

# **Examination of Expert Witnesses**

George Mason American Inn of Court  
February 23, 2000

Paper Prepared by

Maria Vouras  
Ken Falkenstein  
Liz Homoki  
Larry Lewis  
Jeffrey M. Summers

# Part 1 - Outline

## EXAMINATION OF EXPERT WITNESSES

### I. Examination of Expert Witnesses under Federal Law

#### A. Standards for Expert Testimony

##### 1. Required Reliability and Relevance of Testimony<sup>1</sup>

a. The introduction of expert opinion testimony is governed by Federal Rule of Evidence 702, which provides:

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise.

b. Court Must Be Gatekeeper

(1) Daubert requires that the district court act as "gatekeeper" for the admission of novel scientific evidence.<sup>2</sup> To perform this function, the district court must conclude, pursuant to Federal Rule of Evidence 104(a), that the proposed testimony is:

(a) reliable (i.e., constitutes valid "scientific knowledge," in cases involving scientific evidence); and

(b) relevant (i.e., it "will assist the trier of fact to understand the evidence or to determine a fact in issue").

c. Factors in Determining Reliability and Relevance

(1) In Daubert, the Supreme Court set forth the following nonexclusive list of factors to assess the reliability and relevance of proffered novel scientific evidence:

---

<sup>1</sup> FEDERAL EVIDENCE PRACTICE GUIDE § 11.18 (Matthew Bender & Co., Inc. 1999).

<sup>2</sup> Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2768, 125 L.Ed. 2d 469 (1993).

- (a) Whether the theory or technique at issue can be, and has been, tested.
- (b) Whether the theory or technique has been subjected to peer review and publication.
- (c) The known or potential rate of error and the existence and maintenance of standards controlling the technique's operation.
- (d) The extent to which the theory or technique has attained "general acceptance" in the relevant field.

## 2. Trial Court's Discretion to Admit; Appellate Review

- a. In General Electric Co. v. Joiner, the Supreme Court held that review for abuse of discretion, the standard ordinarily applicable to review of evidentiary rulings, is also the proper standard for an appellate court to review a district court's decision to admit or exclude expert scientific evidence.<sup>3</sup> An appellate court will not reverse a trial court in such a case unless the ruling is manifestly erroneous. Therefore, the trial court to which a case is assigned (e.g. pro-plaintiff vs. pro-defendant, judicially conservative vs. judicially liberal, etc.) can affect the outcome of the underlying litigation.<sup>4</sup>

## 3. Kumho: Daubert Applies to All Expert Testimony<sup>5</sup>

- a. Daubert specifically addressed "scientific knowledge" because that was the type of evidence at issue. However, Federal Rule of Evidence 702 also applies to "technical, or other specialized knowledge." In Kumho, the Supreme Court held that the Daubert gatekeeping obligation applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge, and hence, to all expert testimony.<sup>6</sup>
- b. Kumho noted that Federal Rule of Evidence 702 does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge, but that any

---

<sup>3</sup> General Electric Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512 (1997).

<sup>4</sup> David M. Governo, et al., *A Daubert Primer: From Historical Basis to Current Controversy*, MEALEY'S LITIGATION ADVISOR: TRENDS & REVIEWS (Mealey Publications, Inc., June 11, 1999).

<sup>5</sup> FEDERAL EVIDENCE PRACTICE GUIDE § 11.18 (Matthew Bender & Co., Inc. 1999).

<sup>6</sup> Kumho Tire Co. v. Carmichael, 526 U.S. 137, 143 L.Ed. 2d 238, 119 S. Ct. 1167 (1999).

such knowledge might become the subject of expert testimony. The trial judge must determine whether any expert testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." In assessing the reliability of an expert's proposed testimony, a trial court has considerable discretion. The objective of Daubert is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

- c. The Advisory Committee on the Federal Rules of Evidence has proposed an amendment to Federal Rule of Evidence 702 which would apply Daubert criteria to all forms of expert testimony<sup>7</sup>. While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science.<sup>8</sup> An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.<sup>9</sup>
4. Post-Kumho Decisions<sup>10</sup>
- a. Early post-Kumho decisions reveal widely divergent approaches by the federal courts of appeals employing the abuse of discretion standard of review. Two decisions illustrate this divergence.
  - b. In Black v. Food Lion, Inc., 171 F.3d 308 (5th Cir. 1999), the court held it was an abuse of discretion to permit plaintiff's treating physician to testify that plaintiff's fibromyalgia was caused by a fall in defendant's store. Although the doctor had employed the standard protocols in the field for making a differential diagnosis, the court stated, the testimony was inconsistent with medical literature which found there were insufficient studies of whether fibromyalgia can be caused by an injury.
  - c. By contrast, the 4th Circuit U.S. Court of Appeals in Westberry v. Matakiki Kemi, AB, No. 98-1540 (4th Cir. 1999), found no abuse of discretion in permitting plaintiff's

---

<sup>7</sup> Faust F. Rossi, *Survey: Evidence*, 49 SYRACUSE L. REV. 507, 524-25 (1999).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Mark S. Mandell, *Kumho: Some Clarity- but Not the Last Word- on Experts*, FEDERAL DISCOVERY NEWS, June 1999.

treating physician to testify on the basis of his differential diagnosis that plaintiff's respiratory problems were caused by airborne talc at his workplace. The court held that where the physician's diagnosis comported with standard medical practice by relying on physical examination, medical history and clinical tests, the testimony was admissible despite the absence of support in epidemiological studies or the medical literature.

## B. Direct Examination of Expert Witnesses

### 1. Qualifications<sup>11</sup>

- a. An "expert" is not viewed in a narrow sense. Under Federal Rule of Evidence 702, an expert is a person qualified by knowledge, skill, experience, training or education. District courts have broad discretion to admit or exclude offered expert testimony. A court may exclude testimony where the expert lacks training or experience in the field or where the expert appears to be unreliable.
- b. Three Approaches Available to Develop Opinion Evidence<sup>12</sup>
  - (1) Federal Rules of Evidence 703 and 705 control the method by which counsel introduces opinion testimony from his or her expert.
  - (2) Under Rule 703, counsel has three approaches available to develop opinion evidence:
    - (a) expert may provide an opinion based upon his firsthand knowledge;
    - (b) the expert may provide his opinion in response to a hypothetical question;
    - (c) the expert may provide an opinion based on data presented to the expert outside of court and developed by someone other than the expert.
  - (3) Rule 705 provides allows the expert to testify in terms of opinion or inference without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may be required to disclose the underlying facts or data on cross examination. This rule eliminates the need of elaborate foundation for expert

---

<sup>11</sup> FEDERAL LITIGATION GUIDE § 33.16 (Matthew Bender & Co., Inc. 1999).

<sup>12</sup> *Id.*

opinion testimony. In most situations, however, the expert should be asked on direct examination to state in detail the basis of any opinions.

c. Use of Treatises<sup>13</sup>

- (1) Learned treatises should be introduced during direct examination only if some need exists to do so beyond mere corroboration.
  - (a) First, the lawyer who does so opens up the door to effective cross-examination on the basis of those treatises. If conflicting evidence appears elsewhere in the treatise, the expert will have undermined his own credibility.
  - (b) Second, you should consider using a treatise only when you anticipate a strong challenge to the witness' opinions. Even then, it may be better to save the treatises for redirect examination.
  - (c) Finally, too frequent reliance on learned treatises to bolster your expert's opinion may create the impression that you are concerned with your expert's testimony--it may be viewed as a sign of weakness or uncertainty.

C. Cross Examination of Expert Witnesses

1. Cross Examination on Credentials<sup>14</sup>

- a. A court's ruling that a witness may testify as an expert only means that the witness possesses sufficient credentials to pass the evidentiary threshold. It may still be possible to diminish the weight of the witness's qualifications during cross examination. Basic methods for discrediting a witness's credentials include:
  - (1) limiting the scope of the witness's expertise;
  - (2) stressing missing credentials, such as certifications, degrees or licenses;
  - (3) contrasting your expert's credentials to point out an adverse witness's missing credentials

---

<sup>13</sup> *Id.*

<sup>14</sup> MODERN TRIAL ADVOCACY, Ch. 8, § VI, NATIONAL ASS'N FOR TRIAL ADVOCACY (1997).

#### D. Use of Learned Treatises<sup>15</sup>

1. Impeachment through the use of a learned treatise is a form of cross examination unique to expert witnesses. Under Federal Rule of Evidence 803(18), an expert witness may be confronted with statements contained in “published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art,” so long as they are established as reliable authority. Under Rule 803(18) the reliability of a learned treaties may be established either by admission of the witness, or by other expert testimony, or by judicial notice.
2. Challenge the Witness’s Impartiality<sup>16</sup>
  - a. Counsel must bring to the jury's attention all matters that may affect the objectivity of the expert, such as:
    - (1) Compensation paid to the expert, including whether higher compensation is paid for testifying than for normal consultations.
    - (2) Relationship with the plaintiff or the defendant.
    - (3) Relationship with plaintiff's or defendant's industry or other companies in that industry.
    - (4) Extent to which the expert testifies or consults in litigated matters.
    - (5) Whether the expert testifies exclusively for plaintiffs or defendants.
    - (6) Whether the expert offers the same opinion in every case.
    - (7) Relationship to opposing counsel.
    - (8) Interest in the outcome of the case, whether philosophical (an expert who testifies for "causes" he or she supports) or economic (expert's fee is contingent).
3. Point Out Omissions<sup>17</sup>

---

<sup>15</sup> *Id.*

<sup>16</sup> FEDERAL LITIGATION GUIDE § 35.12 (Matthew Bender & Co., Inc. 1999).

<sup>17</sup> MODERN TRIAL ADVOCACY, Ch. 8, § VI, NATIONAL ASS’N FOR TRIAL ADVOCACY (1997).

- a. A lawyer must pursue thorough discovery to determine whether processes were shortcut or slighted, preferably after first consulting his/her own expert.
  - b. Substitute Information<sup>18</sup>
    - (1) Change Assumptions — Ask the witness to alter an assumption, substituting one that you believe to be more in keeping with the evidence in the case.
    - (2) Vary the facts upon which the expert has relied, or suggest additional facts.
    - (3) Degree of Certainty — It is possible to challenge an expert's degree of certainty by suggesting alternative scenarios or explanations.
    - (4) Dependence on Other Testimony
      - (a) The opinion of an expert witness often depends upon facts to be established by other witnesses.
      - (b) Thus, the expert's testimony may be undermined by challenging its factual underpinnings during the cross examination of the fact witnesses.
      - (c) It is necessary only to obtain the expert's concession that the other witness's facts are essential to her opinion.
4. Challenge Technique or Theory <sup>19</sup>
- a. Challenging the witness's method, theory or logic is the most difficult form of expert cross examination. It is possible, but extremely unlikely, that an expert will agree that she made a mistake or that her reasoning is faulty. In most cases you have little to gain by confronting an expert with any but the most glaring flaws, since that will only afford her an opportunity to explain. It is usually far more effective to use your own expert to point out the opposition's errors and then to draw your own conclusions during final argument.

## II. Local Rules of Federal Court – District Court for the Eastern District of Virginia

### A. Expert Disclosures – Rule 26(D)

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

1. Rule 26(D)(1) Agreement upon disclosure
  - a. counsel is encouraged to agree on sequence and timing of expert disclosures required by Fed. R. Civ. P. 26(a)(2)
  - b. form: consent order entered by the Court
2. Rule 26(D)(2) timing of mandatory disclosure
  - a. absent consent or other order:
    - (1) Fed. R. Civ. P 26(a)(2) disclosures shall be made by:
      - (a) plaintiff – not later than sixty days before the earlier of date set for completion of discovery or final pre-trial conference, then evidence that is solely contradictory or rebuttal fifteen days after defendant’s disclosure
      - (b) defendant – thirty days after plaintiff’s original disclosures
3. Rule 26(D)(3) completion of disclosure
  - a. whether by agreement pursuant to subsection 11.1(A) or the schedule set by 11.1(B) all expert disclosures shall be complete not later than 30 days after the date upon which plaintiff is or would be required to disclose contradictory or rebuttal evidence
4. Rule 26(D)(4) general provisions
  - a. who are plaintiffs:
    - (1) counter-claim plaintiffs
    - (2) cross claimants
    - (3) third-party plaintiffs
  - b. interrogatories directed at expert for clarification of written reports disclosed pursuant to Fed. R. Civ. Proc. 26(a)(2) are due
    - (1) fifteen days after date of service

(2) see attached Local Rule 26(D); Fed. R. Civ. P. 26(a)(2); Fed. R. Evid. 702, 703 and 705.

### III. Federal District Court for the Eastern District of Virginia

#### A. Rule 26(D) — Expert Disclosures

1. The District Court for the Eastern District of Virginia Rule 26(D) expert disclosures incorporate the requirements of Fed. R. Civ. P. 26(a)(2). First, counsel is encouraged to agree to a consent order for the timing and sequence of all Fed. R. Civ. P. 26(a)(2) required disclosures.<sup>20</sup> Those disclosures require the disclosing party the identity and contact information for the expert, a written report of the expert's testimony and basis for the testimony.<sup>21</sup>
2. The timing of such disclosures shall be either by consent order or other court order. If neither of these is present the plaintiff shall disclose this information sixty (60) days before the earlier date of either the completion of discovery or the final pre-trial conference. The defense has thirty (30) days thereafter. Plaintiff then shall disclose solely contradictory or rebuttal evidence fifteen (15) days thereafter.<sup>22</sup>
3. Disclosure shall be completed not later than thirty (30) days after the date the plaintiff is or would be required to disclose contradictory or rebuttal evidence.<sup>23</sup>
4. For the purposes of this provision all counter-claim plaintiffs, cross-claimants and third-party plaintiffs shall be plaintiffs to all elements of their prospective claims.<sup>24</sup>
5. Answers to all interrogatories directed at clarification of the expert's written report shall be due fifteen (15) days after service.<sup>25</sup>

---

<sup>20</sup> Virginia (ED) Rules 26(D)(1).

<sup>21</sup> Fed. R. Civ. P. 26(A)(2).

<sup>22</sup> Virginia (ED) Rule 26(D)(2).

<sup>23</sup> Virginia (ED) Rule 26(D)(3).

<sup>24</sup> Virginia (ED) Rule 26(D)(4).

<sup>25</sup> Id.

B. Virginia (ED) Rule 26(D) Expert Disclosure.

1. *Agreement Upon Disclosure*: Counsel are encouraged to agree upon the sequence and timing of the expert disclosures required by Fed. R. Civ. P. 26(a)(2). All such agreements must be in the form of a consent order entered by the Court.
2. *Timing of the Mandatory Disclosure*: Absent such a consent order or unless ordered otherwise, the disclosures required by Fed. R. Civ. P. 26(a)(2) shall be made first by the plaintiff not later than sixty (60) days before the earlier of the date set for completion of discovery or for the final pretrial conference, if any; then by the defendant thirty (30) days thereafter. Plaintiff shall disclose fifteen (15) days thereafter any evidence that is solely contradictory or rebuttal evidence to the defendant's disclosure.
3. *Completion of Disclosure*: Whether accomplished by agreement pursuant to subsection 11.1(A) or pursuant to the schedule set by subsection 11.1(B), all parties shall complete all forms of expert disclosure and discovery not later than thirty (30) days after the date upon which plaintiff is, or would be, required by subsection 11.1(B) to disclose contradictory or rebuttal evidence.
4. *General Provisions*: For purposes of this rule, counter-claim plaintiffs, cross-claimants and third-party plaintiffs shall be plaintiffs as to all elements of the counter-claim, cross-claim or third-party claim. Answers to interrogatories directed at clarification of the written reports of expert witnesses disclosed pursuant to Fed. R. Civ. P. 26(a)(2) shall be due fifteen (15) days after service.

IV. Virginia Law

A. Common Law

1. Admissibility of expert testimony
  - a. Must not be within the range of common experience.<sup>26</sup>
  - b. Not admissible if members of the jury are competent to draw their own conclusions.<sup>27</sup>

---

<sup>26</sup> 219 Va. 716, 250 S.E.2d 749 (1979).

<sup>27</sup> Brown v. Corbin, 244 Va. 528, 423 S.E.2d 176 (1992).

- c. Subject need not be related to science, art, or learned or technical profession.<sup>28</sup>
  - d. Expert need only have sufficient expertise in the field, however obtained, that the expert's opinion will be of benefit to jury.<sup>29</sup>
  - e. General test is whether expert testimony assists finder of fact in understanding the evidence.<sup>30</sup>
  - f. Testimony may not be speculative or founded upon assumptions that have an insufficient factual basis.<sup>31</sup>
  - g. Questioning or contradiction of expert testimony has no bearing on admissibility.<sup>32</sup>
  - h. Admissibility is within the sound discretion of the trial judge.<sup>33</sup>
2. Expert testimony must be in form of opinion.
  3. Commonwealth is not required to provide a defendant with a list of its expert witnesses.
  4. An opponent of expert testimony need not wait until the evidence has been admitted to assert the challenge. He may raise the challenge prior to or at the trial.<sup>34</sup>
  5. It is within the court's discretion to determine how many expert witnesses a party may call.<sup>35</sup>
  6. Matters upon which expert testimony may be received include, but are not limited to

---

<sup>28</sup> Lakeside Inn Corp. v. Commonwealth, 134 Va. 696, 114 S.E. 769 (1922).

<sup>29</sup> Id.

<sup>30</sup> Tittsworth V. Robinson, 252 Va. 151, 475 S.E.2d 261 (1996).

<sup>31</sup> Id.

<sup>32</sup> Walrod v. Matthews, 210 Va. 382, 171 S.E.2d 180 (1969).

<sup>33</sup> Hegworth v. Virginia Natural Gas, Inc., 256 Va. 362, 505 S.E.2d 372 (1998).

<sup>34</sup> Commonwealth ex rel. Evans v. Harrison, 5 Va. App. 8, 360 S.E.2d 212 (1987).

<sup>35</sup> Maupin v. Maupin, 158 Va. 163, 164 S.E. 557 (1932).

- a. medical questions<sup>36</sup>;
  - b. valuation of a pension<sup>37</sup>;
  - c. valuation of a business enterprise<sup>38</sup>;
  - d. future dangerousness<sup>39</sup>;
  - e. life expectancy<sup>40</sup>; and
  - f. reasonableness of a defendant's fear of victim where self-defense is an issue.<sup>41</sup>
7. Matters upon which expert testimony may sometimes, but not always, be received include
- a. whether a person should have been hospitalized sooner<sup>42</sup>; and
  - b. accident reconstruction
- (1) While such testimony has sometimes been allowed, courts are highly reluctant to permit such testimony.
- (a) The basis for this reluctance is the pre-statute common law prohibition on opinion as to ultimate issues of fact. Since the relatively new statute allows such opinion on some occasions, it is possible that courts may become more tolerant of accident reconstruction testimony.<sup>43</sup>

---

<sup>36</sup> Little v. Cross, 217 Va. 71, 225 S.E.2d 387 (1976).

<sup>37</sup> Clements v. Clements, 10 Va. App. 580, 397 S.E.2d 257 (1990).

<sup>38</sup> Marion v. Marion, 11 Va. App. 659, 401 S.E.2d 432 (1991).

<sup>39</sup> Stewart v. Commonwealth, 254 Va. 222, 427 S.E.2d 394 (1993).

<sup>40</sup> Poloquin v. Daniels, 254 Va. 51, 486 S.E.2d 530 (1997).

<sup>41</sup> Peeples v. Commonwealth, 28 Va. App. 360, 504 S.E.2d 870 (1998).

<sup>42</sup> Commercial Distribs. v. Blankenship, 240 Va. 382, 397 S.E.2d 840 (1990).

<sup>43</sup> See Va. Code Ann. § 8.01-401.3.

(b) It is improper for any witness, lay or expert, including police officers, to express a conclusion regarding a motor vehicle accident.<sup>44</sup>

B. Statutory Law – Virginia Code § 8.01-401.1 and § 8.01-401.3

1. Expert testimony is admissible if it will “assist the trier of fact to understand the evidence or to determine a fact in issue....”<sup>45</sup>
  - a. Is this a more liberal standard than the common law requirement that the matter not be one that is within common knowledge? Courts appear to be interpreting the statute as maintaining the common law standard
2. Statute eliminates requirement that expert testimony be in the form of an opinion. Therefore, expert witness need not testify as to his opinion about the present litigation and need not even be familiar with the facts in the present litigation.<sup>46</sup>
3. Definition of expert witness remains the same as common law -- Expert need only have sufficient expertise in the field, however obtained, that the expert’s opinion will be of benefit to jury.<sup>47</sup>

C. Qualifications of Expert Witnesses

1. Qualifications must be established before expert may testify.<sup>48</sup>
  - a. Opposing party may stipulate.<sup>49</sup>
  - b. If opposing party does not stipulate, qualification must be shown and made part of the record.<sup>50</sup>

---

<sup>44</sup> Lopez v. Dobson, 240 Va. 421, 397 S.E.2d 863 (1990).

<sup>45</sup> Va. Code Ann. § 8.01-401.3.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Combs v. Norfolk & W. Ry. Co., 256 Va. 490, 507 S.E.2d 355 (1998).

<sup>49</sup> Id.

<sup>50</sup> Id.

2. Decision as to qualification is within sound discretion of trial judge.<sup>51</sup>
3. Statute and common law appear to be consistent regarding qualification of expert witnesses.<sup>52</sup>
  - a. There are no “degrees” of qualification. The witness will either be deemed qualified or not qualified.<sup>53</sup>
  - b. Witness need not be “highly” qualified. The witness must only be better qualified than the jury to form an inference from the facts.<sup>54</sup>
4. Being an expert in one field does not qualify a witness to testify on matters in another field or even in matters in another branch of his or her own field on which the witness may not have expertise. The expert’s testimony must not exceed his or her knowledge or area of expertise.<sup>55</sup>
5. The fact that a witness considers himself or herself to be an expert is not dispositive of his or her qualification as an expert.<sup>56</sup>
6. An expert’s competence should be established through voir dire. The court’s failure to give a party the opportunity to establish its witness’ credentials is reversible error.<sup>57</sup>
7. A party must object to the witness’ qualifications at trial. If a party fails to do so at trial, an objection as to a witness’ qualifications will not be noted on appeal.<sup>58</sup>

#### D. Basis of Expert Testimony

---

<sup>51</sup> Id.

<sup>52</sup> See Va. Code Ann. § 8.01-401.1 and 801-401.3.

<sup>53</sup> Chesapeake & Ohio Ry. v. Meyer, 150 Va. 656, 143 S.E.2d 478 (1928).

<sup>54</sup> Id.

<sup>55</sup> Combs v. Norfolk & W. Ry. Co., 256 Va. 490, 507 S.E.2d 355 (1998).

<sup>56</sup> Maxwell v. McCaffrey, 219 Va. 909, 252 S.E.2d 342 (1979).

<sup>57</sup> Parker v. Elco Elevator Corp., 250 Va. 278, 462 S.E.2d 98 (1995).

<sup>58</sup> Cook v. City of Waynesboro, 225 Va. 23, 300 S.E.2d 746 (1983).

1. No matter how well qualified the expert may be, his or her testimony must be based upon a proper foundation.<sup>59</sup>
2. The expert's opinion may be based upon
  - a. Firsthand knowledge – data made known to or perceived by the witness at or before the hearing or trial;<sup>60</sup>
    - (1) Includes hearsay sources if and only if they are of a type normally relied upon by experts in that field.<sup>61</sup>
    - (2) Applies only to civil cases – The Virginia Supreme Court has specifically declined to extend this rule to criminal cases.
  - b. Facts in evidence assumed in a hypothetical question;<sup>62</sup>
    - (1) When the expert witness has no personal knowledge of the facts, he or she must render the opinion based upon information presented in hypothetical form.<sup>63</sup>
      - (a) The use of a hypothetical question when a witness does have firsthand knowledge of the facts is considered harmless and is therefore not reversible error.<sup>64</sup>
    - (2) The question must embody all of the material facts – *i.e.*, all of the facts that the evidence tends to prove – affecting the question upon which the expert is asked to express an opinion.<sup>65</sup>

---

<sup>59</sup> Tarmac Mid-Atlantic, Inc. v. Smiley Block Co., 250 Va. 161, 458 S.E.2d 462 (1995).

<sup>60</sup> Walrod v. Matthews, 210 Va. 382, 171 S.E.2d 180 (1969).

<sup>61</sup> Papuchis v. Commonwealth, 15 Va. App. 281, 422 S.E.2d 419 (1992).

<sup>62</sup> Walrod v. Matthews, 210 Va. 382, 171 S.E.2d 180 (1969).

<sup>63</sup> Richmond v. Wood, 109 Va. 75, 63 S.E. 449 (1909).

<sup>64</sup> State Farm Mut. Auto Ins. Co. v. Futrell, 209 Va. 266, 163 S.E.2d 181 (1968).

<sup>65</sup> Ames & Webb, Inc. v. Commercial Laundry Co., 204 Va. 616, 133 S.E.2d 547 (1963).

- (3) An opinion based upon a hypothetical incorporating incorrect or incomplete data is inadmissible.<sup>66</sup>
  - (4) Objection to a hypothetical question must be prompt and specific.<sup>67</sup>
  - c. Testimony observed by the witness in the course of the trial;<sup>68</sup>
    - (1) Statutory law allows one expert witness for each party to remain in the courtroom throughout the trial upon the request of all parties in civil cases.<sup>69</sup>
  - d. Exhibits admitted into evidence;<sup>70</sup>
  - e. The witness' prior experience.
3. The expert's opinion may not be based upon
- a. Speculative, incorrect, or incomplete information;<sup>71</sup>
  - b. Mere assumption which has no evidentiary support;<sup>72</sup>
  - c. Another opinion;<sup>73</sup>

---

<sup>66</sup> Waitt v. Commonwealth, 207 Va. 230, 148 S.E.2d 805 (1966).

