

EFFECTIVE SELECTION, IDENTIFICATION, PREPARATION AND CROSS EXAMINATION OF EXPERT WITNESSES

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I. Selection.

A. Case Evaluation.

1. The first step in any case, whether prosecuting or defending, is to determine the elements of proof needed to prevail on your claims or defenses.
2. In this initial process you must determine whether expert testimony will be needed to prevail.
3. If you determine that expert testimony is required, then promptly engage an expert to evaluate your position and provide an early, preliminary opinion. If you cannot secure the required expert testimony, you should consider abandoning your case as a plaintiff or settling your case as a defendant, if you can.

B. Locating the Best Expert.

1. Some opinions must be rendered by an expert familiar with the standard of care in the local community. Professional negligence cases for example, fall into this category.
2. In other instances, the battle of the experts can be won based on national, or even international acclaim or reputation.
3. In all cases, you must be sensitive to how your expert will be received by your trier of fact. An expert must be able to explain his or her opinions in clear, concise and understandable language.
4. Some important traits of a good expert include the following:
 - credentials
 - integrity
 - independence
 - consistency
 - common sense
 - presence

- coolness under fire
 - ability to teach the trier of fact
 - impeccable background
 - availability
 - affordability
5. Your expert must be capable of overcoming pretrial attacks to exclude or limit his or her testimony. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), while U.S. Supreme Court cases, have been followed in Virginia circuit courts. Accordingly, while an expert may be qualified in his or her particular field, and his or her field of expertise may be implicated in the case generally, the expert may not have the requisite competency to render the particular opinion in the case at hand. Likewise, an expert who is otherwise competent to render opinions, might be stretched into an area where he or she lacks core competency.
6. Tips on locating an expert:
- start early
 - ask your client
 - ask other lawyers
 - review reported cases on the subject area
 - trade associations
 - jury verdict reporter
 - expert firms
 - public data banks
 - in-house data banks
 - avoid using the same expert over and over
7. Interesting Statistics.
- 61% of jurors believe “lawyers can always find an expert who will back up their point of view” and 72% of jurors believe “there is a lot of disagreement among experts in most professions.”¹
 - The presence of experts on both sides tends to create a “canceling out” effect.²
 - “Most jurors expressed some reservations about the experts at the outset, rather than accepting expert assertions uncritically, as is often supposed.”³

¹ Source: Frederick, “The Survivor’s Guide to Expert Witnesses: From Selection Through Trial” (2007).

² Source: Brekke & Borgida (1988).

³ Source: Ivkovic & Hans, “Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message” (2003).

- Jurors reject experts who seem to be “hired guns,” as demonstrated by high compensation, frequently testifying for one side, party or lawyer, and a close relationship with one side.⁴
- In a recent study, jurors reported considering the following factors in determining the credibility of expert witnesses:⁵
 - Credentials
 - Area of specialization
 - Education background
 - Professional activities
 - Familiarity with case specifics
 - Motives
 - Monetary gain
 - Repeated testimony for one party or lawyer
 - Potential relationship with party or lawyer
 - General Impressions
 - Personality
 - Attitude
 - Attire
 - Presentation Style – positive elements
 - Acting as a teacher
 - Use of lay terminology, no jargon
 - Technical aids (*e.g.*, charts, models, diagrams)
 - Being direct, not evasive
 - Content of Testimony – influencing factors
 - Were there inconsistencies between trial and deposition testimony?
 - Did testimony differ from jurors’ own experiences?
 - Were there “gaps” in the explanation provided?
 - Was the testimony clear and did it provide repetition?
 - Did the expert use terms the jurors could understand?
 - Did the expert use physical technical aids to increase understanding of his testimony?

C. Engagement.

1. Your law firm should engage the expert to best insulate discovery of communications with the expert, particularly where a determination is made to convert the expert from a testifying to a consulting expert. Be

⁴ Source: *Id.* Frederick, *supra*.

⁵ Source: Ivkovic & Hans, *supra*.

very clear, however, with your client and the expert about who is responsible for the expert's bill.

