable authority" foundation has been laid.[7] Easy if the expert has conceded reliability in a deposition or previously in other litigation. Not so easy if the expert hews to the line "nothing is authoritative".

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[5] A reliable authority is a non testimonial expert and is permitted to be read into evidence because of the hearsay exception created by § 8.01-401.1. However, other evidentiary rules limiting admission of expert testimony may operate to bar admission of a statement contained in a reliable authority into evidence. *Weinberg v. Given*, 252 Va. 221, 226, 476 S.E.2d 502, 504 (1996). For example, see *Holley v. Pambianco,* 270 Va. 180, 613 S.E.2d 425 (2005) ruling inadmissible raw statistics about complications occurring during colonoscopy as lacking in probative value. A reliable authority citing the same statistics presumably would be subject to the same evidentiary deficiency.

[6] The cross examiner must establish familiarity with the publication itself and not merely the author. *Griffett v. Ryan,* 247 Va. 465, 473, 443 S.E.2d 149, 154 (1994).

[7] An expert cannot evade cross examination via a publication by simply adroitly avoiding such words as "rely" or "authority". If the expert provides testimony sufficient to establish that the publication is a reliable authority, or is part of the expert's own publication, statements in the publication can be used for purposes of impeachment. *Freshwater v. Scheidt*, 86 Ohio St. 3d 260, 269, 1999 Ohio 161 (1999).

If you are going to hit the wall in efforts to gain a concession that items of literature are reliable, you must decide is there a positive benefit in eliciting serial

denials of knowledge of the literature or its reliability from the expert. Some considerations are:

- has your expert effectively used the literature in support of opinions thus making a nice contrast with the arrogant obstinacy of the cross examined expert.
- is the expert's opinion under attack one that is inherently untrustworthy without being based upon a reliance of peer reviewed research.[8]

Final Prep

Once discovery is completed, most of the tools for cross exam are in your toolbox. However, trial itself is a dynamic, unpredictable environment. For this reason, flexibility to accommodate and exploit new developments must persist into the actual cross exam itself.

Bearing in mind the imperative to change as necessary, the outline of a cross exam will be constructed in the run up to trial. In constructing a cross exam plan, the overarching goal is to prevent an adverse finding of fact predicated on the expert's opinion. To accomplish this goal, the expert need not be cross examined on an opinion at all. If the jury concludes the expert is ill qualified, biased or employing erroneous or incomplete data, the opinion vanishes without ever being directly challenged on cross.

A snake need be killed only one time. Persistence of cross exam after death creates the prospect of resurrection. As with any cross exam, knowing when to stop is an essential skill.

[8] For example surgical technique falls into a category of subjective art as opposed to outcomes of drug therapy where the personal experience of a solitary expert carries little or no scientific weight.