<sup>67</sup> Bowen v. Bowen, 122 Va. 1, 94 S.E. 166 (1917); Flannagan v. Northwestern Mut. Ins. Co., 152 Va. 38, 146 S.E. 353 (1929).

<sup>68</sup> Va. Code Ann. § 8.01-375.

<sup>69</sup> Id.

<sup>70</sup> Board of Supvrs. of Fairfax County v. Telecommunications Indus., Inc., 246 Va. 472, 436 S.E.2d 442 (1993).

<sup>71</sup> Tittsworth V. Robinson, 252 Va. 151, 475 S.E.2d 261 (1996).

<sup>72</sup> Tarmac Mid-Atlantic, Inc. v. Smiley Block Co., 250 Va. 161, 458 S.E.2d 462 (1995).

<sup>73</sup> McMann v. Tatum, 237 Va. 558, 379 S.E.2d 908 (1989).

- d. An hypothesis raised by the expert's own testimony;<sup>74</sup> or
- e. Failure by the witness to consider all variables;<sup>75</sup>
- f. An improper foundation – an assumption that is without foundation in the evidence;<sup>76</sup>
- g. Facts not in evidence.<sup>77</sup>

(1) However, when the expert relies on data customarily relied on and not used solely for the purpose of arriving at a specific opinion in the case, use of hearsay is not objectionable.<sup>78</sup>

- 4. The expert may give an opinion without first disclosing the underlying facts or data unless the court requires otherwise; however, the expert may be required to disclose the underlying facts or data on cross-examination.<sup>79</sup>
- 5. Treatises, periodicals, and pamphlets on a subject of history, medicine, or other arts and sciences established as a reliable authority by testimony or stipulation are not excludable as hearsay when relied upon by an expert witness.<sup>80</sup>

#### E. Expert Opinion on Ultimate Issue

- 1. Virginia courts are reluctant to permit expert witnesses to express an opinion upon the ultimate fact in issue.<sup>81</sup>
- 2. Exceptions to the general prohibition on expert opinion on ultimate issue include

---

<sup>74</sup> Doughty v. Commonwealth, 204 Va. 240, 129 S.E.2d 664 (1963).

<sup>75</sup> Tittsworth V. Robinson, 252 Va. 151, 475 S.E.2d 261 (1996).

<sup>76</sup> CSX Transp. Co. v. Catrale, 250 Va. 359, 463 S.E.2d 445 (1995).

<sup>77</sup> Simpson v. Commonwealth, 227 Va. 557, 318 S.E.2d 386 (1984).

<sup>78</sup> Kern v. Commonwealth, 2 Va. App. 84, 341 S.E.2d 397 (1986).

<sup>79</sup> Va. Code. Ann. § 8.01-401.1.

<sup>80</sup> Id.

<sup>81</sup> Llamera v. Commonwealth, 243 Va. 262, 414 S.E.2d 597 (1992).

- a. Medical witness opinion on cause of injury, illness, or death when the opinion:
    - (1) is submitted with reference to “causative factors,”
    - (2) is supported by evidence in the record,
    - (3) is based upon personal examination or a proper hypothetical question, and
    - (4) will help the jury;<sup>82</sup>
  - b. Standard of care in malpractice cases;<sup>83</sup>
  - c. Forensics (e.g., handwriting in forgery case);<sup>84</sup>
  - d. Damages;<sup>85</sup>
3. Counsel eliciting expert opinions on matters which are central to the case should be careful to avoid the use of legal terminology in framing questions so as to minimize the danger of running afoul of the “ultimate issue” prohibition. (E.g., Counsel should use the phrase “forcibly attacked” rather than “rape.”)
  4. An expert witness may not comment as to the credibility of other witnesses.<sup>86</sup>

#### F. Weight of Expert Testimony

1. Expert testimony is given the same weight as that of other witnesses – to be determined by the trier of fact on a case-by-case basis.<sup>87</sup>

---

<sup>82</sup> Waitt v. Commonwealth, 207 Va. 230, 148 S.E.2d 805 (1966).

<sup>83</sup> Bly v. Rhoads, 216 Va. 645, 222 S.E.2d 783 (1976).

<sup>84</sup> Savino v. Commonwealth, 239 Va. 534, 391 S.E.2d 276 (1990).

<sup>85</sup> R.K. Chevrolet, Inc. v. Hayden, 253 Va. 50, 480 S.E.2d 477 (1997).

<sup>86</sup> Davison v. Commonwealth, 18 Va. App. 496, 445 S.E.2d 683 (1994).

<sup>87</sup> McLane v. Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960); Burket v. Commonwealth, 248 Va. 596, 450 S.E.2d 124 (1994).

2. Expert testimony is not conclusive or binding on the trier of fact, whether jury or judge, even if uncontradicted.<sup>88</sup>
3. Expert opinion does not automatically override the opinion of lay witnesses.<sup>89</sup>
4. Disagreement among expert witnesses does not nullify the probative value of the testimony. It is for the trier of fact to determine what weight to accord the testimony of each expert.<sup>90</sup>

## V. ETHICAL CONSIDERATIONS

A. The Virginia Rules of Professional Conduct (effective January 1, 2000) and Legal Ethics Opinions (LEOs) rendered by the Virginia State Bar provide little direct guidance regarding the cross-examination of expert witnesses. However, the practitioner who deals with expert witnesses should be cognizant of several relevant Rules and LEOs, which are summarized below:

### 1. RULE 1.6 Confidentiality of Information

- a. A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client . . .
2. LEO # 1407 dealt with a law firm's representation of a doctor in two malpractice cases. The doctor later appeared as a witness for plaintiff in a case defended by another of the firm's lawyers. The doctor denied ever having been a defendant in a malpractice action, but the defense lawyer learned from one of his partners that the firm had earlier represented the doctor on two occasions. The Bar ruled that this information was a "secret" (although it could be obtained from public records) because it was gained in a professional relationship. The Bar therefore precluded continued representation of the client, since the lawyer could not effectively cross-examine the plaintiff's expert doctor (unless the doctor consented to disclosure of the confidential information about him).

### 3. RULE 3.3 Candor Toward The Tribunal

---

<sup>88</sup> Beale v. King, 204 Va. 443, 132 S.E.2d 476 (1963).

<sup>89</sup> Hitt v. Smallwood, 147 Va. 778, 133 S.E. 503 (1926).

<sup>90</sup> Ford Motor Co. V. Batholomew, 224 Va. 421, 297 S.E.2d 675 (1982).

- a. A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal;
  - (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;
  - (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
  - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- b. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- c. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- d. A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.
  - (1) This Rule specifically prohibits misrepresentations, misleading legal arguments, offers of false evidence, and perjury. More generally, it stresses that, “[t]he advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal . . .” The advocate, always an officer of the court, must be careful to ensure that all dealings with expert witnesses are supportive of this tenet.

#### 4. RULE 3.4 Fairness To Opposing Party And Counsel

- a. A lawyer shall not:
  - (1) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

- (2) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (3) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:
  - (a) Omitted
  - (b) Omitted
  - (c) a reasonable fee for the professional services of an expert witness.
- (4) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.
- (5) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.
- (6) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (a) the information is relevant in a pending civil matter;
  - (b) the person in a civil matter is a relative or a current or former employee or other agent of a client; and
  - (c) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
  - (d) Omitted
  - (e) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.  
Comments 1 and 7 to these rules are particularly applicable to the just treatment of parties and witnesses, to include experts.

- i) [1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
  - a) Following this principal, LEO #1678 held that a lawyer (acting directly or through an expert witness) may not "advise the other party's expert witness not to testify," although the lawyer has no duty to take any measures in response to the lawyer's expert acting independently in convincing the opposing expert not to testify (unless the "tampering" is a "fraud on the tribunal" or the lawyer hired the expert "merely to harass or maliciously injure plaintiff by subverting plaintiff's employment" of an expert, which did not occur here).
- ii) [7] In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

#### 5. RULE 4.4 Respect For Rights Of Third Persons

- a. In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- b. This Rule is clearly applicable to all advocacy activities. The comment to this Rule states that, "[r]esponsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons. The Committee adopted this Rule as a reminder that there is some limitation placed upon activities for which "zealous representation" might be offered as an excuse.

## VI. Federal Rules of Evidence Pertaining to Expert Witnesses

### A. Federal Rules Criminal Procedure 26(a)(1) and (a)(2).

#### (a) Required Disclosures; Methods to Discover Additional Matter.

##### (1) Initial Disclosures.

Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

##### (2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness.

The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

B. Federal Rules of Evidence 702, 703, 705 (including notes).

## RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

### NOTES TO RULE 702

HISTORY: (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937.)

Notes of Advisory Committee on Rules.

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical

question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705 .

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, *Expert Testimony*, 5 *Vand.L.Rev.* 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 *Wigmore* § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Preliminary draft of proposed amendments.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed the following amendment of Rule 702, dated August 15, 1991:

Testimony providing scientific, technical, or other specialized information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. Except with leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opinion or inference, or reason or basis therefor, that has not been seasonably disclosed as required by Rules 26(a)(2) and 26(e)(1) of the Federal Rules of Civil Procedure.

Committee notes.

This revision is intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues.

The use of such testimony has greatly increased since enactment of the Federal Rules of Evidence. This result was intended by the drafters of the rule, who were responding to concerns that the restraints

previously imposed on expert testimony were artificial and an impediment to the illumination of technical issues in dispute. See, e.g., McCormick on Evidence , § 203(3d ed., 1984). While much expert testimony now presented is illuminating and useful, much is not. Virtually all is expensive, if not to the proponent then to adversaries. Particularly in civil litigation with high financial stakes, large expenditures for marginally useful expert testimony has become commonplace. Procurement of expert testimony is occasionally used as a trial technique to wear down adversaries. In short, while testimony from experts may be desirable if not crucial in many cases, excesses cannot be doubted and should be curtailed.

While concern for the quality and even integrity of hired testimony is not new, *Winans v. New York & Erie R.R.*, 62 U.S. 88, 101 (1858); Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901), the hazards to the judicial process have increased as more technical evidence is presented:

When the evidence relates to highly technical matters and each side has shopped for experts favorable to its position, it is naive to expect the jury to be capable of assessing the validity of dramatically opposed testimony.

3J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, § 706[01] at 706-07(1985).

While the admissibility of such evidence is, and remains, subject to the general principles of Rule 403 , the revision requires that expert testimony be "reasonably reliable" and "substantially assist" the fact-finder. The rule does not mandate a return to the strictures of *Frye v. United States*, 293 F.2d 1013 (D.C. Cir., 1923) (requiring general acceptance of the scientific premises on which the testimony is based). However, the court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder. In civil cases the court is authorized and expected under revised Rule 26(c)(4) of the Federal Rules of Civil Procedure to impose in advance of trial appropriate restrictions on the use of expert testimony. In exercising this responsibility, the court should not only consider the potential admissibility of the testimony under Rule 702 but also weigh the need and utility of the testimony against the time and expense involved.

In deciding whether the opinion evidence is reasonably reliable and will substantially assist the trier of fact, as well as in deciding whether the proposed witness has sufficient expertise to express such opinions, the court, as under present Rule 702, is governed by Rule 104(a) .

The rule is also revised to complement changes in the Federal Rules of Civil Procedure requiring pretrial disclosure of the expert testimony to be presented at trial. The rule precludes the offering on direct examination in civil actions of expert opinions, or the reasons or bases for opinions, that have not been adequately and timely disclosed in advance of trial. It has not been unusual for the testimony given at trial by an expert to vary substantially from that provided under former Fed. R. Civ. P. 26(b)(4)(A)(i) or at a deposition of the expert. At a minimum, any significant

changes in an expert's expected testimony should be disclosed before trial, and this revision of Rule 702 provides an appropriate incentive for such disclosure in addition to those contained in the Rules of Civil Procedure.

Additions or other changes to an expert's opinions must, under Fed. R. Civ. P. 26(e)(1), be disclosed no later than the time the proponent is required to disclose its witnesses and exhibits that are to be used at trial. Unless the court has specified another time, these revisions must be disclosed at least 30 days before trial.

Of course, a witness should not be required to testify contrary to the person's oath or affirmation. If the witness is unable, consistent with the oath or affirmation, to testify in a manner consistent with the earlier disclosure, then--unless the court grants leave to deviate from the earlier testimony--the witness should not testify.

By its terms the new sentence applies only in civil cases. The consequences of the failure to make disclosures of expert testimony which may be required under new Fed. R. Crim. P. 16(a)(1)(E) and 16(b)(1)(C) will be determined in accordance with the principles that govern enforcement of the requirements of Fed. R. Crim. P. 16.

#### RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

#### NOTES TO RULE 703

HISTORY: (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987.)

Notes of Advisory Committee on Rules.

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources.

The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, *The Basis of Medical Testimony*, 15 Vand.L.Rev. 473, 489 (1962).

Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having

the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705 .

The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence.

Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F.Supp.

670 (S.D.N.Y. 1963) See also Blum et al, *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service*, 24 U.Chi.L.Rev. 1 (1956); Bonyng, *Trademark Surveys and Techniques and Their Use in Litigation*, 48

A.B.A.J. 329 (1962); Zeisel, *The Uniqueness of Survey Evidence*, 45 Cornell L.Q. 322 (1960); Annot., 76 A.L.R.2d 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.

See Comment, *Cal.Law Rev.Comm'n, Recommendation Proposing an Evidence Code 148-150* (1965).

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

## RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

### NOTES TO RULE 705

HISTORY: (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987.)  
(Amended Dec. 1, 1993.)

Notes of Advisory Committee on Rules.

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, *Expert Testimony*, 5 *Vand.L.Rev.* 414, 426-427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in the Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR

(McKinney 1963), provides: "Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based.

Upon cross-examination, he may be required to specify the data . . .,".

See also California Evidence Code § 802; Kansas Code of Civil Procedure §§ 60-456, 60-457; New Jersey

Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of

Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan.L.Rev. 455 (1962).

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

Notes of Advisory Committee on 1987 amendments to Rules.

The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments to Rules.

This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised Rules 26(a)(2)(B) and 26(a)(1) of the Federal Rules of Civil Procedure or with revised Rule 16 of the Federal Rules of Criminal Procedure, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

# Part 2 - Articles on Ethics

12 Geo. J. Legal Ethics 465

Georgetown Journal of Legal Ethics

Spring, 1999

\*465 EXPERT WITNESSES: ETHICS AND PROFESSIONALISM

Steven Lubet [FN1]

Copyright © 1999 Georgetown Journal of Legal Ethics; Steven Lubet

## INTRODUCTION

This Article surveys the undeveloped field of expert witness ethics and professionalism. It is common in modern litigation to call individuals from a vast array of professions to testify as expert witnesses. [FN1] Experts may be retained in commercial cases to interpret complex financial data, [FN2] in tort cases to explain the nature of injuries, [FN3] or in criminal cases to translate underworld "gang codes" into everyday language. [FN4] Properly qualified, an expert can be asked to peer into the past, as when an accident reconstructionist re-creates the scene of an automobile collision. Other experts may predict the future, as when an economist projects the expected life earnings of a deceased plaintiff in a wrongful death case. One recent survey of California civil jury trials determined that at least one expert testified in eight-six percent of all cases, with two or more opposing experts testifying in fifty-seven percent of the trials. [FN5]

What are expert witnesses' ethical obligations? This Article will attempt to provide some answers by addressing the interrelated concepts of "professional ethics" and "professionalism." The term "professional ethics" typically refers to the distinct, mandatory responsibilities undertaken by individuals in the course of practicing a trade or calling. Breaches of professional ethics may result in discipline, fee forfeiture, or other adverse consequences. In contrast, the term "professionalism" is often used to identify admirable, model, or ideal conduct \*466 that is generally expected within a given profession--but not absolutely required.

For example, professional ethics compel a physician to maintain a patient's confidences; [FN6] violating confidences may result in censure or worse. A sense of professionalism entails courtesy, clear communication, and punctuality; abandoning these standards may result in a loss of confidence or respect. The two concepts are not wholly distinct. Both are aspirational. Most professionals certainly do not adhere to ethical standards simply as a means of avoiding discipline or liability.

Many professional obligations are identical to personal ethics or moral standards. Outright lying, for example, would commonly be understood as both a moral fault and a violation of professional standards. In many circumstances, however, professional ethics may be quite different from personal ethics. While most citizens believe it their duty to report crimes, lawyers usually must maintain confidences even when the clients have revealed serious criminal behavior. [FN7] Conversely, physicians and social workers, among others, are expected to contact the authorities in cases of suspected child abuse, even in fairly minor situations where ordinary citizens might be justified in remaining uninvolved. [FN8] The comparison of personal and professional ethics is sometimes referred to as "role differentiation," because ethical requirements vary according to the role one has assumed. [FN9]

Of course, all expert witnesses are governed by personal ethics, and all must obey the rules of the courts in which they appear. Still, there is no single source that we can look to for a definitive statement of expert witnesses' professional \*467 ethics. A few organizations have attempted to draft codes of conduct for expert witnesses, [FN10] but none have achieved broad acceptance.

Experts may be drawn from virtually any field or calling, from aviation to zoology. In some cases the expert's own profession may have a well developed code of ethics, as with accounting, [FN11] medicine, [FN12] law, [FN13] and psychotherapy. [FN14] Such experts certainly must adhere to the standards of their own fields concerning matters such as confidentiality and conflicts of interest. They may even be subject to professional regulation or discipline for their conduct as witnesses.

Other professions are unlicensed or unregulated. A musician or composer, for example, might be called as a witness in a copyright case; economists are frequently called to testify in antitrust or tort cases. Neither profession has promulgated a code of ethics, and there are no generally recognized standards governing their conduct in forensic matters. The same is true of "human factors" experts, demographers, political scientists, penologists, journalists, and many others who are frequently called upon to testify in court.

The absence of an enacted code of conduct does not at all imply an absence of content-related professional standards. Academic and industrial scientists, for example, are expected to adhere to strict requirements of objectivity and to follow precise methods of investigation.

This Article deals with the topic of "role differentiated" ethics for expert witnesses. It covers questions that may not arise, or that may arise differentially, in the course of the expert's ordinary, non-forensic work. Specifically, this Article will explore the issues of independence, confidentiality, conflicts of interest, fees, and conduct during trial and discovery.

## I. INDEPENDENCE AND OBJECTIVITY

The single most important obligation of an expert witness is to approach every question with independence and objectivity. Expert testimony is only allowed if the expert's "specialized knowledge

will assist the trier of fact to understand the evidence." [FN15] The expert's opinion, in turn, cannot assist the fact finder's understanding unless that opinion is candidly and frankly based upon the witness's own investigation, research, and understanding.

An objective expert views the facts and data dispassionately, without regard to the consequences for the client. An independent expert is not affected by the goals \*468 of the party for which she was retained, and is not reticent to arrive at an opinion that fails to support the client's legal position.

#### A. COPING WITH LAWYERS

It will probably come as no surprise that there are lawyers who will attempt to influence the content of an expert's testimony. [FN16] After all, advocates want to retain experts for one reason only: to help win the case. Given the effort and expense involved, some lawyers will be tempted to see the expert as simply another member of the litigation team. While expert witnesses will obviously have to work closely with the lawyers who engage them, it is important to maintain a sharp distinction between their roles.

As an advocate in the adversary system, it is a lawyer's job to make the best possible argument in support of her client. A lawyer will often find herself advancing a position in the hope that it will work, without necessarily believing that the view is correct. Lawyers do not testify under oath. While they must be truthful concerning facts and accurate in their representations about the content of the law, [FN17] their opinions and arguments must always be adapted to the needs of their clients. In the classic formulation of the advocate's duty, Boswell reported that Samuel Johnson did not hesitate to raise arguments that he knew to be weak, saying, "... you do not know it to be good or bad till the judge determines it... An argument which does not convince yourself, may convince the judge to whom you urge it: and if it does convince him, why, then Sir, you are wrong and he is right." [FN18]

Experts, however, have no such latitude. As a witness testifying under oath, an expert is not entitled to state a position "which does not convince yourself" in the hope that it may convince the judge or jury. The entire system of expert testimony rests upon the assumption that expert witnesses are independent of retaining counsel, and that they testify sincerely.

Most lawyers understand and accept this on an intellectual level. Still, in the heat of adversary battle, it is not unknown for lawyers to seek to "extend" or "expand" an expert's opinion in just the right direction. This is wrong. It is no more acceptable for a lawyer to attempt to persuade an expert to alter her opinion than it would be to convince an eyewitness to change his account of the facts.

#### \*469 B. WORKING WITH LAWYERS

The need for independence and objectivity does not prevent experts from working closely with the lawyers who retain them. Litigation is a complex process, and it is important that attorneys be able to communicate with the experts working on the case. The lawyers will invariably have important information, and perhaps suggestions, that will facilitate the experts' work. Lawyers may also need

constant input from the experts as the case proceeds, so that they may adjust their goals and strategies in light of the experts' findings.

It is entirely legitimate for expert witnesses to cooperate closely with retaining counsel, so long as the relationship remains independent and professional roles are not blurred.

### 1. Information and Assumptions

To one degree or another, all experts depend upon retaining counsel for the information necessary to do their work. At a minimum, the attorney will have to provide the expert with an explanation of the case, a description of the questions to be addressed by the expert, and the documents or other sources necessary to the expert's assignment. This will ordinarily be an interactive process, with the expert and the lawyer exchanging questions and information.

In many cases the lawyer will also have to inform the expert of the precise legal standard that must be addressed. Of course, some scientific or technical questions may seem purely descriptive: What is the composition of a chemical compound? What caused a stress fracture? What is the standard maintenance schedule for the mechanical part in question? But, even in these situations, the expert may need to be aware of certain legal standards. The test for admissibility of an expert's opinion may vary from state to state. Thus, it is essential that the expert be aware of the relevant test followed in the particular jurisdiction. [FN19] This information can only come from retaining counsel. Moreover, it is certainly permissible for the expert to work with the attorney in order to make sure that her opinion is formed in a manner that will be admissible in court.

In other circumstances there may be legal rules that govern the necessary content of the expert's opinion. A psychologist, for example, may need to **\*470** understand a jurisdiction's legal test for insanity. It is entirely proper for the expert to obtain direction on such matters from the retaining attorneys.

An expert's opinion will often be dependent or contingent upon facts that must be provided by other witnesses. Such facts may or may not be readily accessible, and they will sometimes be hotly disputed between the parties. Counsel may therefore ask the witness to "assume" certain facts, rather than have the witness undertake an independent investigation. This is an appropriate way to proceed, so long as the assumptions are reasonable and clearly identified.

Conversely, not every fact in a case will eventually be allowed into evidence at trial. A lawyer may therefore ask an expert to disregard certain information, on the theory that it is legally irrelevant or inadmissible. An expert may ethically comply with such a request, since the admissibility of evidence is not within the witness' purview.

For example, suppose that an economist has been retained by the defendant in a "wrongful discharge from employment" case. The expert's task is to determine the plaintiff's damages in the event that liability is established. Depending upon the jurisdiction, the elements of such a damage claim might possibly

include back pay, future pay, and increments due to imputed promotions. A competent economist could calculate damages in all three categories, but would have no way of knowing which ones would be recognized by the court. Thus, the witness may rely on directions from counsel in determining which components to consider.

## 2. Suggestions and Questions

In addition to providing information and assumptions, a lawyer may also make suggestions to, or ask questions of, the retained expert. When done properly, this is simply part of the intellectual exchange between two professionals. There may be evident gaps in the expert's analysis, or the reasoning may not appear to support clearly the conclusions. The expert may not have adverted to all of the relevant factors. It is fair and appropriate for the lawyer to ask the expert to reconsider a conclusion in light of additional information. The retaining lawyer may ask pointed questions to make sure that the expert's position is thorough and valid. The attorney may suggest ways in which the opinion could be strengthened or supported.

On the other hand, it is unacceptable for a lawyer to attempt to pressure a witness into changing her opinion. A lawyer must ultimately be willing to take the bad news with the good, and to realize that an expert's opinion may be unfavorable to, or not fully supportive of, the client's position.

A lawyer with integrity will normally accept a negative opinion, or even appreciate it, since that may help counsel and client formulate a settlement strategy rather than take a losing case to trial.

## \*471 3. Trial Preparation

It is not unethical for a lawyer to assist an expert to prepare for trial or deposition. Counsel may inform the witness of the questions to be asked on direct examination, and may alert the witness to potential cross-examination. The lawyer may describe the deposition process to the witness and caution the expert about the risks of volubility. Counsel may likewise tell the witness if her answers seem confusing, unclear, or misleading, or if they are likely to be misinterpreted or misconstrued. An expert may be advised to use powerful language, to avoid jargon, to use analogies, to refrain from long narratives, or to use other means that will help her convey her opinion accurately.

Needless to say, a lawyer absolutely may not instruct a witness how to testify. [FN20]

## 4. Scope of Expertise

It is not unknown for an attorney to try to stretch a witness's expertise, either as a cost saving measure or in an effort to broaden the impact of the testimony. For counsel, the engagement of expert witnesses can be time consuming and expensive, therefore there is a natural impulse to see if the witness can do "double duty."

The situation is usually resolved simply by an appropriate inquiry. Either the witness is legitimately able to opine on the subject, in which case the engagement proceeds on that basis, or the witness lacks the necessary skills or qualification, in which case the subject is dropped.

More troubling is the possibility that some lawyers might try to induce or inveigle an expert to offer opinions that are truly beyond the scope of her expertise. Such testimony, if given, puts the witness out on a limb that may be sawed off during cross-examination. [FN21] Tactics aside, experts must be both qualified and independent. It is therefore unethical for a lawyer to tamper with the independence of an expert's views by attempting to persuade her to exaggerate her qualifications to give opinions outside her expertise.

Honorable experts will not allow attorneys to overstate the scope of their opinions, and honorable counsel will respect this position.

## II. CONFIDENTIALITY

Professional obligations of confidentiality are well recognized. Lawyers, physicians, psychotherapists, clergy, and accountants all operate under various duties of secrecy. It is important for professionals acting as expert witnesses to \*472 understand that these duties generally do not apply in situations where they have been retained for the purpose of testifying in court. [FN22]

Notwithstanding the usually privileged nature of their professional communications, expert witnesses may be expected, and even compelled, to reveal conversations that would otherwise be inviolate. The reason for this distinction should be obvious. Forensic evaluation and testimony do not fall within the ordinary practice of most professions. Communications made to a retained witness, for the purpose of facilitating testimony in court, do not fall within the "zone of privacy" necessary for the invocation of an evidentiary privilege. [FN23] Of course, many professionals--engineers, architects, economists, chemists, and others--do not ordinarily enjoy a privilege of confidentiality. Consequently, expert witnesses should assume that all of their communications, with either the client or retaining counsel, may be subject to disclosure through the process of discovery. Additionally, the witness' research files, work papers, notes, drafts, correspondence, and similar materials may have to be revealed to the attorneys for opposing parties. [FN24] In some jurisdictions it is possible that some items may be protected from discovery, but prudence dictates that the witness presume that her entire file will be an open book.

This is not to say, however, that the expert has no obligations of confidentiality to the client. Even in the absence of a separate ethical duty, principles of agency law require that an expert take reasonable steps to safeguard client confidences, [FN25] and refrain from using confidential information for self-enrichment [FN26] or other improper purposes. [FN27]

\*473 One recurrent issue involves the efforts of lawyers to contact opposing expert witnesses outside the processes of formal discovery. [FN28] Several courts have held that access to experts is limited by the discovery rules, and that all interviews must take place via deposition. [FN29] In a few jurisdictions,

however, extramural interviews have been found permissible. [FN30] But even in jurisdictions where the lawyer is permitted to contact the expert, there is no obligation that the expert respond. Most experts would consider it unprofessional, at the very least, to hold ex parte discussions with opposing counsel in the absence of notice to the retaining lawyer. At the extreme, unauthorized contact with an adverse party's expert may be considered witness tampering, perhaps leading to disqualification of the lawyer or witness, or other sanctions. [FN31]

Because of the complex interplay among professional ethics standards, rules of evidence, discovery, and other law, it is best to clarify expectations of confidentiality at the outset of every engagement. According to the ABA Standing Committee on Professional Conduct, a retention letter "should define the relationship, including its scope and limitations, and should outline the responsibilities \*474 of the testifying expert, especially regarding the disclosure of client confidences." [FN32]

### III. LOYALTY AND CONFLICTS OF INTEREST

For expert witnesses, issues of loyalty and conflicts of interest raise two different questions. First, if asked to opine in two unrelated cases, may a witness accept concurrent engagements for and against the same party or law firm? Second, may an expert switch sides in litigation?

#### A. UNRELATED ENGAGEMENTS

It is a well established rule of legal ethics that a lawyer may not engage in representation "directly adverse" to a current client. [FN33] Thus, even in completely unrelated cases, a lawyer may not simultaneously sue and defend the same party. [FN34] This rule is based upon the principle of attorney loyalty, which must never be diluted by undertaking obligations to adverse parties.

Expert witnesses, on the other hand, do not owe that sort of loyalty to their clients. An expert is not the client's "champion," pledged faithfully to seek the client's goals. Indeed, in many ways the expert's role is precisely the opposite. She must remain independent of the client and detached, if not wholly aloof, from the client's goals. [FN35] There is no reason that an objective expert could not conclude--and explain--that a party is correct in one case and wrong in another. Consequently, there is no general ethical principle that prevents an expert from accepting concurrent engagements both for and adverse to the same party. [FN36]

By the same token, it follows that an expert may concurrently work with and against a lawyer or law firm, testifying for the law firm's client in one case and against the firm in another. Since there is no rule against accepting concurrent adverse engagements, there is also no general restriction on testifying adversely to a former client or against a law firm that previously retained the expert.

The expert's freedom of action, however, is not absolute. As noted in the previous section, the law of agency imposes an obligation to refrain from exploiting a client's confidences for the benefit of another. [FN37] Thus, an expert should not accept conflicting engagements, either concurrently or successively, \*475 that are factually related, since this could risk exploitation or betrayal of a client's confidences. [FN38]

There is a further constraint on the acceptance of engagements, though it is difficult to quantify. It will surely cause a law firm or client great discomfort to see their expert turn up on the opposite side of another lawsuit. Though the matters may be unrelated, posing no threat to client confidences, the expert's dual position places counsel in the troublesome position of having to extol the expert's opinion in one case while attacking it in another. Needless to say, most lawyers would find this situation damaging to the expert's credibility in case one, damaging to the client's position in case two, or both. No doubt, the retaining lawyer would prefer to avoid this dilemma if possible, even if there is no ethical bar to the expert's actions.

As a matter of courtesy and professionalism, it is best to resolve this issue at the outset of every case. A lawyer may reasonably request that the expert refrain from accepting potentially adverse engagements, at least for the duration of the retention. The expert may accept or decline the proposed restriction, or may suggest other terms. The absence of an ethics rule does not prevent the attorney and expert from negotiating a mutually agreeable resolution to what could perhaps become a sticky problem. In any event, a forthright discussion of terms and conditions can prevent the development of an awkward situation down the road.

## B. SWITCHING SIDES

Imagine that an expert has been retained by the plaintiff in a lawsuit. The expert conducts her research and arrives at an opinion that is quite unfavorable to the plaintiff, who then discharges the witness. May the expert subsequently testify for the defendant, whose position is supported by the expert's work?

There is no per se rule that prohibits an expert witness from switching sides in a lawsuit. Since the expert's job is to arrive at an independent opinion, it cannot be disloyal for the witness to begin working for one party and end up working for the other. On a case by case basis, however, considerations of confidentiality and privilege will often operate to prevent an expert from switching sides. [FN39]

The answer to the question will ultimately depend upon the nature and extent \*476 of the relationship between the expert and the original client. In brief, an expert may not switch sides, even following discharge or release, if that would violate the original client's reasonable expectation of confidentiality. [FN40] This in turn will depend on a number of factors. How extensive was the communication between the expert and the client or the client's counsel? Was the expert provided with non-public or privileged information? Did the expert participate in strategy discussions with counsel, or otherwise learn of the client's decision-making strategy?

While the courts have used a variety of tests to weigh these factors, it is fair to say that the touchstone has invariably been access to confidential information. [FN41] Hence, an expert who only participated in a short preliminary discussion with one attorney would be free to accept retention from the other side. [FN42] Conversely, an expert who had performed an extensive fact investigation, working closely with counsel, would more likely be barred from switching sides. [FN43]

A further distinction should be made between a witness who is discharged (or who initially declined an engagement) and a witness who defects. There are few cases dealing with this phenomenon, no doubt because it seldom concerns. Nonetheless, a witness who deliberately sets out to switch sides, or who is lured away by opposing counsel, may well find herself disqualified from testifying in the case. Not only is such a witness likely to have compromised confidences, but a defecting witness also creates the appearance of chicanery. A court may bar the witness on the ground that her conduct (or counsel's) has been "prejudicial to the administration of justice."

Again, most difficulties can be avoided if there is frank discussion at the outset **\*477** of the engagement. A well-drafted retention letter will spell out the expert's duties and the client's expectations concerning confidential information, as well as the expert's options in the event of discharge or release. [FN44]

#### IV. FEES

Unlike other witnesses who can be reimbursed for only expenses, an expert may be paid a fee for preparing and testifying in court. [FN45] A variety of ethics issues arise in the context of experts' possible fee arrangements, including contingency fees, fee structures other than hourly billing, and non-refundable fees.

##### A. CONTINGENCY FEES

It is considered unethical in virtually every jurisdiction to pay an expert witness a contingency fee, [FN46] meaning a fee that is "contingent upon the content of [the] testimony or the outcome of the case." [FN47] Such fees are prohibited because they create an unacceptable incentive for the expert to tailor her opinion to the needs or interests of the retaining party. In other words, the expert's independence and objectivity become impaired when payment hinges on the success of the litigation.

A similar though not identical problem may be raised by other fee structures. Consider, for example, the practice of "value billing," which has increasingly been used by lawyers and consultants. [FN48] In value billing, the fee is eventually determined by the value or benefit conferred by the work, rather than by the number of hours devoted to the task. For expert witnesses, however, value billing can come uncomfortably close to charging on the basis of the content of the testimony.

**\*478** For example, imagine that an expert follows a policy of rebating or returning fees in the event that her opinion cannot be used by the retaining party. While the expert might justify this approach as an

effort to avoid excessive billing for unproductive work, it clearly results in additional compensation when the expert's opinion is favorable to the client. The same result occurs when the expert's hourly rate is adjusted (up or down) following the initial research or evaluation.

In order to avoid any suggestion of a "contingency," most experts bill at a constant hourly rate. [FN49] Of course, even in these circumstances, a favorable initial evaluation may presumably lead to further hours spent on preparation, deposition, and perhaps trial testimony. While this additional work will obviously result in greater total compensation, it is not considered a contingent fee.

## B. FLAT FEES, MINIMUMS, AND ADVANCES

In addition to hourly billing, other fee structures may include or combine flat fees, minimums, or retainers. Unless they are excessive, none of these devices present ethical problems.

A flat fee compensates the expert in a set amount for all, or some defined portion, of the work. For example, a flat fee could cover the entire engagement all the way through testimony at trial, or it could be determined in stages--perhaps one amount for the initial research and work-up, another if a written report becomes necessary, and a final amount for deposition and trial time. A minimum fee, usually used in conjunction with an hourly rate, ensures that the expert will be compensated at a certain level regardless of the amount of work ultimately involved in the case. An advance, sometimes also called a retainer, provides the witness with some or all of her payment at the outset of the engagement, rather than billing exclusively as work is performed.

To one degree or another, each of these fee structures provides additional security to the expert. In that sense, minimums, flat fees, and advances may be seen as the "flip side" of contingent fees. In each case, guaranteed payment becomes entirely disengaged from the content of the expert's opinion.

## C. LOCK-UP FEES

Some expert witnesses insist upon the payment of a nonrefundable "lock-up" fee at the outset of every engagement. The amount may be small or large, but in either case the purpose of the fee is to compensate the witness for agreeing to forego retention by the other parties in the litigation.

**\*479** As noted earlier, an expert who has received significant confidences from one party may not thereafter accept retention by the other side. [FN50] Thus, there is some financial risk, especially in the case of a prominent individual, when an expert agrees to begin working on a case. It may be only a few hours until the expert reaches an opinion adverse to the retaining client, yet the expert might then be precluded from doing further work, and billing numerous hours, for another party in the litigation. The lock-up fee resolves this dilemma by, in essence, providing the expert with a "signing bonus" in exchange for agreeing to work exclusively with one client in the matter.

When received by lawyers, particularly in criminal and divorce cases, nonrefundable retainers have been criticized as oppressive and exploitative. [FN51] A number of jurisdictions have either banned or sharply curtailed their use by attorneys. [FN52]

In this regard, however, expert witnesses do not operate under the same restraints as lawyers. The chief objection to the attorney's nonrefundable retainer is that the forfeiture of the retainer creates a defacto impediment to firing the lawyer. In turn, this chills the client's unfettered right to discharge counsel at any time without cost or penalty. But the same considerations do not apply to experts. To be sure, the client is always free to fire an expert witness, but no comparable public policy is served by ensuring that there is no financial loss to the client who does so. [FN53] Consequently, lock-up fees should not be considered unethical when used by expert witnesses.

## V. DISCOVERY

Discovery is the formal process by which lawyers are able to gain facts and information about the opposing party's case. A number of ethics issues also arise out of the discovery process, including communicating with adverse counsel, production of documents, and behavior during depositions.

### \*480 A. COMMUNICATING WITH ADVERSE COUNSEL

The Federal Rules of Civil Procedure, and the corresponding provisions in most states, place limits on the right of a lawyer to contact opposing counsel's experts. In brief, experts are divided into two categories: those who have been identified as "testifying experts"; and those who have been consulted but who have not (or not yet) been listed as witnesses. The later group of experts are sometimes called either "consulting experts" or "non-testifying experts." Although there are limited exceptions, only testifying experts are broadly subject to discovery. Purely consulting experts, other than in extreme circumstances, are exempt from discovery. [FN54]

As noted above, [FN55] an enterprising lawyer may occasionally seek an extracurricular interview with the opposing party's expert. Although the courts are somewhat divided on the propriety of this tactic, the majority view is that such contacts are prohibited in the case of both testifying and non-testifying experts.

While the discovery rules probably do not constrain the witnesses themselves, agency principles require reasonable steps to maintain a client's confidences. A responsible expert, therefore, should notify retaining counsel in the event that she is approached for substantive information by the attorney for an adverse party.

### B. PRODUCTION OF DOCUMENTS

As we have seen, a testifying expert's entire file will usually be subject to full disclosure to the adverse party. On the other hand, a non-testifying expert's materials are only discoverable under very unusual

circumstances. Of course, discoverability is a legal question, to be resolved by the lawyers and court. Experts are neither expected nor allowed to decide on their own which materials should and should not be disclosed.

Discovery requests to experts are channeled through retaining counsel. Typically, the attorney will ask the expert for a described set of materials (perhaps "everything") and the expert will either copy the materials or turn over the originals. The lawyer will then decide which items must be produced to the other side. In some situations, especially in criminal cases, materials may be sought directly from the witness via subpoena.

It is unethical, and perhaps even criminal, to conceal or destroy material that has been subpoenaed or requested in discovery. [FN56] Of course, disclosure may be \*481 resisted. There can be objections to discovery and subpoenas may be quashed. But that process nonetheless requires good faith compliance, or at least acknowledgement of the existence of the requested items.

An expert may ordinarily rely upon the decisions of retaining counsel with regard to discoverability. It is not unusual for a lawyer to advise a witness that certain documents must be produced while others need not be. In either case, however, the witness must forthrightly answer questions about the existence and location of documents or physical objects relevant to the expert's work.

Most important, an expert should never destroy any item, document, object, photograph, or record for the purpose of concealing it from discovery or obstructing another party's access to evidence. Of course, papers and objects may be discarded in the course of "housekeeping," but any item that has been requested in discovery must be preserved until the request has been complied with by the expert or disallowed by a court.

### C. DEPOSITIONS

A deposition is pretrial testimony, taken under oath for the purpose of discovering what the witness has to say. Depositions generally proceed in a lawyer's office. There is no judge present, and consequently there is no one there to resolve disputes between the attorneys or to instruct the witness how to proceed. There are relatively few ethics problems exclusive to depositions, though all of the standard issues such as confidentiality, coaching, and candor certainly can and do arise. In addition, the fact that no judge is present during the testimony raises one unique question.

From time to time in the course of almost every deposition, lawyers are inclined to confer with their witnesses. Sometimes the conference occurs "off the record," either in whispers at the table, or during a formal recess. Other times the lawyer speaks directly to the witness "on the record," with all counsel present and the court reporter busily transcribing everyone's remarks. On-record comments often come in the form of instructions or advice to the witness. Either circumstance can quickly become uncomfortable for an expert, especially if the witness is unfamiliar with local procedures.

## 1. Conferring Off the Record

Jurisdictions differ widely, one is almost tempted to say wildly, about the acceptability of conferences between lawyer and witness in the course of a \*482 deposition. It was once considered routine almost everywhere for lawyers to pull aside their witnesses so long as there was no question pending at that particular moment. While most such conferences were no doubt conducted in good faith to clarify a point, to preserve a confidence, or to calm down a nervous witness, they were also the occasion of much abuse. Too many lawyers used off-record conferences to obstruct the deposition, coach the witness, or worse.

In a predictable reaction, courts in many jurisdictions have now issued rules or orders that significantly limit a lawyer's right to confer with a witness during deposition. The most drastic restrictions prohibit all conferences, other than those necessary to determine the applicability of an evidentiary privilege. [FN57]

Though the clear trend is toward regulation, if not outright elimination of witness conferences, it has not taken hold everywhere. Consequently, expert witnesses may face a great variety of environments, and may not always be able to count on the lawyers for clear or knowledgeable directions. [FN58] What is a witness to do?

The rules of deposition procedure are aimed primarily at counsel, and lawyers are expected to understand and follow the rules. Consequently, experts may generally rely on counsel's representations concerning the acceptability of off-record conferences. Certainly, if the deposing lawyer does not object, the witness has little reason to be concerned about the propriety of the conference.

On the other hand, the deposing lawyer may well object. The following scenario places the witness in an extremely awkward position.

RETAINING LAWYER: Excuse me, but I need to confer with the witness for a moment before you ask the next question. Let's go off the record.

DEPOSING LAWYER: Off-record conferences are not permitted in this jurisdiction, especially with expert witnesses. Let's proceed.

RETAINING LAWYER: You're wrong about that. We're going off the record.

DEPOSING LAWYER: I object. If you insist on conferring off the record you will be putting yourself and the witness at risk of contempt of court. I will seek a protective order and I intend to enforce it.

RETAINING LAWYER: Bunk. I'm taking my witness out of the room. I'll tell you when we are ready to reconvene. (Speaking to witness) Let's get of here.

It is not the witness's job to resolve this squabble between the attorneys. While \*483 there must be an answer to the controversy--the conference is either allowed or it is not--the witness ordinarily has no way of knowing which lawyer is correct.

Unless the witness has reliable independent knowledge of the jurisdiction's rule, the best approach to this problem is probably to follow the directions of the retaining lawyer. Recall that an expert has specific professional obligations to the client, including a duty to take reasonable steps to protect certain confidences. It is the retaining lawyer who speaks for the client, and it is the retaining lawyer who is most knowledgeable about the effect of the deposition upon the client's confidences. Hence, the prudent path is usually to accept the retaining lawyer's understanding of the rules.

Nonetheless, experts should be aware that retaining counsel is not infallible. An expert should never violate or disregard a court order, no matter how many assurances are forthcoming from retaining counsel. Even where conferencing is freely allowed, an expert should likewise never permit retaining counsel to dictate or alter the content of her testimony. In extreme or extraordinary circumstances, the expert should consider whether she needs to consult her own attorney.

## 2. Instructions or Directions

From time to time, retaining counsel may interrupt a deposition by giving instructions directly to the witness. For example, if the lawyer believes that a particular question is improper, or that it seeks privileged information, the witness may be directed not to answer. Such instructions generally occur on the record, often attended by spirited argument between the lawyers. The following colloquy is typical, including the ultimate challenge to the witness.

RETAINING LAWYER: I object to that question since it calls for "work product." I instruct the witness not to answer.

DEPOSING LAWYER: You waived work product when you designated the witness as a testifying expert. The question stands.

RETAINING LAWYER: You can ask what you want, but the witness is not going to respond. If you want an answer you'll have to take it before the judge.

DEPOSING LAWYER: This witness is not your client. You can object, but you cannot give her any instructions. I am going to ask the question one more time. If the witness refuses to answer we have no choice but to certify the question and get a court order compelling her to answer. (Speaking to the witness) Are you going to follow your lawyer's instructions and refuse to answer my question?

\*484 The witness is now in a bind. Retaining counsel has instructed her not to answer a question but the deposing lawyer insists threatening court action if she refuses. Which lawyer is right? Which one should the witness believe? Most important, how should the witness respond?

As is often the case, it turns out that each lawyer is partially correct, and each is partially wrong. It is imperative that the retaining lawyer take the necessary steps to protect privileged information, including so-called "work product." [FN59] Those steps may well include preventing an expert witness from disclosing otherwise undiscoverable information during a deposition. The deposing lawyer is accurate, however, in pointing out that the retaining lawyer does not represent the witness and cannot give her instructions. Although this might seem to confuse the matter, it actually suggests a clear course of conduct for the expert.

The witness must always be sensitive to the need to shield privileged information. Once information has been revealed, it may lose its protected nature even if the deposing lawyer was never entitled to it in the first place. [FN60] This "cat out of the bag" rule requires extreme caution in responding to questions that have drawn objections. And while it is true that retaining counsel cannot instruct an expert to refrain from answering, that does not mean that the witness must answer.

Here is the solution. If the witness improperly declines to answer, the information can always be provided later. Thus, there is relatively little harm in refusing to answer a particular question, pending resolution by the lawyers or a ruling by the court. On the other hand, information can never be retrieved once it has been disclosed. Great damage can be done by ignoring an objection and by proceeding to reply.

Thus, in the absence of other factors, the best approach for a witness is to decline to answer questions once retaining counsel has objected on the basis of privilege or confidentiality. [FN61] A polite refusal to answer will preserve the objection so that it may, if necessary, be brought before the court, as in the following example.

DEPOSING LAWYER: Are you going to follow your lawyer's instructions and refuse to answer my question?

EXPERT WITNESS: I am not following anyone's instructions, but I decline to answer that question. It is not my job to resolve disputes between counsel about privilege or discoverability.

\*485 One last point. Note that the deposing attorney made a sly reference to "your lawyer's instruction." Retaining counsel is not the witness's lawyer. Expert witnesses are almost never represented by counsel at a deposition. The expert is there to provide an independent analysis and opinion. Since the expert is not a party to the case, the expert is not represented by either of the attorneys.

## VI. TRIAL CONDUCT

As with discovery, the basic principles of professional ethics govern an expert witness's conduct at trial. In addition, the expert must be aware of the following "trial specific" issues, including ex parte communication, third party communication, and excluded evidence.

## A. EX PARTE COMMUNICATION

### 1. Judges

Ex parte communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter. [FN62] During trial, it is normally prohibited for the judge to participate in a conversation that includes only one side of the case. Of course, the judge can engage in pleasantries with a single lawyer, and certain matters may legitimately be heard without all parties present. [FN63] But on matters related to the case at hand, the general rule is that all communication with the court must take place in the presence of all attorneys.

Thus, expert witnesses should avoid engaging in private conversations with the court. Should the expert incidentally come in contact with the judge, perhaps in the hall or away from the courthouse entirely, care should be taken not to discuss the substance of the case or the content of the witness's testimony.

It occasionally occurs that an ex parte interview between the court and a witness is either authorized by law or agreed to by the parties. In those \*486 circumstances, the witness may (and should) communicate candidly with the judge.

Unfortunately, it also occurs that judges seek out witnesses even without legal justification. [FN64] Perhaps the judge is curious, incautious, or simply unaware of the extent of the rule against ex parte communication. Whatever the reason, such contact can obviously cause much discomfort for the witness. Most witnesses would never presume to question the judge's knowledge of law or ethics. And, of course, the judge is the judge, perhaps the interview is permitted under the circumstances of the case?

Unless the circumstances are clearly improper, it may be extremely difficult for an expert witness to refuse a judge's request for a private interview. In all situations, however, the occurrence of such an interview should immediately be reported to all counsel in the case.

### 2. Jurors

All communication between an expert witness and the jurors must take place from the witness stand. It is never permissible for a witness to engage in private discussion with a juror. When encountering jurors in the courthouse hallway or cafeteria, contact should be limited to a polite smile or greeting. Under no circumstances should a witness ever discuss a case with a sitting juror.

## B. THIRD PARTY COMMUNICATION

Once a trial has begun, and particularly after the witness has taken the stand, there are significant limits on the propriety of a witness's communications with others, including other witnesses, counsel, and members of the press.

### 1. Other Witnesses

Many courts follow a policy of excluding witnesses from the courtroom while other witnesses are testifying. [FN65] Experts are often excepted from such orders, but that is not always the case. Thus, an expert witness should always check with retaining counsel before attending the trial as an observer.

Equally important, experts must understand that the exclusion of witnesses is meant to prevent them from gaining knowledge of other witnesses' testimony; it is not merely a prohibition against sitting in the courtroom. Thus, an expert \*487 should not debrief another witness who has already testified and should not read the transcript of earlier testimony, other than at the direction of trial counsel.

### 2. Counsel

Once a witness has taken the stand, what matters may she discuss with retaining counsel during breaks and recesses? There is no single answer to this question, as the rules vary considerably from jurisdiction to jurisdiction.

In some courts it is considered improper for a witness who has already taken the stand to have any contact whatsoever with any of the attorneys in the matter. In other jurisdictions, witnesses may speak with counsel, but not about the substance of the case. In yet other jurisdictions, the witness and the lawyer may speak freely, but the content of any discussion may be explored on cross-examination.

Complicating matters further, there is no unanimity as to when the various restrictions begin to apply. Thus, some states allow continuing lawyer-witness contact until the end of the direct examination, barring only once the witness has been "tendered for cross." In other courts, the ban on communication begins as soon as the witness is placed under oath.

Needless to say, expert witnesses should determine the applicable rule for the court in question. Whatever the rule, the witness should comply.

### 3. The Press

In the absence of a gag order or secrecy statute, witnesses are free to speak with the press about the trials in which they have participated.

A sense of professionalism, however, may well counsel restraint. Ordinarily, a party to litigation does not retain an expert for the purpose of speaking to the press. The party may not want the case

publicized and may not want to risk the exposure of confidences. In this regard, experts should take their cue from retaining counsel.

### C. EXCLUDED EVIDENCE

With or without the expert's knowledge, certain evidence may have been ruled inadmissible by the court. While judges most often make evidentiary rulings in response to objections at trial, they may also rule on motions in limine before the expert ever takes the stand. Once evidence has been ruled inadmissible, either during or before the witness's testimony, it is unethical to sneak it in "through the back door." [FN66] Thus, if an expert has been instructed to refrain from testifying \*488 about certain facts or on certain issues, the witness should not attempt to blurt out the proscribed information on the pretext of answering an unrelated question.

### VII. POSSIBLE LIABILITY FOR NEGLIGENCE

While the doctrine of witness immunity has traditionally protected experts from litigation arising out of their forensic work, [FN67] a theory of expert witness negligence may be emerging. [FN68] The term "theory" is apropos; to date no such standard has been firmly established. [FN69] Nonetheless, some argue for its inception, [FN70] and a hand-full of courts have warmed to the notion. [FN71]

### CONCLUSION

As modern litigation continues its march toward increasing technical complexity, it will become more important to define and understand issues of ethics and professionalism as they relate to expert witnesses. This Article was intended as a first step in that direction. While it may not have answered all of the most important questions, perhaps it has succeeded in raising the right issues.

[FN1]. Professor of Law, Northwestern University. Thanks are due to Jill Trumbull-Harris, Northwestern University School of Law class of 2000, for research assistance. This Article is adapted from STEVEN LUBET, *EXPERT TESTIMONY: A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM* (1998).

[FN1]. See Michael A. Graham, *Expert Witness Testimony and the Federal Rule of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43, 45 (1986) (noting that practicing lawyers can locate quickly and easily an expert witness to testify in nearly every sort of case); see also *Defendants File Expert List with Texas District Court*, 11 MEALEY'S LITIG. REP.: TOBACCO (Mealey) No. 5 (July 3, 1997) (listing the 101 proposed expert witnesses for the defense in Texas' Medicaid recovery action against the American Tobacco Company).

[FN2]. See, e.g., *Lazy Oil v. Witco Corp.*, 1997 U.S. Dist. LEXIS 21397 (W.D. Pa. 1997) (discussing issues relevant to the settlement of an antitrust class action suit).

[FN3]. See, e.g., *GE v. Joiner*, 522 U.S. 136 (1997) (discussing the appropriateness of certain witnesses in testifying about the nature of injuries).

[FN4]. See, e.g., *United States v. Williams*, 81 F.3d 1434, 1441 (7th Cir. 1996) (finding the designation of a gang member defendant as an expert appropriate where his "specialized knowledge" enabled him to translate "gang codes" for the jury).

[FN5]. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1119-20.

[FN6]. *PRINCIPLES OF MEDICAL ETHICS V* (Am. Med. Ass'n 1996).

[FN7]. *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.6 (1996) [hereinafter *MODEL RULES*].

[FN8]. Ark. Code Ann. § 12-12-504(a) (Michie 1987); 325 Ill. Comp. Stat. 5/4 (West 1994); Minn. Stat. Ann. § 626.556 (West 1992). Note also that in most states the duty to report supersedes any privilege of confidentiality. See *Jaffee v. Redmond*, 518 U.S. 1 (1996) (discussing Supreme Court recognition of both a psychotherapist-client and social worker-client privilege and noting that all 50 states and the District of Columbia already recognize some form of a psychotherapist-client privilege and the vast majority of states extend that privilege to licensed social workers); see also *id.* at 28 n.19 (noting "we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist"); *United States v. Burtrum*, 17 F.3d 1299, 1302 (10th Cir. 1994) (discussing how child abuse is generally an exception to these privileges since it "occur[s] in a clandestine manner and victimize[s] a vulnerable segment of society" and declining to recognize a psychotherapist/client privilege in a criminal child sexual abuse case and commenting that "moreover, minor victims often are intimidated by the legal system and may have difficulty testifying" and recommending special trial procedures for child victims); Thomas R. Malia, *Annotation, Validity, Construction, and Application of Statute Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect*, 44 A.L.R.4th 649 (1987) (listing and discussing cases).

[FN9]. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DAVID LUBAN, *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 38-39 (1983); Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

[FN10]. See, e.g., *ETHICAL GUIDELINES FOR OCCUPATIONAL AND ENVIRONMENTAL MEDICINE EXPERT WITNESSES* (Am. College of Occupational & Env'tl. Med. 1997); *ETHICAL PRINCIPLES AND CODE OF CONDUCT* § 7 (Am. Psychological Ass'n 1992).

[FN11]. See, e.g., *CODE OF PROFESSIONAL CONDUCT* (Am. Inst. of Certified Pub. Acct. 1997).

[FN12]. See, e.g., PRINCIPLES OF MEDICAL ETHICS (Am. Med. Ass'n 1996).

[FN13]. See, e.g., MODEL RULES.

[FN14]. See, e.g., Am. Psychological Ass'n, *supra* note 10.

[FN15]. Fed. R. Evid. 702.

[FN16]. See Lester Brickman & Ronald Rotunda, When Witnesses Are Told What to Say, WASH. POST, Jan. 13, 1998, at A15 (noting that lawyers may overstep and put their words in the mouths of witnesses); Jan Crawford Greenburg, The Whole Truth ... and Nothing But; The Line Between Coaching Witnesses and Obstructing Justice Is a Lot Fuzzier Than You Would Think, CHI. TRIB., June 7, 1998, at C1 (noting that even prosecutors can "improperly shape witness' testimony"); Larry Tye, Boom in Experts For Hire Worries Trial Observers, BOSTON GLOBE, Oct. 26, 1997, at A1 (commenting that lawyers may influence testimony by limiting questions asked).

[FN17]. MODEL RULES Rule 4.1.

[FN18]. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 47 (1887).

[FN19]. The current standard for admitting expert scientific testimony in federal trials was set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the court stated that the trial judge must determine at the outset whether the expert is proposing to testify to "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592. The Court stated that in order to "qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." *Id.* at 590. The Court noted four nonexhaustive factors that would bear on this inquiry: (1) falsifiability, (2) peer review, (3) rate of error, and (4) general acceptance. *Id.* at 593-94. In *Kumho Tire Co. v. Carmichael*, the court applied the same four factors to non-scientific expert testimony. 119 S. Ct. 1167 (1999). See also *GE v. Joiner*, 522 U.S. 136 (1997) (holding that appellate courts reviewing a trial court's decision to admit or exclude expert testimony should apply the abuse of discretion standard).

[FN20]. MODEL RULES Rule 3.1 cmt. 1.

[FN21]. See STEVEN LUBET, MODERN TRIAL ADVOCACY 244-45 (2d ed. 1997) (listing techniques for cross-examining expert witnesses).

[FN22]. Even where the witness was not retained for the purpose of testimony, as in the case of a treating physician, most professional privileges are waived once the witness is called to testify. Gross, *supra* note 5, at 1223.

[FN23]. See Fed. R. Civ. P. 26(a)(2)(B) (declaring that discovery disclosures include the expert's written report, which "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions ..."). The accompanying commentary states that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions-- whether or not ultimately relied upon by the expert-- are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." *Id.*

[FN24]. Some courts have gone even further. In *Herrick Co. v. Vetta Sports, Inc.*, the judge ordered an ethics expert to turn over to plaintiffs the records of 18 unrelated matters on which he had consulted with the defendant law firm. No. 94 Civ. 0905, 1998 U.S. Dist. LEXIS 14544 (S.D.N.Y. Sept. 14, 1998). In fact, the disclosure order extended to nine matters in which the content of the expert's opinion had not previously been disclosed to third parties. Though such information "would normally be shielded by the work product doctrine or attorney-client privilege," the court held that these protections were waived once the expert was designated as a potential witness. *Id.*

[FN25]. See RESTATEMENT (SECOND) OF AGENCY § 395 (1958) ("Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency ...").

[FN26]. See *id.* § 388 ("Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.").

[FN27]. Other law may also limit the expert's use of confidential information. For example, an economics expert may obtain "insider information" concerning a publicly traded corporation. The use of this information for investment purposes could constitute a crime under the federal Securities Exchange Act.

[FN28]. See Fed. R. Civ. P. 26(b)(4)(A) (1993) (allowing parties to depose "any person who has been identified as an expert whose opinions may be presented at trial"); see also *id.* 26(b)(4)(B) (declaring, in part, that "a party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial").

[FN29]. See *Erickson v. Newmar Corp.*, 87 F.3d 298, 302-03 (9th Cir. 1996) (finding an attorney guilty of "misconduct" that was "prejudicial to the administration of justice" following an ex parte meeting with opposing counsel's witness); *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 26 (9th Cir. 1980) (finding that an attorney commits a "flagrant violation" of federal rule of civil procedure 26(b)(4)(A) if she makes ex parte contact with an opposing party's expert witness); *Heyde v. Xtraman, Inc.*, 404 S.E.2d 607, 611 (Ga. Ct. App. 1991) (holding that an attorney who does not follow the proper discovery

procedures regarding expert witnesses "should not now be allowed to circumvent them by engaging in ex parte communications with the opposing party's expert"); see also GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 3.4, at 402 (2d ed. Supp. 1994) (concluding that, "Since existing rules of civil procedure carefully provide for limited and controlled discovery of an opposing party's expert witnesses, all other forms of contact are impliedly prohibited"). Although the Model Rules do not squarely address this issue, the ABA Committee on Ethics and Professional Responsibility declared that "a lawyer who engages in such contacts may violate Model Rule 3.4(c)." ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 93-378 (1993). This applies only if "the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule of Civil Procedure 26(b)(4)(A). *Id.* Model Rule 3.4(c) states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." MODEL RULES Rule 3.4(c).

[FN30]. See *Brown v. Hamid*, 856 S.W.2d 51, 54-55 (Mo. 1993) (holding that the trial court did not err in failing to sanction improper ex parte contact because prejudice to the complaining party was not shown); see also *Brandt v. Pelican*, 856 S.W.2d 658, 661 (Mo. 1993) (finding no grounds for a new trial where an expert medical witness had also served as plaintiff's treating physician).

[FN31]. See *Erickson*, 87 F.3d at 300 (denying plaintiff's motion for judgment against the defendant for tampering with a material witness when defense counsel asked the plaintiff's expert witness to evaluate evidence in an unrelated case).

[FN32]. ABA Standing Comm. on Prof. Conduct, Formal Op. 97-407 (1997).

[FN33]. MODEL RULES Rule 7.1.

[FN34]. See *id.* Rule 1.7(a) (stating that a lawyer may engage in such representation only if each client consents following disclosure).

[FN35]. "A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert." ABA Standing Comm. on Prof. Conduct, Formal Op. 97-407 (1997).

[FN36]. There is authority that one person may testify for both sides (on different issues) in the same lawsuit. *Id.*

[FN37]. See *supra* notes 20-21 and accompanying text.

[FN38]. See, e.g., *Theriot v. Parish of Jefferson*, 1996 U.S. Dist. LEXIS 9713 (E.D. La. 1996) (disqualifying an expert where a case amounted to "an outgrowth of ... prior litigation" in which expert was consulted by, and testified for, the adverse party). Note that the affected clients could consent.

[FN39]. Courts have developed the following test for determining whether an expert should be disqualified for switching sides. "First, was it objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed? Second, was any confidential or privileged information disclosed by the first party to the expert?" Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1178, 1181 (5th Cir. 1996). If a negative answer is given to either prong, "disqualification is likely inappropriate." Wang Lab., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1248 (E.D. Va. 1991). Additionally, "many lower courts have considered a third element: the public interest in allowing or not allowing an expert to testify." Koch, 85 F.3d at 1181. The party seeking disqualification bears the burden of proving these elements. Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 580 (D.N.J. 1994).

[FN40]. "[N]o one would seriously contend that a court should permit a consultant to serve as one party's expert where it is undisputed that the consultant was previously retained as an expert by the adverse party in the same litigation and had received confidential information from the adverse party pursuant to the earlier retention. This is a clear case for disqualification." Toshiba, 762 F. Supp. at 1248. Note that both elements of the test must be proven in order to disqualify the expert; even if a confidential relationship exists, disqualification is inappropriate unless some privileged or confidential information passed. If this were not the rule, then a lawyer could potentially disqualify an expert merely by retaining him, with no intention of actually using the expert's services, to disable his opponent from using the expert for himself. Id.

[FN41]. See Hansen v. Umtech Industrieservice Und Spedition, No. CIV.A.95-516 MMS, 1996 U.S. Dist. LEXIS 10949, 20 (D. Del. July 3, 1996) (noting that "the most important consideration in expert disqualification cases ... is the preservation of confidentiality").

[FN42]. See, e.g., English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498 (D. Colo. 1993) (refusing to disqualify an expert on the grounds that no confidential information had been given to the expert); Mayer v. Dell, 139 F.R.D. 1 (D.D.C. 1991) (refusing to disqualify an expert where no confidential relationship was found with an original client).

[FN43]. See, e.g., Toshiba, 762 F. Supp. at 1248 (disqualifying an expert who was given a detailed memorandum containing a patent file history and potential defenses to the lawsuit, both of which were protected confidential work products); Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271 (S.D. Ohio 1988) (disqualifying an expert who switched sides after having extensive involvement with the original client, including a retainer agreement and compensation, reviewing case material, and preparing an oral report).

[FN44]. See *infra* Section IV.C. (concerning the relationship between preclusion and fee arrangements).

[FN45]. MODEL RULES Rule 3.4(b) cmt. See also, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) (1980) [hereinafter MODEL CODE].

[FN46]. MODEL RULES Rule 3.4(b) cmt. See also *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988) (discussing ethical problems with contingent fees); *Swafford v. Harris*, 967 S.W.2d 319 (Tenn. 1998) (holding a contingency fee void as against public policy). But see David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281 (1990) (discussing the importance of expert witnesses to indigent defendants); Reed E. Schaper, *The Contingent Compensation of Expert Witnesses in Civil Litigation*, 52 IND. L.J. 671 (1977) (arguing in favor of an impartial expert to help satisfy the needs of less affluent litigants); Note, *Contingent Fees for Expert Witnesses in Civil Litigation*, 86 YALE L.J. 1680 (1977) (arguing that indigents should be able to contract on a contingent basis with expert witnesses); Jeffrey Parker, Note, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 S. CAL. L. REV. 1363 (1991) (examining current expert witness compensation schemes and proposing alternatives).

[FN47]. MODEL CODE DR 7-109(C). The Model Code has been superseded in most states by the Model Rules, but the definitions of "contingent fee" remain accurate. See, e.g., Illinois Rules Of Professional Conduct Rule 3.3(a)(15).

[FN48]. See Mike Francet, *Clock's Running on Billable Hours*, NAT'L L.J. Dec. 19, 1994, at C1 (noting how value billing, among other alternative billing methods, is "becoming increasingly commonplace"); David H. Maister, *The New Value Billing*, AM. LAW., May 1994, at 40 (describing value billing schemes including holdback and guarantee billing systems).

[FN49]. Some experts bill at a higher (or "premium") rate for time spent in deposition or trial, on the theory that such time is more taxing or arduous. In the same vein, many lawyers charge more for trial time and physicians charge more for surgery than they do for office visits. "Premium time" billing is not regarded as unethical, though the practice is not widespread.

[FN50]. See *supra* Section III.B.

[FN51]. Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 FORDHAM L. REV. 149 (1988). See also, P.S. Kunen, *No Leg To Stand On: The General Retainer Exception To the Ban on Nonrefundable Retainers Must Fall*, 17 CARDOZO L. REV. 719 (1996) (arguing that an attorney should not be permitted to retain a fee simply because it is paid as a part of a general retainer, if the representation terminates prematurely).

[FN52]. See, e.g., *Federal Sav. & Loan Ins. Corp. v. Angell, Holmes & Lea*, 838 F.2d 395 (9th Cir. 1988) (holding that a firm was not entitled to fees for services performed after the date of firing); *Wong v. Michael Kennedy, P.C.*, 853 F. Supp. 73 (E.D.N.Y. 1994) (noting that a nonrefundable retainer agreement is a per se violation of public policy and is unenforceable); *In re Comstock*, 664 N.E.2d 1165 (Ind. 1996) (suspending an attorney for charging an unreasonable fee); *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994) (holding that use of nonrefundable fee arrangements warrants a two-year suspension).

[FN53]. For an extended discussion of the use of nonrefundable retainers by certain expert witnesses, see Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1 (1993) (arguing against the use of nonrefundable retainers by lawyer "ethics experts"); Steven Lubet, *The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers*, 73 N.C. L. REV. 271 (1994) (demonstrating that use of nonrefundable retainers by expert witnesses is ethically acceptable); Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11 (1995) (relenting);

[FN54]. Fed. R. Civ. P. 26(b)(4).

[FN55]. *Supra* Section IV.C.

[FN56]. See 18 U.S.C. §§ 1501-1515 (1996) (providing criminal penalties for those who obstruct justice by tampering with evidence); see also Phoebe L. McGlynn, Note, *Spoilation in the Product Liability Context*, 27 MEM. ST. U.L. REV. 663, 664 (1997) (discussing criminal and civil liability for the destruction of evidence). Cf. Margaret O'Mara Frossard & Neal S. Gainsberg, *Spoilation of Evidence in Illinois: The Law After Boyd v. Traveler's Insurance Co.*, 28 LOY. U. CHI. L.J. 685, 686 (1997) (discussing how some states now recognize spoilation of evidence as a tort); Eric Marshall Wilson, Note, *The Alabama Supreme Court Sidesteps a Definitive Ruling in Christian v. Kenneth Chandler Construction Co.: Should Alabama Adopt the Independent Tort of Spoilation?*, 47 ALA. L. REV. 971, 977-78 (1996) (observing that a number of states now recognize spoilation of evidence as a tort).

[FN57]. See DAVID M. MALONE & PETER T. HOFFMAN, *THE EFFECTIVE DEPOSITION* (2d ed. 1996) (discussing the invocation of privilege at depositions).

[FN58]. *Id.*

[FN59]. An attorney's "work product," including documents and tangible things "prepared in anticipation of litigation or for trial," is generally protected from discovery by the opposing party. Fed. R. Civ. P. 26(b)(3).

[FN60]. "Generally ... if a party voluntarily discloses privileged information to anyone other than his or her attorney, the party completely waives the protection afforded by both the attorney-client privilege and the work-product doctrine." Janet Hall, "Limited Waiver" of Protection Afforded by the Attorney-Client Privilege and the Work-Product Doctrine, 1993 U. ILL. L. REV. 981, 981 (citing federal rule of civil procedure 26(b)(3) and federal rule of evidence 501).

[FN61]. Not all objections require refusal to answer. Lawyers will often say something on the order of, "Objection, the witness may answer." Experts need not concern themselves with the rules of evidence or other procedural complexities that create this situation. MALONE & HOFFMAN, *supra* note 57.

[FN62]. JEFFREY M. SHAMAN, STEVEN LUBET, & JAMES ALIFINI, *JUDICIAL CONDUCT AND ETHICS* 149 (2d ed. 1995).

[FN63]. The legality of ex parte proceedings is beyond the scope of this Article.

[FN64]. See SHAMAN ET AL., *supra* note 62, at 162.

[FN65]. This is sometimes called "Invoking the Rule." Fed. R. Evid. 615. "Few trials begin without at least one of the parties asking that the judge invoke the rule." Gregory M. Taube, *The Rule of Sequestration in Alabama: A Proposal for Application Beyond the Courtroom*, 47 *Ala. L. Rev.* 177, 177 (1995). "The rule is the rule of sequestration which has been adopted by most modern rules of evidence." *Id.* at n.1.

[FN66]. See LUBET, *supra* note 21, at 81. Note, however, that federal rule of evidence 703 permits an expert to rely on inadmissible evidence in forming an opinion, if the inadmissible evidence is of a type reasonably relied upon by other experts in the field.

[FN67]. Such conduct, though otherwise actionable, escapes liability because the expert "is acting in furtherance of some interest of social importance ...." W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 114, at 815 (5th ed. 1984). If the social interest is deemed to be of special importance, absolute immunity may be afforded. *Id.* at 816. If, on the other hand, the interest is deemed to be less important but the expert has acted reasonably and in good faith, qualified immunity may be applied. *Id.* Expert witnesses have traditionally received absolute immunity for words spoken or written in the course of a judicial proceeding. Leslie R. Masterson, Note, *Witness Immunity or Malpractice Liability for Professionals Hired as Experts?*, 17 *REV. LITIG.* 393, 399 (1998) (citing KEETON, *supra*, § 114, at 816-17); see also Christopher M. McDowell, Note, *Authorizing the Expert Witness to Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness*, 28 *MEM. ST. U.L. REV.* 239, 241-42 (1997) (noting that when "experts are hired by a party, either to testify or to provide litigation support, the expert is cloaked with the shield of absolute immunity so long as the statements made by the witness are relevant to the proceeding").

[FN68]. Masterson, *supra* note 67, at 394; see also Douglas R. Richmond, *The Emerging Theory of Expert Witness Malpractice*, 22 *CAP. U. L. REV.* 693 (1993).

[FN69]. See Masterson, *supra* note 67, at 418 (concluding that "professionals who appear as expert witnesses at trial are protected from liability for their testimony by the doctrine of witness immunity").

[FN70]. Randall K. Hanson, *Witness Immunity Under Attack: Disarming "Hired Guns,"* 31 *WAKE FOREST L. REV.* 497, 497 (1996); Eric G. Jensen, Note, *When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 *UMKC L. REV.* 185, 185 (1993).

[FN71]. See, e.g., *Levine v. Wiss & Co.*, 487 A.2d 397 (N.J. 1984) (holding immunity unavailable to shield a "friendly" accountant's malpractice, even though the professional was hired to prepare an appraisal for a judicial proceeding); *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982) (finding that while adverse doctors forensic misdiagnoses are not actionable under a claim of defamation, "the diagnoses themselves may be actionable on other grounds ... [the Plaintiff] is not prevented from recovering from the doctors for negligent misdiagnosis-medical malpractice merely because their diagnoses were later communicated to a court in the due course of judicial proceedings"); *Bruce v. Byrne-Stevens & Assocs. Eng'rs*, 776 P.2d 666 (Wash. 1989) (Pearson, J., dissenting) (arguing that the purpose of absolute witness immunity is not to shield an expert from otherwise actionable professional malpractice); *Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal. App. 4th 820 (Cal. Ct. App. 1997) (holding that immunity was unavailable to shield a claim against a "friendly" accounting firm for expert witness negligence); *Murphy v. A.A. Mathews*, 841 S.W.2d 671 (Mo. 1992) (holding that witness immunity does not protect an expert who provided negligent litigation support).

(Cite as: 37 NO. 1 Judges' J. 4)

Judges' Journal

Winter, 1998

**\*4 THE ROLE OF ETHICAL NORMS IN THE ADMISSIBILITY OF EXPERT TESTIMONY**

Daniel W. Shuman [FN1]

Stuart A. Greenberg [FNaa1]

Copyright © 1998 by the American Bar Association; Daniel W. Shuman, Stuart A. Greenberg

**\*5 Courts and legal commentators frequently complain about the ethics of expert witnesses.**

Although the professional bodies that regulate the behavior of these experts were once ambivalent about their legal involvement, increasingly they have begun to promulgate ethical codes and guidelines that address legally relevant behavior. The courts have been largely unwilling, however, to utilize these ethical norms when addressing the threshold reliability requirements for expert testimony. In this article, we examine the rationale and the consequences of this approach and suggest that courts utilize ethical norms as red flags to raise potential problems of reliability in the admissibility of expert testimony.

## INTRODUCTION

The legal profession and the professions of expert witnesses themselves, have complained about the way experts are used in the legal system for as long as we have been using expert witnesses. [FN1] These complaints are not surprising given the American adversarial system's reliance on lawyers to choose their own expert witnesses, and the potential of these expert witnesses to influence the outcome of litigation. Although the selection of potential fact witnesses is largely settled at the time of the litigated event, and is dictated purely by happenstance and the randomness of events, the selection of expert witnesses usually is not. Lawyers generally select expert witnesses long after the event has occurred, from a pool limited only by qualifications, cost, and expert willingness. The expert witness selection process is based primarily on the lawyer's assessment of the expert's ability to present favorable and persuasive opinion testimony.

One criticism of the utilization of expert witnesses addresses the judicial system's use [FN2] and ability to scrutinize expert testimony. [FN3] Another addresses the behavior of the experts themselves. The latter alleges that partisan experts often behave as if their own professional ethical norms do not apply when they act as expert witnesses. [FN4] This ethical critique maintains that partisan experts' opinions are often influenced by who pays them, [FN5] and that they often assert opinions in court that they would not assert as scientifically reliable in a professional forum, in their own fields of expertise. [FN6]

This problem is exacerbated by judicially imposed confidence threshold requirements. It is hardly possible to publish an experimental finding in a reputable scientific journal unless the researcher can demonstrate that the results would occur by chance less than 5 percent of the time. Error rates of not greater than one time in 100 or 1,000 are commonplace in published scientific studies. Yet, in most personal injury cases, for example, experts can offer opinions with only the confidence that, to a reasonable degree of medical or scientific certainty, [FN7] the defendant's conduct is (or is not) more likely than not to have caused the plaintiff's harm.

Why this huge discrepancy between what the courts will accept and what scientific peers will accept? We believe that the answer lies, at least in part, in the reality that rarely will the facts of a particular case closely match the variables, procedural controls, or the empirical results of a methodologically sound experiment. There is an inverse relationship between the forensic relevance and the scientific validity of much research. If the expert seeks to ground an opinion in scientific research, he or she must usually rely on a large number of experiments, of which each may address only some of the elements in the case, rather than any single experiment that addresses a majority of the unique facts of a particular case. For example, in applying the research that examines the effect of certain questioning styles on young children [FN8] to the questioning of a child in a particular case, the child witness will necessarily differ (by age; ethnicity; socio-economic status; intelligence; physical, emotional, religious, and moral development; prior life experiences; current emotional state; what is at stake in making a particular statement) from the children in the research, as will the questioner. The questions asked in the actual case will not be the same as those asked in the study, nor will the events examined in the study be the same as those present in the particular case. The expert must use his or her judgment and experience to extrapolate from the scientific literature to form an opinion based on the facts of the case.

The necessity for the expert to infer from many studies to form an opinion not only explains the lowered courtroom threshold, but it also explains why many ethical problems arise. What constitutes reliable testimony under a "more likely than not" standard, is not reliable to the standard for science. The reality is that the minimum thresholds of reliability for scientific research far exceed the minimum thresholds of reliability for the purpose of courtroom testimony. In the courtroom, the lower threshold allows for many of the errors and abuses that pass for expert testimony. Given the necessity for the lower reliability threshold of the courtroom, judges can best identify \*6 and exclude witnesses who abuse this opportunity by being familiar with and applying the ethical norms of the profession. These norms will allow them to distinguish those experts who legitimately offer scientific testimony from those who misuse the opportunity for other motives and, in so doing, mislead the court.

Until recently, judges had nothing to guide them when attempting to assess the influence of payment and partisanship on an expert's forensic behavior, and its impact on the reliability of that expert's proffered evidence. This vacuum left courts to seek answers about the questionable behavior of partisan experts from other partisan experts. That has begun to change. Increasingly, many professional organizations concerned about the conduct of their members in the legal system have formulated ethical codes and guidelines that specifically address forensically relevant behavior. [FN9] These codes and guidelines seek to assure that when professional information is provided to third parties, such as the

courts, it is done by those with the requisite expertise, relying on validated methods and procedures, using the informational bases that have been found necessary for accurate results, and understanding the limits of the profession's knowledge.

The courts, for the most part, have not embraced the use of these codes and guidelines to address the admissibility of unreliable expert testimony, although they apply professionally developed ethical norms in other contexts as a metric for professional competence. For example, courts apply ethical norms as one means to set the standard of care in professional malpractice cases, [FN10] by translating psychiatrists' and psychologists' ethical ban on sexual relations with patients [FN11] into a tort duty to abstain from this behavior. [FN12] Nonetheless, courts have been reluctant to apply professional ethical norms to the decision to admit expert testimony, even when these norms express professional consensus about what is minimally necessary to present reliable professional information.

Encouragingly, courts are becoming increasingly concerned with the behavior of expert witnesses, and are struggling to raise the reliability threshold for the admissibility of expert testimony. Initially, the Federal Rules of Evidence and state evidence rules patterned after them, evinced a "liberal thrust" [FN13] in favor of admissibility, rejecting an era of overprotectiveness of juries. However, in response to complaints from the legal, scientific, and business communities, the current paradigm places the onus on trial judges to act as gatekeepers to protect juries from unreliable expert testimony. Underlying this gatekeeping directive is a lingering concern with the proliferation of experts and the judicial system's limited ability to identify methods and procedures necessary to ensure reliable information. We suggest that ethical rules and guidelines may assist the courts in this task by serving as red flags to raise potential problems of the reliability of expert testimony. Further, we suggest that when an ethical violation is one that would raise questions as to the objectivity, impartiality, or reliability of the proffered testimony, then that violation should result in a presumption in favor of exclusion of that testimony.

## JUDICIAL DISREGARD OF PROFESSIONAL ETHICAL CODES

While concerns about the way the ethics of expert witnesses are linked to the reliability of their testimony apply with equal force to all professions, these concerns have been particularly notable with regard to the testimony of psychiatrists and psychologists. This may be because of the increasing frequency with which these professionals are offered to support or oppose novel and often controversial claims. Examples include the host of newly recognized rights of tort recovery tied to the claims of repressed memory and post-traumatic stress disorder, [FN14] and to criminal defenses that "medicalize" behavior, such as "battered spouse syndrome." [FN15] Underlying concerns about the increased reliance on psychiatric and psychological evidence is a fear that what psychiatrists and psychologists really have to offer in the legal setting are personal values masked in scientific jargon, but not grounded in the methods and procedures of science. [FN16]

Because these judicial examinations of psychiatry and psychology may shape public perceptions of these professions, the professions have an important stake in their outcome. [FN17] There has been much discussion within psychiatry [FN18] and psychology [FN19] about the forensic application of the

American Medical Association's (AMA) Principles of Medical Ethics, [FN20] the American Psychological Association's (APA) Ethical Principles of Psychologists and Code of Conduct, [FN21] and the emergence of ethical guidelines that specifically address the activities of psychologists and psychiatrists in court. [FN22] Psychiatric and psychological organizations have, however slowly, begun to address the unethical behavior of some of their members. For example, the APA Board of Trustees voted to expel Dr. James Grigson from membership "for arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100 percent certainty that the individuals would engage in future violent acts." [FN23] Dr. Grigson's testimony in capital punishment cases regarding the future violence of defendants was the subject of numerous appellate opinions [FN24] including the United States Supreme Court's decision in *Barefoot v. Estelle*. [FN25]

In another instance, the APA censured a psychologist for falsely representing that he had conducted a one hour interview with a parent and child when he had not done so. [FN26] And, in yet another case arising out of a child custody proceeding, [FN27] the West Virginia state psychological association censured \*7 a psychologist for making a recommendation without an adequate basis. The psychologist in question made a custody recommendation on the basis of a single ninety-minute interview with the children and one parent, without seeking the input or participation of the other parent. [FN28]

Although the courts have recognized the authority of psychiatric and psychological organizations to enforce their ethical norms relative to the activities of their members in the courts, they have been largely unwilling to incorporate the norms into their own standards for admissibility, which would discourage the unethical activity that results in unreliable expert testimony. For example, in *Barefoot*, [FN29] mentioned above, the APA's amicus brief to the Supreme Court asserted, inter alia, that Dr. Grigson should not have been permitted to render an opinion about the defendant's dangerousness in the absence of a personal examination, because it is "unethical for a psychiatrist to offer a professional opinion unless he/she has conducted an examination" [FN30] (at least when the opportunity to do so exists). Ironically, while Grigson's method did not survive peer review, it did satisfy judicial review.

It would be imprudent to abdicate judicial responsibility for the decision to admit expert testimony to a professional organization. However, prudence does dictate that in admitting expert testimony, the judiciary carefully consider the relevant professional ethical norms and the reasoning underlying them. In *Barefoot*, rather than addressing the reason that psychiatrists regard it as unethical to offer an opinion about the mental status of someone they have not examined and the impact on the reliability of any resulting opinion, the Court dismissed the APA's ethical argument noting that experts are frequently permitted to offer opinions based on hypothetical questions. [FN31] The Court discounted, without any analysis, the importance of mental health professionals conducting examinations to form accurate opinions. In essence, the Court lumped mental health professionals together with experts from other trades and professions for whom personal examinations or inspections do not play the same role in reaching reliable opinions.

The APA's Guidelines for Child Custody Evaluations in Divorce Proceedings, state that "comprehensive child custody evaluations generally require an evaluation of all parents and guardians and children, as well as observations of interactions between them." [FN32] Under these guidelines, a psychologist who evaluates only one parent may offer a noncomparative opinion about the person he or she has examined (e.g., that one parent is well adjusted and suffers from no psychopathology or has a good relationship with the child), however, the opinion should not address the best interests of the child—the ultimate standard that governs child custody determinations. An opinion about the best interests of the child in a custody evaluation is of necessity comparative and in the absence of comparative information, such an opinion lacks an adequate foundation. Although an expert's recommendation made without proper foundation may be grounds for professional disciplinary action, [FN33] the courts have not acknowledged its importance as a prerequisite for competent legal expert opinion.

Weber v. Weber [FN34] is an example of the court's failure to acknowledge the importance of the professional code and guidelines. In Weber, a psychologist offered an opinion on which parent should be primary caretaker, after performing an evaluation of only one parent. In response to a challenge to the admission of this testimony as unethical and unreliable, the court concluded that the deficiency bore on the weight, rather than the admissibility of the opinion. Although the APA Child Custody Guidelines address the evaluation of all parties and children as a fundamental element of a competent custody evaluation, the court did not treat this relevant professional ethical norm as a fundamental factor in assessing the competence of the expert's opinion.

Just as attorney conflicts of interest raise a fundamental limitation on the ability of one attorney to perform conflicting roles, [FN35] the same problem exists in other professions. One such conflict for psychiatrists and psychologists is between professional, clinical, and forensic roles. [FN36] For instance, a treating therapist may be asked to go beyond describing diagnosis and prognosis to ascertain whether sexual harassment in the workplace or a sexual assault ten years earlier is the proximate cause of the injury for which the plaintiff seeks compensation. These conflicting roles threaten both the efficacy of therapy and the accuracy of judicial determinations for two reasons: (1) Therapy does not provide an adequate professional basis to gather the type and amount of data necessary to form an adequate foundation for a psycholegal assessment; and, (2) Such testimony asks the therapist, who is charged with being supportive and accepting, to be objective and judgmental. The importance of this role conflict is recognized in ethical norms for forensic psychiatrists [FN37] and psychologists. [FN38] While these conflicts occur daily, no reported cases reflect that these issues have been identified and raised in the courts.

Courts that would not hesitate to disqualify an attorney for the conflict of interest that arises from representing both the husband and wife in a contested divorce, for example, do not seem to take seriously the importance of role conflicts for other professionals. For example, in a case involving an allegation of an expert's ethical conflict, Baskerville v. Culligan Intl., Co., [FN39] Baskerville sued her former employer, Culligan, for sexual discrimination and harassment. Baskerville's "treating psychologist and her proposed expert witness regarding her psychological condition, treatment, \*8 and prognosis" was her sister, Dr. Gale Bell, a psychologist. [FN40] The defendant sought to exclude Dr. Bell's

testimony as inherently unreliable based on the ethical proscription on entering into conflicting roles set forth in the APA's Ethical Principles of Psychologists. [FN41] This rule prohibits a psychologist from entering into a treatment relationship with a sibling, spouse, parent, or child because it would impair the psychologist's objectivity and effectiveness. A psychologist should not treat a relative because the psychologist's personal relationship will invariably cloud the psychologist's professional judgment and application of professional skills. In addition, it risks threatening a breach of confidentiality with other family members, and interjecting the personal relationship as a treatment issue that could obfuscate or delay addressing the reason the relative sought treatment. [FN42] However, the court failed to see that this conflict fundamentally affected the reliability of her resulting opinion, refused to exclude her testimony on this basis, and simply noted that it was an appropriate subject for cross-examination.

The AMA's and APA's ethical codes are incorporated by reference into many state standards for licensing and regulation of the behavior of physicians and psychologists. [FN43] Yet, courts faced with ethically based challenges to the reliability of expert testimony look to the rules of evidence and see nothing there that explicitly refers to or incorporates the ethical codes and guidelines. This results in their giving these ethical norms little regard in evidentiary decisions.

#### FRYE AND DAUBERT

Under both *Frye v. United States* [FN44] and *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, [FN45] professional scrutiny of the methods and procedures used in the evaluation process is a fundamental consideration in the admissibility of any resulting expert opinion. *Frye* requires the court to ascertain whether the expert's methods and procedures have gained general acceptance in the relevant professional community to assess its reliability. *Daubert* requires federal courts to determine "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning properly can be applied to the facts in issue," [FN46] considering, among other things, peer review. Peer assessment is an explicit consideration in both determinations. The articulation of the minimum requirements for valid opinions or assessments in the ethical code or guidelines of the profession in which the expert bases a claim of expertise, goes to the heart of the admissibility requirements articulated in both *Frye* and *Daubert*.

While compliance with a profession's ethical code or guidelines provides no assurance that the reasoning and methodology underlying the testimony is scientifically valid, failure to comply with them is powerful evidence that such reasoning and methodology may be invalid. For example, articulations in psychiatrist's and psychologist's ethical codes and guidelines that an examination or interview is a prerequisite for an opinion or assessment, reflects professional consensus about the methodology necessary to render a valid opinion. While these codes and guidelines do not resolve for the courts whether psychiatrists or psychologists can contribute reliably to custody determinations, for instance, they do reflect the accumulated wisdom of these professions relative to the necessity of interviewing and observing both parents and their interactions with the child, when making a determination of the best interests of that child.

The problem with rendering an opinion in a child custody case regarding the most appropriate placement without first interviewing both parents is not simply that it is unethical, but rather why it is unethical. The opinion lacks a minimally adequate foundation. It does not lack an adequate foundation because it is unethical, it is unethical because it lacks an adequate foundation. Such an opinion should be rejected because the accumulated professional knowledge is that reliable opinions can only be reached based on an examination. Professional ethical codes and guidelines that address the reliability of methods and procedures are not collateral to the admissibility inquiry, but go to the heart of that inquiry.

Although courts are rarely explicit about their reasons for refusing to consider professional ethical norms, two reasons may explain their coolness toward applying them to admissibility decisions. The first reason is a free market approach to expert witnessing in which the jury is the marketplace. [FN47] According to this view, ethics are a utilitarian concern to be valued only for their impact on the expert's believability, and the jury is assumed to be able to assess the relevance of any violation of ethical rules to the expert's believability. This approach is reflected by the Supreme Court's response in *Barefoot v. Estelle*. [FN48] The Supreme Court posited that the jury could be "trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness." [FN49]

Apart from the significant assumptions this approach makes about juror decision making behavior without providing any support from the body of jury research, it is difficult to reconcile this approach with *Daubert* and the sea of change it signals, even in states that have not adopted the *Daubert* rationale. *Daubert* and a recent spate of state and federal decisions reject *Barefoot's* approach. [FN50] Thus, relating issues of experts' professional ethics to credibility rather than admissibility is inconsistent with contemporary views of the trial judge's gatekeeping responsibility.

Another possible rationale for failing to apply professional ethical norms to admissibility decisions questions \*9 whether the professions' concerns ought to be the courts' concerns. Ethical codes may advance a variety of interests, some of which are guild interests and not all of which are concerned with reliability or designed to protect the public.

Realistically, a code of ethics consensually validates the most recent views of a majority of professionals empowered to make decisions about ethical issues. It is inevitably, anachronistic, conservative, protective of its members, the product of political compromise, restricted in its scope, and too often unable to provide clear-cut solutions to ambiguous professional predicaments. [FN51]

The appropriate response to this concern is simply that courts should not advance ethical principles designed to protect the profession at the expense of advancing the presentation of reliable opinions and assessments.

A related argument is that if the profession thinks these ethical rules are so important, they should enforce them themselves. Independent of professional willingness and ability to protect the courts, professional enforcement only addresses unethical conduct *ex post*. Moreover, effective professional enforcement requires adequate professional resources, which may be in doubt. Further, contrary to

popular belief, experts who testify frequently are in the minority, accounting for 5 percent or fewer of testifying experts. [FN52] Expert witnessing is instead dominated by large numbers of occasional experts who testify infrequently. These occasional experts are less likely to be familiar with the specialized ethical concerns that distinguish forensic activities, and sensitive to professional enforcement actions taken against others for forensic activities. Moreover, their occasional behavior is less likely to trigger professional sanctions than the behavior of repeat players. Thus, professional enforcement actions sanctioning the behavior of occasional experts are less likely to reduce the presence of unethical experts as they account for only a minuscule portion of the testimony received by the courts.

Unless membership in the professional organization is a condition of practice, professional sanctions are only effective in precluding unethical expert witness behavior if legal actors give them due regard. In the absence of the equivalent of an integrated bar, these professional sanctions are of no immediate consequence to the right to practice or testify as an expert. Ex ante, case-by-case judicial enforcement of these ethical norms is necessary to curtail unreliable, unethical behavior.

#### ADMITTING ETHICAL EXPERT TESTIMONY

Ethical norms are red flags that raise fundamental problems with the reliability of professional methods, procedures, and opinions. An expert witness' violation of a relevant professional ethical norm that addresses the requirements for valid opinions or assessments should result in a presumption in favor of exclusion of that testimony. To assist courts in applying this approach, we suggest that when ruling on the qualification of a person to be an expert witness, courts consider (1) the professional organization that promulgated the standard or rule; (2) the purpose of the ethical norm; and (3) the appropriate remedy or response to a violation of the professional norm.

Because the majority of professional organizations are private, voluntary organizations, they may not represent the majority of the profession and may not ground their rules in rigorous study of the methods and procedures. Courts must be careful to probe both the professional organization that promulgated the norms and the process they used to do so.

Second, it is necessary to examine the concerns that the ethical norm is intended to address. One analysis of the ethical codes of thirty-five professional organizations revealed thirteen areas of commonality: "professional role in society, client/employee relations, integrity, objectivity/independence, diligence/due care/confidentiality, fees, advertising/solicitation, form of practice, consulting services/advising/evaluating, contractual relationships, communications, and supervision." [FN53] Ethical rules addressing advertising or form of practice, for example, have little bearing on the reliability of the resulting professional information and therefore, violations of these rules should have little bearing, if any, on admissibility decisions. Ethical rules addressing integrity, objectivity/independence, or diligence/due care, for example, have a significant impact on the reliability of the resulting professional information and therefore, violations of these rules should have a significant bearing on admissibility decisions. The ethical rules that require psychiatrists and psychologists to avoid conflicting roles, and to conduct a personal examination when it is possible to do so before rendering a professional opinion, are examples of rules

that have a significant effect on the reliability of the resulting professional information, and for which unexcused violations should have a significant impact on admissibility decisions.

Third, the remedy for the failure to comply with ethical norms must be tailored to the harm. For example, the testimony of a forensic psychologist who violates the ethical rule about not taking contingent fees for expert testimony [FN54] or that of the therapist who violates the ethical rule about not treating relatives, [FN55] should be excluded entirely because these ethical violations raise global and pervasive concerns about the capacity of the expert to act competently. Likewise, a therapist who engages in the conflicting role of treating and forensic psychologist should be prohibited from offering testimony on psycholegal issues. However, he or she should be permitted to offer an opinion as a treating \*42 psychologist regarding diagnosis and prognosis, because the unreliability concerns addressed by these ethical rules do not place in doubt the clinician's opinions about therapeutic issues.

## CONCLUSION

The ethical dilemmas posed by the use of expert witnesses are caused by and inextricably intertwined with the way in which experts are used in the adversary system. [FN56] While proposals for reshaping the presentation of expert witnesses by using court-appointed impartial experts, for example, have been advocated for some time, [FN57] and could be implemented under existing rules, they have not generally taken hold, [FN58] because impartiality does not exist. [FN59] Thus, the adversary presentation of partisan experts and the concomitant ethical concerns it raises seem to be here to stay for the present.

Of all the possible judicial responses to this dilemma, one is clearly unacceptable; it will not do for courts to sit back and criticize the unethical behavior of experts without utilizing the tools available to address this problem. Where professional ethical codes exist, courts have at their disposal an important and practical tool to address the problem of unreliable expert testimony. When ruling on a party's challenge to the admissibility of expert testimony, or when it is appropriate for the court to raise the issue of admissibility on its own motion, ethical norms may serve as red flags to inform courts of potential problems of reliability. While these ethical norms cannot be expected to respond to all issues of forensic ethics, [FN60] they provide important clues for judges and lawyers to address significant issues that regularly come before the courts.

[FN1]. Note 1. Daniel W. Shuman is a professor of law at the Southern Methodist University School of Law in Dallas, Texas. His research on ethical norms and the admissibility of expert testimony was made possible by a grant from the M.D. Anderson Research Fund.

[FN1]. Note 2. Stuart A. Greenberg, Ph.D., ABPP, is a forensic psychologist in private practice. He is affiliated with the Departments of Psychology and Psychiatry at the University of Washington in Seattle, Washington.

[FN1]. See, e.g., *Keegan v. Minneapolis & St. Louis R.R.*, 76 Minn. 90, 95, 78 N.W. 965, 966 (1899) (Experts are "often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit.") quoted in *Chaulk v. Volkswagen of America, Inc.*, 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting).

[FN2]. Anthony Champagne et al., *An Empirical Examination of the Use of Expert Witnesses in American Courts*, 31 JURIMETRICS J. 375, 392 (1991).

[FN3]. For an empirical examination of the criticism of the capacity of the legal system to scrutinize the testimony of experts, see, e.g., Champagne, *supra* note 2; Daniel W. Shuman, et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts-Part II, A Three City Study*, 34 JURIMETRICS J. 193 (1994); Anthony Champagne et al., *The Problem with Empirical Examination of the Use of Court-Appointed Experts: A Report of Nonfindings*, 14 BEHAV. SCI. AND LAW 361 (1996); Daniel W. Shuman et al., *Juror Assessments of the Believability of Expert Witnesses: A Literature Review*, 36 JURIMETRICS J. 371 (1996); Daniel W. Shuman et al., *Assessing the Believability of Expert Witnesses: Science in the Jury Box*, 37 JURIMETRICS J. 23 (1996).

[FN4]. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 560 (1994).

[FN5]. See authorities cited, *supra* note 2.

[FN6]. Judge Patrick E. Higginbotham advanced this critique in *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1234 (5th Cir. 1986).

[FN7]. See Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43 (defining reasonable degree of scientific certainty with reference to whether the expert relied on an accepted theory accepted in the expert's field).

[FN8]. STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* (1995).

[FN9]. Bruce D. Sales and Daniel W. Shuman, *Reclaiming the Integrity of Science in Expert Witnessing*, 3 ETHICS & BEHAV. 223 (1993).

[FN10]. *Allen v. Lefkoff*, 265 Ga. 374, 453 S.E.2d 719 (1995).

[FN11]. AMERICAN PSYCHIATRIC ASSOCIATION *PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY* § 2(1) (1989) ("sexual contact with the patient is unethical"); American Psychological Association, *Ethical Principles of*

Psychologists, 47 AM. PSYCHOLOGIST 1597, 1605 (1992) § 4.05 ("Psychologists do not engage in sexual intimacies with current patients or clients.").

[FN12]. See, e.g., *Zipkin v. Freeman*, 436 S.W.2d 753 (Mo. 1968); *Weaver v. Union Carbide Corp.*, 378 S.E.2d 105 (W. Va. 1989).

[FN13]. *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2794 (1993).

[FN14]. Daniel W. Shuman, *Persistent Reexperiences in Psychiatry and Law: Current and Future Trends in Post-traumatic Stress Disorder Litigation*, in *POST-TRAUMATIC STRESS DISORDER IN LITIGATION: GUIDELINES FOR FORENSIC ASSESSMENT 1* (Robert I. Simon ed., 1995).

[FN15]. DANIEL W. SHUMAN, *PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE* ¶¶ 12-3-12-6 (2d ed. 1994).

[FN16]. Maureen O'Connor, Bruce D. Sales & Daniel W. Shuman, *Mental Health Professional Expertise in the Courtroom*, in *LAW, MENTAL HEALTH AND MENTAL DISORDER 40* (Bruce D. Sales & Daniel W. Shuman eds., 1996).

[FN17]. Bruce D. Sales & Daniel W. Shuman, *Reclaiming the Integrity of Science in Expert Witnessing*, 3 *ETHICS & BEHAV.* 223 (1993).

[FN18]. See, e.g., ALAN A. STONE, *LAW, PSYCHIATRY, AND MORALITY* (1984); ISAAC RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* (1938); Paul S. Appelbaum, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*, 13 *INT'L J. LAW & PSYCHIATRY* 249 (1990); Seymour L. Halleck, *The Ethical Dilemmas of Forensic Psychiatry: A Utilitarian Approach*, 12 *BULL. AM. ACAD. PSYCHIATRY & LAW* 279 (1984); Henry C. Weinstein, *How Should Forensic Psychiatry Police Itself? Guidelines and Grievances: The AAPL Committee on Ethics*, 12 *BULL. AM. ACAD. PSYCHIATRY & LAW* 289 (1984).

[FN19]. Gary I. Perrin & Bruce D. Sales, *Forensic Standards in the American Psychological Association's New Ethics Code*, 25 *PROF. PSYCHOL.: RES. AND PRAC.* 376 (1994).

[FN20]. 245 *JAMA* 2187 (1981).

[FN21]. 47 *AM. PSYCHOLOGIST* 1597 (1992).

[FN22]. American Academy of Psychiatry and the Law, *Ethical Guidelines for the Practice of Forensic Psychiatry* (1989); Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 *LAW & HUM. BEHAV.* 655 (1991) (Approved by vote of American

Psychological Association Division 41 and the American Psychology-Law Society); American Psychological Association, Guidelines for Child Custody Evaluations in Divorce Proceedings, 49 AM. PSYCHOLOGIST 677 (1994).

[FN23]. American Psychiatric Association, News Release No. 95-25, July 20, 1995.

[FN24]. Dr. Grigson's notoriety comes not only from his testimony but from his participation in the trials of Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), and Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). These opinions have shaped the admissibility of psychiatric testimony presented in Texas capital murder trials. Based on my experience, no other witness has generated such controversy.

Fuller v. State, 829 S.W.2d 191, 212 (Tex. Crim. App. 1992) (Baird, J., concurring and dissenting).

[FN25]. 463 U.S. 880 (1983).

[FN26]. Budwin v. Am. Psychological Ass'n, 24 Cal. App. 4th 875, 29 Cal. Rptr. 2d 453 (1994).

[FN27]. Patricia Ann S. v. James Daniel S., 190 W. Va. 6, 435 S.E.2d 6 (1993).

[FN28]. 435 S.E.2d at 10 n.3.

[FN29]. 463 U.S. 880 (1983).

[FN30]. The Principles of Medical Ethics, With Annotations Especially Applicable to Psychiatry § 7(3), p. 9 (1981).

[FN31]. 463 U.S. at 903.

[FN32]. Guidelines for Child Custody Evaluations in Divorce Proceedings, supra note 22, at 677.

[FN33]. Patricia Ann S. v. James Daniel S., 190 W. Va. 6, 435 S.E.2d 6 (1993).

[FN34]. 512 N.W.2d 723 (N.D. 1994).

[FN35]. Rule 1.7-ABA Model Rules of Professional Conduct (1995).

[FN36]. See Stuart A. Greenberg & Daniel W. Shuman, The Conflict Between Therapeutic and Forensic Roles, 28 PROF. PSYCHOL.: RES. & PRAC. 50 (1997); Kirk Heilbrun, Child Custody Evaluation: Critically Assessing Mental Health Experts and Psychological Tests, 29 FAM. L.Q. 63 (1995); Robert I. Simon, Toward the Development of Guidelines in the Forensic Psychiatric Examination of Post-traumatic Stress Disorder Claims, in POST-TRAUMATIC STRESS DISORDER

IN LITIGATION: GUIDELINES FOR FORENSIC ASSESSMENT 31 (Robert I. Simon ed., 1995); Larry H. Strasburger, Thomas G. Gutheil & Archie Brodsky, On Wearing Two Hats: Role Conflict in Serving as Both Psychotherapist and Expert Witness, 154 AM. J. PSYCHIATRY 448 (1997). See also Institute of Electrical and Electronic Engineers Code of Ethics (Members of the IEEE agree "to avoid real or perceived conflicts of interest whenever possible and to disclose them to the affected parties when they do exist.") Id. at 2.

[FN37]. Ethical Guidelines for the Practice of Forensic Psychiatry:

A treating psychiatrist should generally avoid agreeing to be an expert witness or to perform an evaluation of his patient for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship.

American Academy of Psychiatry and the Law, Ethical Guidelines for the Practice of Forensic Psychiatry (1989).

[FN38]. Specialty Guidelines for Forensic Psychologists (IV.D.):

(1) Forensic psychologists avoid providing professional services to parties in legal proceedings with whom they have personal or professional relationships that are inconsistent with the anticipated relationship.

(2) When it is necessary to provide both evaluation and treatment services to a party in a legal proceeding (as may be the case in small forensic hospital settings or small communities), the forensic psychologist takes reasonable steps to minimize the potential negative effects of these circumstances on the rights of the party, confidentiality, and the process of treatment and evaluation.

Committee on Ethical Guidelines for Forensic Psychologists, Specialty Guidelines for Forensic Psychologists (IV.D.), 15 LAW & HUM. BEHAV. 655 (1991) (Approved by vote of American Psychological Association Division 41 and the American Psychology-Law Society).

[FN39]. 1994 U.S. Dist. LEXIS 5296 (N.D. Ill.), rev'd on other grounds, 50 F.3d 428 (7th Cir. 1995).

[FN40]. Id. at 9.

[FN41]. A psychologist refrains from entering into or promising another person, scientific, professional, financial, or other relationship with such persons if it appears likely that such a relationship reasonably might impair the psychologist's objectivity or otherwise interfere with the psychologist effectively performing his or her functions as a psychologist, or might harm or exploit the other party.

47 AM. PSYCHOLOGIST 1597 (1992).

[FN42]. The Commentary to the APA Ethics Code notes:

The current Ethics Code proscribes entering into multiple relationships based on a threshold defined as appearing likely that the relationship reasonably might lead to the feared problems. The risks of concern are stipulated as impaired objectivity on the part of the psychologist, other interference with the psychologist's effective performance, harm to the other party, and exploitation of the recipient of the psychological services. It highlights the need for psychologists to be sensitive not only to the dangers of loss of objectivity on their part, but also to the possibility of other potential sources of decreased effectiveness, as, for example, changes in how the other party may hear and function in the context of the original professional relationship that predated the professional relationship, resulting in less successful outcomes.

MATHILDA B. CANTER ET AL, ETHICS FOR PSYCHOLOGISTS: A COMMENTARY ON THE APA ETHICS CODE 48 (1994).

[FN43]. Those incorporating the AMA code include: Haw. Rev. Stat. Ann. § 453-8 (1995); Ohio Rev. Code Ann. § 4731.22 (Anderson 1995). Those incorporating the APA code include: Ala. Code § 34-26-3 (1995); Miss. Code Ann. § 73-31-21 (1995); N.C. Gen. Stat. § 90-270 (1995).

[FN44]. 293 F. 1013, 1129-30 (D.C. Cir. 1923).

[FN45]. 113 S. Ct. 2786 (1993).

[FN46]. *Id.* at 2796.

[FN47]. See, e.g., Elizabeth F. Loftus, Experimental Psychologist as Advocate or Impartial Educator, 10 LAW & HUM. BEHAV. 63 (1986) (arguing for a Darwinian approach in deciding the proper role of the experimental psychologist expert in which "[e]ach individual can decide what strategy best suits him or her, and let the survival of the fittest expert prevail.") *Id.* at 77.

[FN48]. 463 U.S. 880, 901 (1983).

[FN49]. *Id.*

[FN50]. Daniel Shuman & Bruce Sales, Reconstructing the Admissibility of Scientific Evidence: Distinguishing Expert Testimony Based Upon Clinical Judgment and Research, PSYCHOLOGY, PUBLIC POLICY, AND LAW (forthcoming 1998).

[FN51]. Donald N. Bersoff & Peter M. Koeppl, The Relationship Between Ethical Codes and Moral Principles, 3 ETHICS & BEHAV. 345, 348 (1993).

[FN52]. Shuman, *supra* note 3, at 205.

[FN53]. Cynthia B. Schmeiser, Ethical Codes in the Professions, EDUCATIONAL MEASUREMENT: ISSUES AND PRACTICE 5, 7 (Fall 1992). This survey included, among others, the codes of the American Bar Association, American Institute of Certified Public Accountants, American Dental Association, American Psychological Association, American Medical Association, and American Bankers Association.

[FN54]. DANIEL W. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE ¶¶ 6-12 (2d ed. 1994).

[FN55]. American Psychological Association, Ethical Principles of Psychologists and Code of Conduct, 47 AM. PSYCHOLOGIST 1597 § 1.17 (1992).

[FN56]. "[F]unctioning in the adversary system of the legal process creates inescapable professional tensions and conflicts." Henry C. Weinstein, How Should Forensic Psychiatry Police Itself? Guidelines and Grievances: The AAPL Committee on Ethics, 12 BULL. AM. ACAD. PSYCHIATRY & LAW 289 (1984).

[FN57]. MANFRED GUTTMACHER & HENRY WEIFHOFEN, PSYCHIATRY AND THE LAW (1952).

[FN58]. Joe S. Cecil & Thomas E. Willging, Federal Judicial Center, Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706 (1993); Anthony Champagne et al., The Problem with Empirical Examination of the Use of Court-Appointed Experts: A Report of Nonfindings, 14 Behav. Sci. and Law 361 (1996).

[FN59]. Bernard Diamond, The Fallacy of the Impartial Expert, 3 ARCH. CRIM. PSYCHODYNAMICS 221 (1959).

[FN60]. Daniel W. Shuman, The Use of Empathy in Forensic Examinations, 3 ETHICS & BEHAV. 289 (1993).

# Part 3 - Practice Tip Articles of Interest

## LAWYERS WEEKLY USA

September 06, 1999

Cite this as Page: 99 LWUSA 828

Section B Story:

### Five 'Silver Bullet' Questions For Opposing Experts

**By Christa Zevitas**

During the first 10 of his 25 years as a litigator, John F. Romano developed what he calls "five silver bullet questions" to use when deposing opposing expert witnesses. For the past 15 years, Romano has used these questions every time he has deposed an opposing expert, and he says that they never fail to get him information that bolsters his case.

Romano, is former head of the Academy of Florida Trial Lawyers, the Southern Trial Lawyers Association, ATLA's criminal law section and the Washington, D.C.- based National College of Advocacy. He has lectured nationally on trial advocacy, litigation techniques and demonstrative

evidence, is the author of the textbook Strategic Use of Circumstantial Evidence and currently edits The Trial Lawyer.

Romano is a fellow of the International Academy of Trial Lawyers in Minneapolis. He spoke to Lawyers Weekly USA from his' office in Lake Worth, Fla.

#### **Can you explain the overall goal of your silver bullet questions?**

They usually either give you the answers you want so that you can use those answers in front of a jury or they lead you to information that you can later develop and use during trial. They also help you settle cases in your client's favor because the opposition sees what's happening and understands that their risks are, little by little, increasing.

The risks increase because these questions generally:

- Establish that an expert is biased.
- Put a wall around an expert's testimony.
- Weaken the credibility of the opposition's expert.
- Strengthen the credibility of your own expert and/or police witnesses on your side.

### **What are the five questions?**

1. What do you perceive as your purpose and function in this case?
2. Assume your opinion is wrong or invalid. What steps would you go through to analyze and assess the opinion to find your error?
3. What further work do you intend to do and what further work have you been asked to do for this case?
4. Do you have any criticism of the police or of my expert(s) in this case in terms of their methodology or techniques?
5. Have you made any credibility judgments as part of your analysis in this case?

### **Could you explain what the purpose of each question is and give some examples of how they've helped you win cases or settle cases in your favor?**

Absolutely. Let's start with, "What do you perceive as your purpose and function in this case?" When I ask this question, I'm trying to:

- Establish the expert's bias: and
- Limit the scope of his or her testimony.

If, for example, I file a personal injury case in which my client has a lower back injury from an auto wreck, the insurance company's lawyers will hire a doctor to examine my client. From the start, that doctor knows that his or her role is to minimize the plaintiff's injuries – and he or she will do this. Yet when I ask about his or her purpose in the case, a typical response by a defense examiner is, "My function in this case is to give an independent and objective evaluation of the plaintiff's injuries."

So I then go on to explore what the doctor alleges is an "independent and objective" evaluation by asking questions such as:

- Isn't it true, doctor, that in the last calendar year you earned in excess of \$800,000 performing defense exams?; or
- Isn't it true that approximately 65% of your practice now involves conducting defense exams?

Once I've established that the opposing expert is not objective after all, I move on to putting a wall around that doctor's testimony. Let's say it's a medical malpractice case and a doctor says, "I'm here to testify on the issue of causation only." I will then ask something like, "So you are not here to testify on whether or not there was a breach of the standard of care?"

The response I typically get is, "That's correct, Mr. Romano. " This means that I've eliminated that expert as a witness on the issue of the standard of care and effectively narrowed the scope of his testimony.

**What are you trying to do with your second question? (Assume your opinion is wrong or invalid. What steps would you go through to analyze and assess the opinion to find out your error?)**

First of all, I should tell you that lawyers will virtually always get an objection to this question in deposition, but the witness must answer the question regardless.

With this question, I'm aiming to establish the errors in an expert's analysis — I have yet to see an expert witness in a deposition go through the same steps in responding to this question that he originally went through in his initial assessment.

**Could you give an example of how you exposed the flaws in an expert's analysis by using this question?**

Sure. I recently deposed an engineering expert in a product liability case in which a defective mountain bike came apart when my client rode over a 4-inch curb. When the bike came apart, my client catapulted into the air, landed on his head and ended up with a brain injury.

After the engineer testified that the bike wasn't defective due to manufacturing, I asked him to go through the steps which led him to that conclusion. He spent an hour or two doing that. Then I said, "Sir, I'd like you to assume that your opinion turns out to be wrong and that it's true that the welds were inadequate or ineffective. Now that you assume that your opinion is wrong take me back through all of the steps you need to go through in order to figure out where you went wrong."

The witness spent four hours going through those steps more than twice as long as it took him to make his original conclusion. Because he was much more thorough when assuming his opinion was wrong, I was able to show that he didn't go from A to Z in establishing his original opinion. This, in turn, showed his bias for the bike manufacturer.

**In your third question - (What further work do you intend to do or have you been asked to do for the case?) — are you attempting to establish that an opposing witness is biased?**

No. What I'm trying to demonstrate is that an expert has prematurely arrived at an opinion when he still needs to do more evaluation.

For example, I recently had a case in which my client, a backseat passenger in an auto wreck, suffered a severe knee injury from the accident. She wasn't wearing her seatbelt at the time of the accident, but we were arguing that whether or not she had her seatbelt on was irrelevant because her knee was only two to three inches away from the rear of the passenger seat.

The defense's accident reconstruction expert testified that if she had been wearing her seatbelt, she wouldn't have suffered a knee injury. But when I asked the expert if he intended to do any further work on the case, he said he wanted to:

- Measure the distance between the back seat of the car and the passenger seat with someone of the plaintiff's height and weight; and
- Find the weight of both the plaintiff's and the defendant's vehicles.

I then asked the expert if he considered those additional factors to be important ones to consider in arriving at a final opinion. He answered "yes," and I was able to show that his opinion was flawed because it relied on insufficient data.

**Does this question work particularly well in personal injury cases?**

Yes, but it can work in almost any kind of case. I've used it in everything from criminal cases to business tort suits.

**Let's move on to your fourth silver bullet question. (Do you have any criticism of the police or of my experts in this case in terms of their methodology or techniques?) What are you attempting to prove when you ask this?**

The purpose of this question is to build the credibility of my expert or a police officer that I intend to put on the stand.

In a recent vehicular homicide case I tried in Fort Lauderdale, the defense was implying that the police officer could have done a better job in investigating the homicide. I was arguing that the police officer did an excellent job, and during deposition I asked one of their experts if he had any criticism of the officer's investigation.

That expert said, "No" — and in this case what that "no" meant was that they couldn't argue anything but that the police officer had done an excellent job at the scene.

That helped me position the case. Originally, it was going to trial on the issues of both liability and damages; however, because their expert did not fault the police, they ended up admitting liability and the case was tried on damages only.

**What are you aiming to prove when you ask your fifth silver bullet question? (Have you made any credibility judgments as part of your analysis in this case?)**

Again, I am trying to establish that an opposing expert is biased towards his or her side.

The simple truth is that most experts make credibility judgments. If the witness says that he hasn't, it will be very difficult, for him to explain a number of his conclusions or findings without conceding that he made credibility judgments in order to come to those conclusions. On the other hand, when the witness admits to making credibility judgments — especially about your client — you have an opportunity to explore them in detail during deposition.

For example, I had a personal injury case for which the defense hired a doctor to examine my client. In his report, the doctor wrote that the plaintiff was exaggerating her symptoms solely for the purpose of secondary gain. That meant that the doctor had chosen to attack my client's

credibility based on his own credibility judgment, when he should have been looking at medical tests and diagnostic studies in establishing his opinion.

That case settled in our favor for \$340,000.

**Should you ask these five silver bullet questions in the order you just presented them, or should you mix them up?**

Although it obviously is important for you to figure out what questions need to go in which particular order, it's a good strategy to not be predictable. Don't ask questions in the same order and in the same way.

**Do most attorneys use questions similar to these when deposing opposing experts?**

No, they typically don't.

Lawyers generally have problems in doing the right thing in deposition. I continue to hear lawyers say things such as "We'll get over there and play it by ear" and "Well, let's just see how it goes" as they are about to go into a deposition. These types of remarks mean that an attorney isn't prepared and doesn't have a clear strategy and a clear set of goals in mind for taking the deposition.

### **Why do you think this is?**

Lawyers commonly make the mistake of thinking that a particular deposition is less important than other, "more important" depositions in their case. But the trial advocate must consider every deposition as critical to the case. This is true even when, for example, someone is only being deposed to lay a foundation for a single piece of evidence.

Also, too many lawyers have the nonchalant attitude that they've taken 200 or 300 depositions during their career they therefore think it's okay to shoot from the hip and go into depositions without properly preparing for them.

And it's not okay because there is no such thing as a run-of-the-mill deposition.

© 1999 Lawyers Weekly Inc., All Rights Reserved.

## Trial Practice

### Preparing to Destroy Any Expert Every Time

*By Walter R. Lancaster*

We've all heard the story of Achilles. When he was an infant, his mother dipped him into the River Styx, which made every part of his body invulnerable, except where her hand had grasped his heel. He then went on to be invincible, until he was killed when Paris shot him in the heel with a poisoned arrow. Achilles, as a semideity, was also the world's first expert, and because of Achilles, every expert ever since has been born with his own unique Achilles' heel. Your job, as a lawyer, is to find it.

The first problem is that because most people have never heard the full Achilles story, they get intimidated in the presence of experts. Some lawyers, it seems, are so convinced that a given expert is invulnerable that they don't even try to attack him, but instead are content to hire their own experts to fight their battle in the courtroom.

Well, we now know that the idea that experts are invulnerable is a myth. To the contrary, experts are uniquely susceptible to good cross-examination. What I have learned, in part by trial and error, in part from the mentoring of some great trial lawyers, is that by following a few basic rules, you can find every expert's Achilles' heel, and thus destroy any expert, every time.

**RULE 1: Become the master of your case.** You must be intimately familiar with every fact, every document, every witness in the case. Admittedly, this rule may have some practical limitations. Due to the magnitude of some cases, you may have to rely on others to become the masters of their portion of the case. But remember that every time you do that, every time you add a layer between you and the facts, you are compromising this first principle. This is especially true when it comes to expert discovery, because this is one of the key ways to achieve a significant advantage over any expert. The more popular—or greedy—an expert is, the less time he will have to devote to your case. While the expert may know his field intimately, you should know the case in which he seeks to apply that field even more intimately. One of the most common mistakes that experts make is not being intimately familiar with the facts. Remember, jurors are less forgiving of experts than they are of lay witnesses. All you need to do is catch the expert in one significant mistake to cast doubt on all his opinions. If you can master the facts, you will have your first significant strategic advantage.

**RULE 2: Know your prey.** This requires research and study. One of your goals should be to know the expert as well as she knows herself. That means more than getting the expert's self-serving curriculum vitae. Experts are creatures of public record. Know that record. Prior depositions and writings are the most likely source of useful information, but do not ignore the lesser known sources of information such as nonpublished reports, affidavits, articles or news pieces about the expert, academic records, and litigation involving the expert.

**RULE 3: The only way to beat an expert is to be a better expert.** Besides knowing the case, you also must learn that field of specialized knowledge that the expert wants to bring to bear. Difficult? Yes. Impossible? No. By reading voraciously in the field, by consulting your experts, you will become an expert in the field.

**RULE 4: Advance preparation makes winners.** Always get an advance copy of the expert's file. As more and more jurisdictions limit the number of depositions and/or their length it becomes even more important that the litigator make every minute of cross-examination count. Getting the file in advance allows you to walk into the deposition with a plan, save the client money, and take a potential strategic advantage away from the expert. Most lawyers will agree to providing the file several days in advance of the deposition, provided that you agree to reciprocate with your experts. If a lawyer refuses, then issue a Rule 45 subpoena.

**RULE 5: Cooperation is nice, subpoenas are better.** Even if your opponent has agreed to voluntarily tender the expert's file in advance of the deposition, you should always issue a subpoena. You want the expert under the court's subpoena power, whether it comes to issues of production or conduct during a deposition. But be careful about what you ask for, because what is good for the goose is usually good for the gander.

**RULE 6: Take the time you need to get it right.** It's no good amassing all of this information if you don't put it to good use. You have to study it, work it, prepare a plan, and then execute that plan. Read through that file until you know it cold. How much time to prepare? Here, lawyer's working on a contingency fee have a distinct advantage; they take as much time as they need to. But for lawyers billing by the hour, I can already hear the dissent. I'd love to be fully prepared, but my client will only pay for two hours of preparation time. Well, let me preach a little heresy. You and your client should have an understanding of the importance of expert discovery, and the amount of time necessary to prepare. In most cases, once the client understands what's at stake, you will have no problem getting the time you need. But if you run into a situation where you need more time than the client will pay for, then you have to look yourself in the mirror and ask whether your desire to win is limited by whether or not the meter is running.

**Rule 7: Don't plan to ask, plan to attack.** As Judge Bazelon once said, "Challenging an expert and questioning his expertise is the lifeblood of our legal system. . . . It is the only way a judge or jury can decide whom to trust." Accordingly, your plan should be to destroy the expert in the deposition. With very few exceptions, there is no reason to hold your bullets for trial. Most cases settle. The systematic destruction of your opponent's experts will enhance the prospects of settlement on terms that favor your client. This, in turn, maximizes the client's return on his or her investment in you. Accordingly, your deposition should be your trial cross-examination, with the added advantage that you get to take chances in a deposition that you would not want to take for the first time in front of a jury.

If you hurt the expert in the deposition, then expect him to change his opinions at trial. If this happens, move to preclude or strike these "new" opinions during a sidebar. If the judge lets the expert "flip," don't panic, impeach. The flipping expert gives you the greatest gift of all, a concession, in front of the jury, that you know more than he does. It's a great way to begin, and end, your cross on a high note.

An effective expert cross-examination can mean the difference between winning and losing a case for your client. No expert is immune to cross-examination. Whether it's their fees, their bias, their lack of familiarity with the facts, or their faulty methodology, every expert has an Achilles heel. Through creativity, determination, and, above all else, hard work, you should be able to find it. Once you become adept at doing so, you will be able to destroy any expert, every time.

***Walter R. Lancaster is a partner with the law firm of Kirkland & Ellis, in Chicago, Illinois.***

This article is an abridged and edited version of one that originally appeared on page 46 in *Litigation*, Fall 1997 (24:1).

## **American Bar Association Center for Continuing Legal Education**

### **Nine Ways to Cross-Examine an Expert**

It was a Friday evening in The Brief Bag, and Flash Magruder was pontificating about cross-examining expert witnesses.

"There's only one way to cross an expert," Magruder said. "Punch him full of little holes and let all the air leak out."

Everybody laughed--all except Angus.

"Flash, the trouble with that theory is that someone might actually try it."

"Why not?" asked Flash.

"Because," said Angus, "it suggests that it doesn't matter what you do--that the only thing that counts is how you do it."

"And what's wrong with that?" asked Flash. " 'It Ain't Whatcha Do But the Way Hutcha Do It.'"

"Look," said Angus, "I have no quarrel with technique. If you don't do it well, you might as well not do it. But before you ever get to technique, you have to know what your options are, and cross-examining expert witnesses is a perfect example. There are at least nine ways to cross-examine an expert witness--in addition to the approaches you can take with any other witness."

It was obvious that Angus was in rare form, so I got out my pencil. Here are my notes.

#### **Make Him Your Witness**

First, do not attack any witness--especially an expert--unless it will help your case. Cross-examination is a lot easier if you and the witness do not disagree. True, you say, but so what?

Simply this. Say you represent the plaintiff in a traumatic brain-injury case. The defendant's doctor has just testified on direct examination that your plaintiff's seizures are not due to trauma, but to a congenital abnormality.

You can take the doctor head-on if you want, but maybe that will not be necessary. The doctor's only adverse testimony is on the cause of the plaintiff's injuries. He admits they are there; he only disputes how they arose.

Note that the defendant's own doctor admits that the plaintiff will be subject to sudden seizures for the rest of his life; that this form of epilepsy can only be treated, not cured; and that the plaintiff's condition puts him out of work as a machinist and means he can never drive a car again.

If you have a strong case on causation, you may decide it is better to make this witness your own on the issue of damages than to try to beat him down on the subject of cause.

### **Attack His Field**

Attack an entire field of expertise? This one is likely to make you snort in derision until you think about it a bit. Just because the court lets a witness testify does not mean you have to dignify the field--which is what a lot of cross-examination does.

Say you are for the defense in an automobile case, and the plaintiff calls an accidentologist to the stand. If you are not going to call an accidentologist yourself, you can go after the whole field.

**Q. I'm a little confused here. How do I address you--Doctor, Mister, or what?**

**Q. Now then, do you have a degree in accidentology from some college or university?**

**Q. In other words, you have never worked for the police or any other law enforcement officials?**

### **Attack His Qualifications**

The range in this option is wonderful. It covers training, experience, accomplishment, and awards. No matter how well-qualified the witness, there is always a higher level he has not reached. Approached subtly, you even can have the witness discredit your own expert's standing.

Of course, it is a mistake to slam a witness gratuitously, but if the witness literally asks for it, then the jury will appreciate what you do.

How do you know if the witness is asking for it? One place to look is his resume. That is what Keith Roberts from Wheaton, Illinois, did in one of the most delightful examples of this method. An orthopedic surgeon actually included a junior-high school citizenship award in his resume.

**Q. Doctor, I see here that you attended Thomas Jefferson Junior High?**

A. Yes.

**Q. And it says here they gave you the Bronze Buffalo Award. Is that right?**

A. Yes.

**Q. I gather it was a good citizenship award?**

A. That's right.

**Q. Doctor, I don't suppose there was a Silver Buffalo Award, was there?**

A. Well, yes, there was, actually.

**Q. But you didn't win it?**

A. No.

**Q. Tell me, Doctor, was there a Gold Buffalo Award?**

### **Expose His Bias**

Of course, any witness can be biased because of friendship or enmity, but experts are special. They can be biased because of money--their fees for testifying. Because bias is never collateral, it is always a proper subject for cross-examination, and if it is denied, it may be proven with other witnesses.

You must have a sense of proportion. Just because a witness gets paid for his time does not suggest his integrity is for sale. But witnesses who spend a disproportionate amount of time in court or who charge large fees are surely vulnerable to attack.

### **Attack His Facts**

An expert witness is an explainer. And while the explainer himself may be unimpeachable, his explanation is no more reliable than the facts he is relying on. Attacking the information (instead of the expert) is particularly suited for the expert witness who has done no factual investigation himself, but relies entirely on the reports of others. It does not have to be hostile to be effective:

**Q. Doctor, can we agree that your opinion can be no better than the information on which it is based?**

A. Well, yes, I guess so.

**Q. If the information you have is not accurate, then the opinion would have to suffer too?**

A. Of course.

**Q. Which is why you would rather gather the information yourself than have to trust some source you have not worked with before?**

A. Absolutely.

**Q. But you were not given an opportunity to do that in this case?**

A. Well, not exactly. No, I wasn't.

And now a word of warning. Do not be like the hack adventure story author who has a character leave a gun in his sock drawer in Chapter One and then never does anything with it for the rest of the book. If you point out the possibility of unreliable facts, there better be something you can point to later on, or the jury will feel cheated.

### **Vary the Hypothetical**

Changing the hypothetical is closely related to attacking the facts on which the expert relies. You are permitted to change the facts around to see at what point they alter the expert's opinion--depending on whether the question on direct examination originally was asked as a hypothetical.

You can insert facts you feel were left out on direct, or take out facts you feel should not have been included. But watch out. This does not mean you are free to invent facts like some first-year torts teacher, just to see how the witness responds. You must have a factual basis for all your changes. If the basis for your question is not already in evidence, you must be able to connect it up later.

### **Impeach with a Treatise**

The point is simple. If the expert differs with others in his field, he may be wrong. One way to attack him is with a learned treatise--a book or article by a recognized authority--that disagrees with what the witness has said on the stand.

Before the Federal Rules of Evidence, the expert had to have relied on the treatise in forming his opinion, or at least recognized it as being authoritative in the field.

Unfortunately, this put the witness in charge of his own impeachment. Properly prepared, few expert witnesses would admit that any works were truly authoritative. So Rule 803(18) of the Federal Rules of Evidence lists three ways to establish that a learned treatise is authoritative: from the testimony of the witness himself, from the testimony of some other witness, or by judicial notice.

### **Attack Him Head-on**

Notice that until now everything has been indirect. The most difficult and dangerous way to cross-examine an expert is by fighting him on his own ground. You can do that in any number of different ways, such as trying to show he erred in his factual investigation, his computation, or his logic.

But be careful. This is a game that is easy to lose, so you should not play it unless you must. It is usually better to base your cross-examination on some combination of the other options.

At that point Angus stood up and paid his bill. "Well," he said, "I've got to get home."

"Wait a minute," said Flash. "You said there were nine ways to cross-examine an expert, but I counted only eight. What's the ninth?"

"Easy," said Angus, putting on his coat. "Punch the witness full of little holes and let all the air leak out."

Center for Continuing Legal Education I ABA-CLE Catalog  
<http://www.abanet.org/cle/articles/litich31.html>, visited 2/6/00

## EXPLOSIVE AND DYNAMIC CROSS-EXAMINATIONS OF EXPERT WITNESSES

Paul J. Sceptur  
Aiken & Sceptur, S.C.  
260 East Highland Avenue  
Suite 700  
Milwaukee, Wisconsin 53202-3131  
(414) 2225-0250

### I. INTRODUCTION

There is no greater courtroom drama than cross-examination. More cases are won or lost on cross-examination than on any other aspect of trial. How many times have our witnesses sailed through direct examination, passing with flying colors, only to have their ship torpedoed with concise and compelling cross-examination? When witnesses are being cross-examined, a lawyer has the least control over the witness and the client's fate. Clarence Darrow, Louis Nizer, and perhaps that most famous trial lawyer of all, Perry Mason, made their reputations on cross-examination.

### II. ADVANCE PREPARATION FOR CROSS-EXAMINATION

The three basic purposes of cross-examination are: to present evidence helpful to the plaintiff; to rebut evidence harmful to the plaintiff; and to lay a foundation for other evidence. Cross-examination at trial is not something that happens overnight. The groundwork is laid months before the trial through investigation, diligence, and thorough discovery, including adverse depositions. Ineffective cross-examination usually occurs when the trial lawyer fails to follow through or fails to prepare sufficiently for this task.

Advance preparation for cross-examination is a primary requirement, starting with the discovery deposition of the adverse party and then proceeding to experts and others. These depositions are nothing more than another form of cross-examination. Before deposition, the theory of the case and the elements of proof necessary to succeed with that theory must be identified. This information is generally obtained through formal discovery, but can also be obtained through thorough investigation and by a complete understanding of the topic or topics essential to the case. At deposition, the information possessed by the witness and how it bears on the legal and factual issues of the case must be obtained. Additionally, preparation for discovery deposition must include researching and understanding the topic that is the subject of the examination. If a medical expert is being deposed, the trial lawyer must research the area of medicine involved. Take, for example, the adverse examination of a defendant doctor in a medical malpractice case. The doctor, a general surgeon, performs a gallbladder removal, called a cholecystectomy. This involves identifying the anatomy and certain landmarks and then carefully transecting a bile duct so that it can be removed. If the wrong duct is transected, serious complications can result. A lawyer preparing to adversely examine the defendant doctor must gain an understanding of the anatomy and what landmarks must be identified in performing this operative procedure. Although some of this can be obtained by consulting with experts who are supportive of the plaintiff's case, the trial lawyer should also reference medical texts and articles to become familiar with anatomy. In the case of

the cholecystectomy, the physician was asked about certain areas of the anatomy, one called Calot's Triangle. a triangular area formed by the junction of several of the bile ducts. The surgeon did not know what Calot's Triangle was or where it was located. Had the lawyer not prepared sufficiently by reviewing the anatomy and the medicine involved, Calot's Triangle would have remained unmentioned. Needless to say, every expert, plaintiff or defense, was quite amazed and amused that the defendant himself did not know what Calot's Triangle was.

These lessons hold true whether your case is a products liability case. medical malpractice action, or automobile accident. The same is true whether your case is a complicated multi-million dollar case or a soft tissue case involving permanency. Preparation is the key to effective cross-examination.

### III. PREPARATION OF CROSS-EXAMINATION

Every trial is a search for the truth, and we all hope to find honesty and reliability in witnesses. As indicated earlier, cross-examination is the stuff that trials are made of. This is the drama, the play of the trial, the showdown at high noon. This is where truth is pulled from a reluctant witness. This is where truth is obtained, however painfully. from witnesses who seek to subvert your case. This is the fun part of the trial for lawyers, as this is where we all think we are sit our best. There are certain issues that must be examined prior to cross-examination.

#### A. Must I Cross-Examine This Witness?

Sometimes testimony on direct examination will not hurt your case. Do we have to cross-examine out of habit, to hear ourselves talk, to feel as if we are accomplishing something? If the testimony has not hurt your case, why cross-examine? If the testimony of this witness is repetitious or if he or she is one of many similar types of witnesses, there is no need. Sometimes the best cross-examination is no cross-examination at all. When we do cross-examine, we expect to "score," to make points, to elicit answers that are helpful to the case. Sometimes witnesses are highly credible; you have no bullets to shoot at that witness, or the witness does not hurt you. If you cannot score, do not shoot the ball.

#### B. Have I Planned Out How to Question the Witness?

Questions must be formed so that witnesses do not merely rehash their direct testimony or re-emphasize testimony that is favorable to the other side. Carefully avoid giving witnesses the opportunity to go through their direct examination in detail and all the evidence that is harmful to your case. This lesson is learned in the most painful of ways. Plan questions carefully in advance so that witnesses are not allowed the opportunity to again explain why their direct testimony must be true, accurate, reliable, and credible. Proper formulation of questions is essential so that this can be avoided.

#### C. How Do I Control the Witness and What Do I Expect to Achieve?

Witnesses on cross-examination must be carefully controlled. Depositions provide an opportunity to test the witness, see if he or she easily angers, is argumentative, or is the type of witness who has to give a two-page answer to a onesentence question. Cross-examination is an attempt to discredit the witness in the eyes of the jurors and allow them to visually and verbally assess the witness. Witnesses will often wilt under the pressure. Anger is another response, when tempers flare and witnesses lash out and

overreach. The cross-examiner must maintain fairness under these circumstances, exhibiting to the jury and the court a rational control of the situation. This control will impress the jury and further strengthen the cross-examination of the hostile witness. In this vein, it is important that the examiner maintain control of his or her emotions as well-the worst thing an examiner can do is appear overtly mad at the witness in front of the jury. Anger must be carefully controlled, as jurors want to identify with witnesses and not attorneys. One law school professor stated that lawyers are like surgeons, and our words are scalpels. As a surgeon must carefully wield a scalpel, so must the lawyer. The careless use of the scalpel will cause the examiner to severely injure him or herself during cross-examination.

#### D. Preparation Been Sufficient to Cross-Examine?

Preparation starts in the discovery phase, but also includes a thorough knowledge of the answers and information obtained during discovery. Deposition summaries must be prepared, and the examiner must have a thorough knowledge of the contents of those depositions so that inconsistencies can be challenged immediately. If you appear to be prepared and confident on your cross-examination, the examination will be more convincing in the eyes of the jury. This confidence can only be obtained by thorough preparation.

#### IV. SUBJECT MATTER OF CROSS-EXAMINATION

The use of leading questions is a matter of right. The leading question and the resulting "yes" or "no" answer is a powerful arrow in the attorney's quiver. It allows for control of the examination, suggestion of answers to the witness, and allows the examiner to put facts and inferences in front of the jury. Witnesses may be cross-examined on any matter that is relevant to any issue in the case. This would include the issue of credibility. This is known as the "wide open" rule. Some courts have a "beyond the scope" rule, limiting cross-examination to matters testified to on direct, but this view is in the minority.

Most witnesses attempt to be honest. Very few intentionally lie or subvert the truth. Cross-examination is a tool whereby reliability is tested along with perception, recollection, and the ability to clearly communicate firsthand knowledge. There are several ways to challenge a witness, One is based on the lack of perception. This is especially true when a witness as to an occurrence. Witnesses are in a position to observe, but their observations are sometimes inaccurate. The accuracy of an observation is based on the ability, opportunity, position, and duration that the witness has in observing an event. Witnesses can be impeached on then experiences, their position, how long they saw an event, whether they had a full or obstructed view, and whether they were fearful, frightened, or in a state of shock.

As recollections are based on memory, the accuracy of the memory should also be tested. The passage of time between the event and the time of testimony acts as a natural eraser of details. Confusion is another eraser of memory. Witnesses tray be so confused so as to become inaccurate, unable to describe the events in a logical and believable way. As time and distance ace difficult for many people to judge accurately. these are areas in which witnesses must be tested

#### V. CROSS-EXAMINATION OF EXPERT WITNESSES

Effective cross-examination of experts mandates familiarity with the subject matter. You must know the area well enough to be reasonably confident of knowing the answers to your questions. When

cross-examining opposing experts, it is best to focus only on areas of disagreement. One effective tool is to make a list on a blackboard of agreements between the plaintiff and defense. This shows that the expert agrees with the plaintiff's case on almost all points and disagrees on only a few. He or she can then be asked if the plaintiff's expert is competent and if there is room for honest disagreement on the disputed points. This narrows the issues to only a few points and effectively reveals that the defense expert could be wrong. Because some attempt to overreach, it is important to point out to the jury that the individual is experienced only in a narrow area that perhaps is not the area of the plaintiff's expert's expertise. In these cases, the opposing expert will often agree that the plaintiff's expert is in a better position to render an opinion. An example might be an injury to a child's jaw and teeth that have both been treated by a pediatric oral surgeon. If the defense presents an expert who does not do any pediatric cases but rather refers them to a pediatric oral surgeon, this should be pointed out, as such an expert will often defer to the specialist.

When, examining a defense expert, especially a medical expert, certain points must be addressed.

A. Was a Report Issued?

If a report was issued, it should be obtained in the discovery process. The report must be analyzed to uncover any inaccuracies. Additionally, the testimony should be compared to the report for any inaccuracies or inconsistencies.

B. Has the Expert Examined the Patient or Seen the Machine in Question?

Defense experts often do not see the product or the patient more than one time. These examiners are subject to effective cross-examination as to their point of reference. As for medical experts, a good tactic is to point out that they have seen the patient either one time or not at all, and therefore they are not in as good a position to render opinions as the treating physician.

C. Who Hired the Expert and What Are the Expert's Fees?

Obviously, experts are compensated. It is essential, especially with medical experts, to point out they have been hired and paid by the defense and are not independent examiners. In Wisconsin, the defense bar attempts to refer to defense medical examinations as independent medical examinations. You could bring a motion in limine barring any reference to an "independent" medical examination and instead seek an order from the court to refer to them as defense medical examinations. The amount of compensation that the expert is receiving must also be brought out on cross-examination. This includes not only testimony in the case at hand but all legal, medical, or forensic work that the expert does. Routinely request 1099 forms from these experts to ascertain other sources of medical/legal fees. This includes testifying not only for that particular defense firm, but for other defense firms as well.

Also, try to find out what other cases that expert has testified in so that you can obtain depositions and/or trial transcripts of that expert's testimony. Prior deposition or trial testimony can be a powerful tool on cross-examination. For example, in a dental negligence case concerning orthodontics and whether orthodontic treatment caused a temporal mandibular joint problem, the defense presented the expert testimony of a dentist who had testified extensively in this area. The plaintiff's lawyer obtained approximately 10 transcripts of prior testimony and was able to effectively use the transcripts to impeach and discredit that particular expert. It got to the point where he was asked a question and would agree,

adding "I suppose you wouldn't ask that question unless the answer was in those transcripts, so I'll agree with your statement."

D. Another Powerful Area of Cross-Examination Is Learned Treatises.

Many experts, medical or otherwise, testify inconsistently with authoritative and respected articles or texts. Professional journals and literature can be utilized on cross-examination to either impeach the witness or show how he or she is out of conformity with the accepted norm of the profession. This can be used effectively when experts present opinions based on "junk science." An example of this is when medical experts testify in malpractice cases that the result is merely an unfortunate complication. Imagine the effectiveness of the cross-examination that starts out with an article published in a respected journal such as *The Journal of Hand Surgery*, which states that the injury complained of is always avoidable if care is used and is never an acceptable complication.

## VI. RULES OF CROSS-EXAMINATION

Professor Irving Younger lectured extensively on evidence and cross-examination. Following are certain principals and rules of cross-examination borrowed from Professor Younger. Some are his, some are the author's, and some have been gathered through the years. These rules are not inflexible nor are they inclusive. They are guidelines and should generally be kept in mind when preparing and conducting cross-examination.

A. Brevity

An effective cross-examination must be brief. If it takes an hour, jurors will forget the first 45 minutes. The examiner should select various issues or topics for examination and then make a point or two after each. Jurors live in the LA. Law age, where closing arguments last 30 seconds. That might be a tad short, but the concept rings true in this day and age. Brevity is superior.

B. Keep Questions Short and Do Not Use Legalese.

Like insurance policies, examiners should use plain talk. Do not use complicated medical or legal terms or even complicated English grammar when examining a witness. Use plain English in the simplest words possible, otherwise you will lose the jurors in the question. Do not forget that jurors come from everyday life, and some may be more or less educated than others. Try to communicate with the least educated juror-if you are successful with that juror you are sure to be successful with the others.

C. Always Ask Leading Questions.

This technique is used to maintain control over the examination. Ask a leading question and then finish it with "is that a fair statement," or preface a question with "would it be fair to state that." This accomplishes two purposes. First, the witness is bound to answer "yes" or "no" in most circumstances. Secondly, the idea is planted in the jurors' minds that you are attempting to be fair and reasonable with the witness. The most effective cross-examination is when the witness says nothing but "yes," "no," or "I don't know."

D. Do Not Ask Questions to Which You Do Not Know the Answer.

This is a rule often breached, sometimes with reluctance. Any good lawyer will tell you not to ask a question to which you do not know the answer, but, especially on discovery, if common sense tells you the answer is in your favor, you may want to ask the question. There are stated exceptions to this rule and they are as follows:

1. If you do not care what the answer is but you do not know the answer, ask the question anyway, but make sure that the answer does not matter to your case.

2. If there is an important question you do not know the answer to and you do not want to risk a bad answer, ask benign questions to build up to the important question. Do this in an innocuous manner so that you can drop the important question when you realize the answer may well be unfavorable.

E. Listen. Listen. Listen.

Many lawyers expect a certain answer and are already thinking of the next question instead of listening to the answer they are getting. Some lawyers have lost cases despite obtaining incredibly favorable answers on cross-examination because they did not hear the answers. Whenever you get this type of answer on cross-examination, go to the court reporter and ask him or her to mark the question and answer so that it can be transcribed and read on closing argument. Many times questions are asked on cross-examination to get one answer to one important question. Do not forget to listen so that you know when that answer arrives.

F. Do Not Argue with the Witness.

If both witness and lawyer are arguing, the witness will usually win. If a witness wants to be quarrelsome or argumentative, allow the witness to do so, but do not stand in the same hole that the witness is in.

G. Avoid Giving the Witness an Opportunity to Repeat or Emphasize His or Her Direct Examination.

The witness can be asked several questions about his or her direct examination to set up the cross-examination. Do not allow the witness to repeat large portions of earlier testimony, however, as that will only imprint that testimony on the jurors' minds. Again, use leading questions to control the witness' testimony in that regard.

H. Do Not Ask "How" or "Why" Questions That Allow the Witness to Explain.

"How" or "why" questions must usually be avoided on cross-examination. As with any rule, there are exceptions. If you know you are in control of the situation and you know the witness' particular position is really indefensible or unexplainable, offer the floor to the witness to explain how or why he or she can state that opinion. Be careful, however, when using this technique, as you must be certain in your mind, and in the mind of common sense and logic, that the witness cannot present a credible explanation.

I. Land the Fish Once, Do Not Try to Land It Twice: Avoid One Too Many Questions.

This is perhaps the hardest rule to follow as we always try to drive the nail in farther than we need to on cross-examination- Often, it is difficult to recognize which question is one too many. It becomes immediately recognizable, however, as soon as you ask that question. For example, an expert in a medical negligence case was asked whether a physician deviated from the standard of care. The expert started his answer by saying "yes" and then gave a somewhat long and tedious explanation trying to wiggle off the hook. That question was followed, up with a question to the effect that "Well, then you believe that Dr. Smith was negligent," to which the physician replied, "Oh, no, if that's what your question implied then I don't believe he deviated from the standard of care." that was clearly one question too many.

J. Save It for Summation.

Use this in the type of case that turns on the testimony of one witness. Your job is to make the jury disbelieve that witness. The jury may not understand what you were driving at during the cross-examination because the argument was so clever and the cross so subtle, but the jury does not have to understand the argument at that time. Sometimes it is best to leave the jury in a state of unsatisfied curiosity, allowing you to tie everything together during your closing argument. Satisfy unsatisfied jurors during your closing argument and they will be grateful to you and likely render a favorable verdict.

VII. ADDITIONAL CONSIDERATIONS

A. Emphasize Only a Few Main Points.

There is no need to rebut every single point made on direct. Pick the important ones and center your exam around them.

B. Before You Attack, Focus on What Is Agreed Upon.

Prove all you can for your case before you attack the witness.

C. Control the Witness From the Start.

If you let the witness control you, you will never control the witness on the important points. Start strong and do not waiver. Make sure the witness and the jury know you are in control.

D. Make the Witness Lock Him or Herself In.

Put the witness in a box so there is nowhere to run when you ask the important questions.

E. Keep the Organization Simple and Do Not Skip All Over.

If you confuse the witness, you will also confuse the jury.

F. Be Flexible and End on a High Point.

Be ready to change the plan if necessary, but always plan where you want to end.

## VIII. SPECIAL CONSIDERATIONS ON CROSS-EXAMINATION

It is important to remember that jurors attempt to identify with lay witnesses and even experts on cross-examination. Any attempt to intimidate or bully the witness will likely produce juror resentment that will taint any points you make on cross-examination. The hard line approach should be saved for those witnesses who are obviously combative or unwilling to tell the truth.

Often, it is important to use a soft touch on cross-examination. This is especially true with women, the elderly, and children.

It is important to exhibit to the jury an attempt to be fair. Preface questions with "would it be fair to state." or "it would be a fair statement would it not," or "you would agree would you not."

It is important to exhibit respect to any witness you are cross-examining. This is especially true when the witness is a police officer, minister, elected official, or one in a position of recognized responsibility and authority. Disrespect to a witness usually fosters disbelief of your cross-examination with the jury. As the whole trial process is establishing the credibility of your case and your client, do not compromise this by bullying or treating people with disrespect.

It is important to develop all factual information necessary to provide a foundation for your theory of the case or the opinions of your expert. You must understand the reasoning process of your expert and provide the factual foundation necessary to support his or her conclusions. Inconsistencies between eyewitness accounts or testimony that you believe to be incredible can be established by cross-examining other witnesses. In a case in which a roofer was knocked off a roof by a piece of unsecured insulation blown loose by a strong wind, the defense tried to establish that the client was told not to work because of the strong winds and so was negligent for remaining on the job. The weather reports for the year prior to the accident established that on approximately 25 work days, the wind was equal to or greater than the wind on the day in question. Every defense lay witness was asked on cross if they were told not to work on any of these 25 days in order to set up the cross of the crucial defense witness, who allegedly told the client not to go up on the roof on the day in question. Needless to say, this testimony was effectively neutralized.

Sometimes cross-examinations should take a different approach than discovery deposition — a different technique, order, or attack should be used at trial than was used in discovery. Many witnesses are prepared for cross-examination by reading their deposition transcripts, and those witnesses will be prepared for a similar style and sequence of questions. By varying the style, sequence, or content, you can decrease the witness comfort level and produce both substantive and intangible evidence.

## IX. ADDITIONAL IDEAS FOR CONSIDERATION -

This list was devised by Greg Cusimano of Gadsden, Alabama. It is by no means inclusive, but provides some ideas and thoughts for discussion.

1. Exercise careful judgment as to whether to cross-examine at all.
2. At the end of the direct examination, decide if the jury liked or did not like the witness.
3. Do not overdo cross-examination.
4. Select two excellent points as the first and last questions.
5. Visualize cross-examination before doing it.
6. Watch where you position yourself physically in the courtroom during the examination.
7. Use the podium to your advantage.
8. Watch the jury and witness closely.
9. Try to anticipate the opposing side's objections to questions and be ready with a "back up" plan to cover the point in the event the objections are sustained.
10. As a rule, do not attack the witness.
11. In any event, do not attack the witness before you have the jury's "permission."
12. Do not attack or intimidate the witness (if at all) until you first elicit any favorable testimony you expect him or her to give.
13. Consider and prepare a "fall back" cross-examination.
14. Use words that will create the desired impression.
15. Use "control" techniques to make the witness answer.
  - a. Strike a bargain.
  - b. Have the court reporter read it back.
  - c. Let the witness ramble and then ask the witness if he or she remembers the question.

- d. Use the loop-back method.
  - e. Is that a "yes?"
  - f. Repeat the question.
  - g. Take the blame for asking an unclear question.
  - h. Appear puzzled and ask it again.
  - i. Hold up your hand as an indication to stop.
  - j. Consider your position.
  - k. "We will get to that."
  - l. "I would love to, but the rules do not allow me to answer."
  - m. "Would you like to explain?"
  - n. Use of deposition *or* statements.
  - o. Consider using the witness' terms.
  - p. Know the facts and show it.
16. Have a reason for every question.
17. Do not let the witness just repeat and re-emphasize direct testimony.
18. Rarely ask a "why" question. (If it is a case where you know the witness' stated reasons are going to be totally inconsistent with logic, then sometimes the "why" question can be dramatic.)
19. Never ask a question to which you do not know the answer, unless:
- a. The answer does not matter; or
  - b. You are prepared to handle whatever answer is given.
20. Be Yourself.

21. When you have scored a hit, move on.
22. After scoring a hit, be wary of the temptation to emphasize it with repetition; the witness may seize the opportunity to explain away or "wiggle off the hook."
23. Beware of traps laid in direct examination.
24. Ask leading questions. (This does not mean ask only leading questions.)
25. Adopt an air of authority, not arrogance.
26. Keep control of yourself and the witness, but do not be afraid to show passion, emotion, and indignation when appropriate.
27. Listen carefully to the witness, and make it clear to both the witness and the jury that you are listening carefully.
28. Plan the cross-examination, but remain flexible.
29. Do not ask the "last" question, no matter how tempting it may be. (Remember, the ultimate destination of all hogs is the slaughterhouse.)
30. Do not be afraid to prove all you can on your case through cross-examination. Do not forget how it will look in the record on appeal.
31. Ask simple questions.
32. When the witness hurts your case, try to avoid a visible reaction and move quickly to a question that is a winner.

## X. CONCLUSION

Cross-examination is an art and can be developed only through practice, during discovery depositions, and at trial. Preparation is the hallmark of successful cross-examination. Without preparation and a thorough knowledge of the arm it is destined to fail. Cross-examination should begin and end on high notes. Most jurors remember the beginning and the end, but nothing in between. Much of an effective cross-examination is based on common sense. Jurors apply their common sense to their interpretation of the evidence, and as most witnesses attempt to be honest they can be turned to your side by the application of common sense. Louis Nizer had something he called the rule of probability. If common sense says something happened, then it probably did. Some truths are eternal. Lastly, in the

words of Melvin Belli, do not try to land the fish twice. When you get a good answer resist the temptation to follow up. Quit while you are ahead and do not let the fish wiggle off the hook. You can land it the second time during your final argument.

PREPARING FOR THE MOMENTS OF TRUTH:  
YOUR EXPERT'S DIRECT AND CROSS-EXAMINATION

Raymond Paul Johnson  
Law Offices of Raymond Paul Johnson  
10990 Wilshire Boulevard  
Suite 1150  
Westwood  
Los Angeles, California 90024  
(310) 246-9300

I. INTRODUCTION

Products liability cases can amount to nothing without competent expert testimony. The main goal: You and your expert must simplify and explain technically complex issues to lay jurors. In general, the defense wants to complicate matters, to show that no one really knows what happened or why and that disagreement permeates the issues, making imposition of liability unfair and arbitrary. You and your experts must prove otherwise. A critical step in this process is thorough preparation of your experts for both direct and cross-examination at trial.

II. INITIAL EFFORTS

Preparation begins at your first contact with the expert, hopefully early in the case. Advise him or her that any notes taken may well be discoverable later in the litigation. Explain the case in general terms, and determine whether any conflicts of interest exist with the defendant, the defense attorneys or the product manufacturer. Ensure that he or she has no conceptual misgivings about the prospect of testifying on behalf of plaintiff in your case.

If all is well, get into details. Find out if your expert has given prior testimony or written reports, papers or books contrary to your position on the specific issues in the case, or about the product or substantially similar products. If so, ask that copies of the transcripts or papers be sent to you along with the expert's curriculum vitae and fee schedule.

After receiving these items, decide whether to proceed with the expert. If you do proceed, send a letter confirming your expert's retention and a complete data package on the case. Remember that in most jurisdictions if the expert testifies at trial, any letters or other documents that you or your staff send will probably be discoverable. As a result, make sure that anything sent to the expert is suitable for projecting on a big screen in front of the jury; that, after all, is exactly what the defense will do if you or your staff send letters telling or suggesting to the expert what to think or say. So don't.

The data package should include any key photographs of the product (before, during, and after the injury event, if available) and the accident scene; any incident reports or witness statements; medical records (especially emergency room, admitting g, and discharge summaries); x-rays (if appropriate); and pertinent deposition transcripts.

Never send black-and-white photocopies of photographs. Photos of the product and accident scene are critical, and copies lack sufficient detail. Don't have your expert start the case with missing material essential to his or her opinions. Send actual photographs, or at least color laser copies to give him or her a fair chance.

After your expert has reviewed the material, ask for a preliminary oral report. If compatible with your positions in the case, go on to the next critical step in preparing your expert-inspection of the actual product

Along these lines, the single most important thing you can do to prepare each and every one of your experts for trial is to gain possession and control of the actual product. Then, let them conduct hands-on inspections. Nothing prepares liability experts more than careful product inspection and (if appropriate) testing.

### III. THE ROLE OF THE EXPERT DEPOSITION

Preparing your expert for deposition is essential, and helps prepare hire or her for trial. But make no mistake, key differences exist in the two types of preparation.

Getting your expert ready for deposition consists of ensuring that lie or she is ready to articulate opinions and the basis for each opinion. Unlike trial preparation, however, emphasizing that testimony be crisp, clear, simple, and straight-forward is not especially important. You do not necessarily want the expert to educate your opponent, only to preserve his or her right to educate the jury at trial. Therefore, deposition testimony can be somewhat complex or convoluted, as long its every opinion and reasons for the opinion ,ire given. so that your opponent cannot yell "Surprise" at trial and have pardons of your experts testimony excluded.<sup>91</sup>

One caveat holds for deposition and trial preparation: Caution your expert not to use terms like "I think," "I assume," and "it's possible" when discussing opinions. The burden of proof is a reasonable engineering or scientific certainty or probability. In every jurisdiction, that means at least a 51 percent chance of correctness. Anything less is meaningless in the expert arena. Encourage your experts to use terms like "highly probable," "very likely," or "almost certainly" when addressing key liability issues at the heart of their opinions.

---

<sup>91</sup>See, e.g., *Kennemur v. California*, 184 Cal. Rptr. 353 (Ct. App. 1982).

#### IV. PREPARATION FOR DIRECT TESTIMONY

Start by having your expert review his or her deposition testimony. Consistency can be critical. In addition, review the major deposition exhibits with him or her. Determine which ones are pertinent to trial, and work out foundational issues and how best to introduce them,

Also, if not already accomplished, your expert should review the deposition of his or her counterpart defense expert. In *that* way, neither of you will inadvertently lay foundation or open the gate for your opponent's evidence and arguments on the central issues.

##### A. The Key Rules

When discussing direct, emphasize and reemphasize the two major rules about jury presentations: Keep it simple, and keep it clear. You and your expert need to put hard time into deciding how to simplify complex matters and present them with clarity. All else follows in importance, especially on the critical grounds: proving the defect and how exactly it caused injury.

Whenever possible, your expert should show the defect point blank-to the jury,

and physically demonstrate the injury mechanism. If demonstration is impractical, clear and simple demonstrative evidence in the form of charts, drawings, graphics, photos, or videotape/CD-ROM should be used. The jury cannot be left with confusion or even ambiguity on the issues of defect and causation.

Caution, however, must be used if you and your expert plan to conduct a demonstration, experiment, or test in the courtroom. Practice and re-practice. If it is not 100 percent repeatable, try something else.

In addition, if you are counting on a courtroom demonstration to show defect or causation, have a backup plan carefully worked out with your expert. You probably will not know for sure if the judge will exclude all or part of the demonstration on evidentiary grounds until just before the planned demonstration. One thing you will know, however: If it is an effective demonstration, your opponent will challenge its admissibility on at least two grounds: (1) the demonstration is not substantially similar to the circumstances surrounding the actual injury event<sup>92</sup> and (2) the probative value of the demonstration is outweighed by its *prejudicial* effect or an undue consumption of time.<sup>93</sup>

##### B. Qualifications

---

<sup>92</sup> See, e.g., *Hurlbut v. Conoco, Inc.*, 253 Kan. 515 (1993).

<sup>93</sup> See, e.g., FED. R. EVID. 443.

Before getting to the meat of direct testimony, spend some quality time at trial going over the qualifications of your expert. In most cases, because you chose your expert very carefully, the substance of qualifying testimony is hardly problematic. The style, however, can be another story.

Necessarily, you must begin direct with qualifications. The problem: This testimony can either bore to tears or, worse, make the jury think your expert suffers from a Napoleonic complex. Also, remember that, as with many things in life, there are halo effects at trial. If qualifications go smoothly, the rest seems to go well. If the road starts out bumpy, the rest can be a terrible trip.

So work with your expert. Devise a way in which your expert can review his or her qualifications with the judge and jury in a natural manner, not appearing either modest or proud. A good part of this, however, is your responsibility.

Know your expert. For example, if he or she has not published papers in the field or does not have a professional engineering license, do not ask related questions. Instead, emphasize strengths, such as work experience, education, and teaching credentials.

And never let your expert go on and on about his or her background. Break it up with interesting questions, smiles, and even a little humor, assuming that style is natural for you and your expert. You are a team, and your expert is not a wind-up toy.

### C. Getting to the Meat

Experts are not simply witnesses; jurors expect more from them. As such, caution your expert never to create unnecessary controversy, and to exude confidence, especially when explaining key points. Eye contact communicates confidence, and your expert should look at the jury except during questions from the bench, when all eyes should be on the judge.

Your expert should also never appear arrogant, over-confident, or condescending. Each and every explanation should respect the intelligence of the jury. At the same time, though, experts should use only understandable lay terms. Acronyms, technical jargon, scientific terms, and the like should be left at the deposition room.

Your preparation of the expert must include focus: specifically, what do you want his or her testimony to add to your case. Consider reviewing the key jury instructions that pertain to his or her testimony with your expert.

Emphasize that he or she need not be 100 percent sure of things. That can seem pompous. As mentioned earlier, he or she should stick to terms like "highly likely" and "very probable,"

Also, spend significant preparation time on the basis for each of your expert's opinions. The judge and jury must understand and accept the bases of his or her opinions.<sup>94</sup> Therefore, review them with him or her, and determine how you both can present them in the most interesting format. One effective technique, if consistent with your expert's background and personality, is to have him or her leave the witness box (with court permission) and go to the blackboard or a writing easel. There, the expert should explain the reasons for his or her opinions much as a professor or teacher might in a classroom setting. When done naturally and correctly, this type of presentation can capture the imagination and understanding of both the jury and the judge, the primary goals of direct.

Also, in preparing for direct, ensure that you and your expert cover the use of demonstrative evidence, and practice presenting the exhibits. Keep the number of charts and other items, however, to a minimum; you do not want to inundate the jury or the expert. Each chart, whenever possible, should be simple, interesting, and so clear that it almost communicates perfectly just sitting there. If the charts proposed by your expert do not do this, you should both work harder on them. In modern products cases, it is simple to be complicated and most times difficult to be simple.

Finally, make sure you carefully review the prima facie elements of your case and the key product defenses that affect your expert's areas of testimony. If applicable, cover alternate designs, comparative fault, product modification, unforeseeable misuse, and the like. With key defenses, make preemptive strikes on direct. At a minimum, it allows your expert to cover his or her most effective arguments twice, once on direct and, in more detail, during cross.

## V. PREPARING FOR CROSS-EXAMINATION

The key to cross-examination is control. Your expert must try to gain and retain control throughout cross-examination.

In general, two types of cross-examination exist: (1) questions designed to discredit the expert's opinion by highlighting a lack of qualifications or bias; and (2) questions that attack based on inconsistencies, improper assumptions or inaccuracies.

### A. Qualifications and Bias

Hopefully, during your search for an expert, you weeded out the unqualified. Therefore, attacks in this area are usually dedicated to situations where an attorney has asked a consultant to stretch opinions into fields outside his or her core expertise. The first step in preparation: avoid doing so. Try never to ask an expert to crawl out on a limb to render an opinion; if the expert doesn't fall, the branch will probably break.

---

<sup>94</sup> See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

If, however, you have no choice, carefully devise tactics with your expert to minimize the likely harm. Have him or her crawl out only as far as is absolutely necessary. Ask him or her to do current research related to the issues, and to consult with others more knowledgeable in the field. As a last resort, have a rebuttal expert lined up (although you can never be sure the court will allow a rebuttal expert in a given case). Again, the best course is never to ask your expert to stretch; it jeopardizes his or her other testimony, and your case.

The topic of fees arises in many products trials. To prepare your expert for likely cross in this area, emphasize only one point: Your expert should never evade the issue. Make sure he or she clearly states that fees, whatever they may be, are his or her "normal and customary" hourly fee for consultation. If the same fee structure applies to non-litigation matters, Make sure that point is made to the jury.

#### B. Inconsistencies, Improper Assumptions, and Inaccuracies

The best way to prepare for this line of cross is to have your expert before deposition eliminate any calculation or reasoning flaws in his or her analysis. If, despite best efforts, however, mistakes are made, the next most important thing is for your expert to realize the errors, correct the analysis and explain the situation to the jury during direct examination. Do not leave unexploded shells for your opponent's cross-examination. Otherwise, he or she will set them off in a way that will maximize damage.

Advise your expert that other lines of attack include: (1) criticizing expert testing as lacking properly calibrated equipment, conditions similar to the injury event and the like; (2) asserting that the expert had inadequate or incomplete information about the case in forming opinions; (3) using an accepted treatise in the field to mount an assault on his or her opinions or the bases for those opinions; (4) getting the expert to agree that if certain key facts were different, his or her opinions might change; and (5) employing hypothetical questions that obscure or confuse the actual facts of the case. In all of these instances, if your expert emphasizes the facts and why they are true, refuses to accept incorrect premises and attempts to regain control of cross and reemphasize his or her opinions whenever an open-ended question is posed, the results will be favorable to the expert, to you, and to your client.

## VI. CONCLUSION

The center of a modern products trial may well be expert testimony. Preparation for both direct and cross-examination can be essential to success. Emphasize with your expert that everything during direct should be focused at presenting a clear and simple explanation of liability. Cross-examination, on the other hand, requires gaining control. With control, your expert can drive home his or her opinions through repetition and emphasis. The goals are clear, the work can be hard, but justice sometimes requires a price. Good luck.

# Expert Overhaul Needed

BY PAUL R. RICE

Once again, the Federal Judicial Conference has merely tinkered with the machinery of evidence law, when what's needed is a complete overhaul of the expert witness rules. In the process, the conference has shown itself too willing to bow to the Supreme Court and too reluctant to acknowledge 25-year-old design flaws.

The goal of the rule drafters should be to allow the unfettered admission of otherwise inadmissible background information that experts rely on to form their opinions. How can we expect jurors to properly weigh expert testimony if they can't review all the evidence that supports those opinions?

Last month, the Federal Judicial Conference sent to the Supreme Court proposed changes to Rules 702 and 703 of the Federal Rules of Evidence. Rule 702 defines who is qualified to give expert witness testimony; Rule 703 identifies what that testimony may be based upon.

The draft revisions to Rule 702 are not substantively troubling. The conference's Evidence Rules Advisory Committee proposes to rewrite the rule to reflect the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). But the advisory committee has acted like an inferior judicial panel bound by Supreme Court precedent. As long as the justices' evidentiary interpretations are not based on constitutional principles—as they are not in *Daubert*—the committee is free to take a different path by simply revising the rules.

And sometimes wholesale replacement of a rule, such as Rule 703, is the only appropriate remedy.

## THE EXPERT'S ROLE

To fully understand Rule 703's problems and the inadequacies of the committee's proposed revisions, one must remember the roles of the jurors and the expert witnesses who testify before them. The jury is the sole independent finder of facts relative to the dispute at issue. The role of the expert witness is to assist the jury in this fact-finding role. Classically, experts have done this by taking the evidence that the jurors have been permitted to hear and suggesting conclusions that could be drawn.

Under common law, before the expert could testify, the court first had to determine that her assistance was necessary for the jury to properly perform its fact-finding function. Today, expert testimony is admissible if it merely assists jurors.

Before 1974, an expert could only consider facts that were admissible and admitted into evidence. If the expert were not aware of these relevant facts from firsthand observation, the facts were usually presented to the expert in the form of a hypothetical question. These questions had to recite *only facts that had been admitted into evidence*. Based on the assumption that those facts were true, the expert was asked if she had an expert opinion on the particular technical or scientific matter in question.

Inadmissible evidence could not be part of the hypothetical questions because inadmissible evidence could make the expert's answer logically irrelevant to the dispute before the jury.

The adoption of Rule 703 in 1974 fundamentally changed the expert's role at trial. The rule's second sentence provided that if evidence relied upon by the expert in forming her opinion were "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence*" (emphasis added).

Permitting experts to rely on inadmissible evidence changed their role from an aid to a *substitute* for the trier of fact. The experts could make findings based on inadmissible evidence and propose that their conclusions be adopted by the jury even though the jury might never hear all the evidence supporting the experts' opinions. In other words, experts may testify about conclusions they could not have made had they been one of the jurors who heard only the admissible evidence presented at trial!

Thus, the role of expert witnesses now is more akin to "super 13th jurors" who consider evidence that the others cannot hear, and who advocate conclusions based on their personal credibility rather than the evidence formally admitted in the judicial proceeding.

## **BAD MEDICINE**

The illogical application of Rule 703 is similar to the absurd treatment of medical experts under common law. When medical doctors testified, they were permitted to testify and rely upon statements that patients had made for purposes of medical treatment, including patients' statements about current symptoms.

The doctors, however, were not permitted to repeat patient statements about medical history and causation unless those statements had been crucial to the doctors' diagnosis and treatment. In such circumstances, the doctors could testify about these statements, but jurors were expressly instructed by the judge that they could only consider the statements for the limited purpose of assessing the value of the doctors' opinions.

This practice made little sense. If the hearsay statements of patients about medical history and causation had been crucial to the doctors' medical conclusions, the acceptance of those conclusions by the jury would also have been an acceptance of their bases. And because jurors were not likely to follow the judges' limiting instructions, the doctors' testimony was an indirect method of getting inadmissible hearsay before the jury.

Recognizing the absurdity of this situation, the original advisory committee solved it by drafting Rule 803(4), which makes statements of medical history and causation *admissible for truth*. In other words, jurors could accept as truth a medical opinion as well as the information relied on by the doctor in forming that opinion. This result is consistent with the role of the expert as an aid to the jury, and the role of the jury as the sole, independent finder of facts.

Ironically, the original advisory committee failed to apply the reasoning of Rule 803(4) to nonmedical experts when it drafted Rule 703. Today, these experts can make findings based on

inadmissible evidence, even though the jury might never hear all the evidence forming the basis of their opinions.

Without acknowledging this irrational practice, the advisory committee proposes expanding Rule 703 to permit disclosure of otherwise inadmissible facts relied on by the expert if "their probative value substantially outweighs their prejudicial effect." However, the only problem this revision addresses is the inconsistent manner in which courts have treated otherwise inadmissible background information. Most have permitted no mention of them; others have.

The proposed Rule 703 does not specify whether the "type [of evidence] reasonably relied upon by experts in the particular field" must be screened for trustworthiness by an expert before it is admitted. For instance, the reliability of psychological interviews with a patient's siblings may depend on who conducted the interviews, the conditions of the interviews, and consistencies among them.

How then are jurors supposed to consider these background facts? May they assume them to be true in the same way the expert has? Probably not, since that would create a virtual open-ended exception to the hearsay rule. But if jurors do not, aren't they deciding a different case than the expert has testified in?

In those courts where reference to otherwise inadmissible background information has been permitted, the disclosure is often accompanied by an instruction from the presiding judge that the jurors cannot accept this information for its truth (even though that information supports the expert's conclusions, which the jurors are told they *can* accept for their truth). It is not realistic to think that jurors can assess an expert's testimony by assuming the truth of the facts relied on, and then disregard those same facts in reaching their own conclusions.

The committee's proposed changes to Rule 703 are based on the assumption that experts can assess the reliability of the otherwise inadmissible evidence separating the wheat from the chaff. If this assumption is accurate, shouldn't the experts be allowed to explain how they have concluded that the inadmissible evidence is wheat rather than chaff? An expert's assessment of background information should constitute a sufficient basis for admitting the evidence for its truth; counsel can always argue about what weight that evidence should be given.

Rather than make only minor adjustments, the advisory committee should look broadly at the adequacy of the federal evidence code. At some point, as with Rule 703, adjustments to faulty rules simply manipulate existing problems rather than resolve them.

The Supreme Court should reject the revisions to the expert witness rules. If the justices fail to do so, Congress should act. We should stop illogically asking jurors to ignore crucial evidence that supports the expert opinions they hear in court. Our juries — and our adjudicatory system — deserve better.

*Paul R. Rice is a professor at the American University Washington College of Law, where he teaches evidence. He is the author of Evidence: Common Law and Federal Rules of Evidence (Matthew Bender 4th ed. 2000) and Attorney-Client Privilege in the United States (West Group 2nd ed. 1999). He can be reached at [acprivilege.com](mailto:acprivilege.com).*

# Techniques For Cross Examining

**BY ANTHONY A. BONGIORNO AND JAMES J. MARCELLINO**

In the middle of the 19th century, Judge John Pitt Taylor said of skilled or expert witnesses that "[i]t is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes and interests of the parties who call them."<sup>1</sup>

That comment reflects a still vibrant concern of everyone associated with the trial of cases. It is a rare case indeed where there are not experts who present radically different opinions. But to vilify expert witnesses is somewhat unfair.

As one author pointed out, the expert "is not self-invited to these parties. He is not a trespasser.

He is called, then he is questioned, criticized disputed, attacked suspected, disregarded and ridiculed."<sup>2</sup>

This article is intended to give an overview of techniques that may be appropriate in cross-examining experts who have been "invited" to the trial by the parties and who play an important role in the outcome of the case.

Why is it so difficult? It is no easy task to cross-examine a skilled expert witness. In the first place, the expert, with opposing counsel's assistance, has great latitude in determining the content and organization of the testimony on direct examination.

Thus, the expert (and the direct examiner) can often structure the direct examination to thwart the cross-examiner. For example, an expert might testify to conclusions based on "experience" or "expertise" rather than on explicit data or specified lines of reasoning.

In addition, successful cross-examination of an expert witness depends on the examiner's ability to control the witness, and expert witnesses are much harder to control than lay witnesses. Almost by definition, they have considerable experience and are generally well-prepared as witnesses.

Moreover, unlike a lay witness, an expert witness should have greater authority in the particular subject than does the cross-examining lawyer - and even the judge who presides at the trial. As a consequence, the cross-examiner is often unable to take advantage of any unexpected answers or even misstatements.

Under ordinary circumstances, many jurors assume that the expert is probably right and that the lawyer is probably wrong. As an example, assume that a lawyer asks a radiologist a question about her specialty: "Isn't a CT scan the preferred method for diagnosing this condition?"<sup>3</sup>

The radiologist might claim that the question cannot be answered without a lengthy background explanation or even that the question misses the point entirely. But suppose the radiologist answers "no."

That could mean, among other things: "(1) the terminology of the question was wrong, (2) there is a newer and better technique than the CT scan, (3) opinions in the field differ, (4) CT scans are not used for initial diagnosis, (5) CT scans are almost always used in conjunction with other diagnostic techniques, (6) the expert has a particular point of view, (7) the expert is ignorant, or (8) the expert is lying."<sup>4</sup>

Okay, it's hard; where to from here? While the challenge is daunting, it is not impossible. There are techniques that assist the cross-examiner.<sup>5</sup>

These techniques, however, reflect the overall case strategy and the reasonable expectations of what can be accomplished on cross-examination.

The cross-examination of an expert, as with any other portion of the trial, is intended to advance your client's cause. Thus, you must first ask: What can you reasonably get from this expert witness that will enhance your chances of winning?

**Attack the facts.** It is difficult to effectively attack an opponent's expert opinion simply by disagreeing with it or by offering conflicting opinions. By attacking the underlying facts, however, one can make headway.

Have the expert specify the facts on which the expert bases his or her conclusions. Then try to get the expert to agree with the principle that if the underlying facts change, the conclusions must necessarily change. To disagree with that proposition makes the expert seem either foolish or obdurate.

**Limit the area of expertise.** Try to limit the expert's specific area of expertise. With the aid of your expert, develop questions that reveal what areas of concern lie outside of the opponent expert's specialty.

**Differences of opinion.** Of course, most expert witnesses would have to agree that, in their particular field of expertise, there are legitimate differences of opinion, even between qualified experts. Indeed, those differences of opinion do exist and occur often.

**Use prior statements.** Most experts" have both testified as experts in other cases and written or lectured about their, areas of expertise. Much of that is available to cross-examining counsel, either

through discovery or other sources, To the extent that the expert makes any contradictory statements on the stand, accentuate the inconsistencies.

**Areas of agreement.** There are occasions where you can get an opposing expert to agree with and corroborate many of the propositions that make up the basis for your expert's opinions and rationale.

**Lack of thoroughness.** While it is an infrequent occurrence, some experts may be forced to admit a lack of thoroughness' in establishing the predicate facts for the' opinions offered and in applying appropriate methodologies.

**Delineating the expert's role.** In your questioning, you can make it clear that the expert either understands or should understand that it is the jury that will determine the underlying facts and that, to the extent that those facts are inconsistent with the facts on which the expert relied, the opinion testimony is . necessarily flawed.

**Pop the pomposity bubble.** James W McElhaney suggests that language is a fruitful target in expert cross-examination because jurors tend not to like self-important witnesses. For example, he suggests the following:

Q: Doctor, those contusions, abrasions and ecchymoses you talked about on direct examination those words mean bruises, scrapes and black-and-blue marks, don't they?

A: Yes.<sup>6</sup>

Other thoughts. Many commentators and practitioners suggest inquiring about expert fees as a matter of course. Such inquiry, however, may not advance. the ball.

In the first place, most jurors know that a fee is being paid and that the amount may be considerable. After all, we live in a capital society you get what you pay for.

But if an opposing expert's fees are exorbitant or exceed by a substantial measure your expert's fees, then carefully elicit the testimony on fees.

Be aware, however, that the expert can rejoin by saying that the fees charged are in line with fees charged generally and are the fees that the expert customarily charges and gets paid.

Often, experts who testify have others who work with them. Establish who did what. If the juniors' opinions provide the necessary building blocks to the ultimate opinion, then you can attack on the theory that, if any of the juniors' opinions are wrong, the ultimate opinion tumbles.

Lay witnesses may also give opinion testimony in limited circumstances. If, in the language of Fed. R. Evid. 701, the opinions or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," then lay opinion is admissible.

In that case, cross-examination may have elements relating to both fact and expert testimony. Because you will want the jury to draw its own conclusions from the facts, and not rely on damaging "opinions" that may flow from the facts, it makes sense to draw a clean distinction between claimed facts and claimed opinions.

One sensible way to pitch the cross-examination is to highlight the distinction between facts and the witness's opinion by pausing and then saying: "Now, I want to ask about your opinions on..."

You then will have the opportunity to ask the jury to draw its own conclusions from the facts as it finds them.

Finally, in rare circumstances, the court may appoint a neutral expert. In federal court, the judge may make such an appointment in the exercise of his or her discretion under Fed. R. Evid. 706. That the expert is appointed by the court complicates the cross-examination, because both sides may be doing it.

Moreover, the jury may take offense if it believes that you are challenging the court by pressing its expert.

Francis L. Wellman, in his "The Art of Cross-Examination," said that "lengthy cross-examinations [of experts] ... are usually disastrous and should be rarely attempted."<sup>7</sup>

While that may be true, cross-examining counsel should always remember that the stage on which this plays out is the courtroom, and that the courtroom, in a manner of speaking, is the domain of the lawyer.

Yes, be careful as you cross-examine an opposing expert, but remember that there are ways to diminish the expert's impact on the jury and move the jurors to your side.

## **Endnotes**

1. John Pitt Taylor, *Treatise on the Law of Evidence*, Sects. 45-50, at 65-69 (3d ed. 1958).
2. Karl Menninger, *The Crime of Punishment*, at 140 (1968).
3. Samuel R. Gross, "Expert Evidence," 1991 *Wis. L. Rev.* 114 (1991).

4. Id.

5. For excellent summaries of techniques for expert cross-examination, see Thomas A. Mauet, *Fundamentals of Trial Techniques* (2d ed. 1988); David Ball, *Theatre Tips and Strategies for Jury Trials* (NITA 2d ed. 1997).

6. James W. McElhaney, "Don't Take the Bait: Slip-up on Cross is Cue for Opponent to Spring a Surprise," 83 A.B.A.J. 80 (June, 1997).

7. Francis L. Wellman, *The Art of Cross-Examination*, at 95 (4th ed. 1979).

*The authors practice law in Boston. This article originally appeared in Massachusetts Lawyers Weekly.*