2. It is not uncommon for counsel to convert a person a potential testifying expert to a consulting expert. Aside from the obvious problem of not obtaining a helpful opinion from the expert, other reasons for the conversion include inability of the expert to make a good impression before the trier of fact, a horrendous performance by the expert during a deposition, inability of the expert to provide a forceful opinion, or a realization that the expert lacks the requisite level of expertise.
3. You should be very careful about how you transmit information to your expert and what you supply your expert to rely upon to form the basis of his or her opinions. You should assume that any and every email, letter and communication of any form that you have with your expert, including notes taken by the expert during telephone conversations with you, may be seen by opposing counsel. Courts vary in their rulings about the extent to which opposing parties may discover information supplied to or relied upon by an expert to form the basis of his or her opinions.
4. Be careful to provide your experts with everything they will need to rely upon to reasonably form the basis of their opinions. Your experts could be gutted on cross examination if you fail to provide them with important information that reasonably should have been supplied to render complete and thorough opinions.

II. Identification.

A. Rule 4:(b)(4)(A)(i) states:

(4) Trial Preparation: Experts; Costs – Special Provisions for Eminent Domain Proceedings. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) a party may depose any person who has been identified as an expert whose opinion may be presented at trial, subject to the provisions of subdivision (b)(4)(C) of this Rule concerning fees

and expenses. (iii) upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this Rule, concerning fees and expenses as the court may deem appropriate.

- B. Be aware of *John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851 (2007), a copy of which is attached. In this case, the Virginia Supreme Court upheld the trial court's exclusion of expert testimony based on an insufficient disclosure of expert witness opinions under Rule 4:1(b)(4)(A). While the *Crane* opinion was fact specific, the case nevertheless sets out some basic standards to which counsel must adhere while identifying and disclosing expert opinions. Further, the Virginia Supreme Court rejected the following arguments made by the appellant to justify an incomplete disclosure:
- The opposing party had the chance to or did depose the witness
 - The opposing party has familiarity with the witness and has deposed him or her before.
 - The opposing party could have asked for more information but failed to do so.

III. Preparation.

- A. Written Report – In most cases it will be beneficial to have your expert prepare a written report. Be aware that drafts of the report will be discoverable. Many of your discussions with your testifying expert must therefore be verbal.
- B. Deposition Preparation – Your opponent will be seeking the “knock out punch” in the deposition of your expert. Prepare your expert, therefore, to thoroughly understand the theories of your case and to forcefully stand by his or her opinions. It is also important for your expert not to agree with opposing counsel on opinions or theories that support an affirmative defense or claim of the opposing party.
- C. Trial Preparation – It is important to engage in mock direct and cross examinations with your expert prior to trial.

IV. Cross Examination.

- A. Depositions – During a deposition of the opposing party’s expert, your objective is to gain as many concessions to your theory of the case as possible, and hopefully render a knock out punch to the expert, excluding him or her as a possible expert for the opposing party. The following are some suggestions for cross examination of a testifying expert during depositions.
1. Try to get the opposing expert to concede something to your theory of the case.
 2. Prior to the deposition, gather all of the documents and other information upon which the opposing testifying expert relies to form the basis of his or her opinions.
 3. Take your own expert with you to the deposition to assist.
 4. Your purpose for taking the deposition includes:
 - (a) disqualifying the expert
 - (b) assisting in your cross examination at trial
 - (c) getting the expert to concede or agree with some part of your case
 5. Don’t fall into the temptation of qualifying the opposing expert, unless you believe you can disqualify the expert.
 6. Get the expert to say that his or her opinion is based on opinions or facts as told to the expert by the lawyer for the opposition.
 7. Find out when the expert obtained the information upon which the opinion is based. How much time has the expert spent preparing or formulating the opinion? Always ask whether experts feel as if they have had enough time to prepare their opinions.
 8. See how often the expert testifies and how much income the expert derives in his or her practice generally by testifying, and compare that to the amount of time the expert spends in research or in general practice.
 9. Pin down the expert on what topics he or she will testify to at trial.
 10. Ask the expert to tell you each opinion he or she has formulated in the case and ask whether or not these are all the opinions the expert intends to render at trial.

11. Ask the expert if he or she plans to perform any additional work or form any additional opinions before trial and obtain an agreement that the opposing party will tell you if the expert does additional work or forms additional opinions before the trial.
 12. Get the witness to admit that he or she is not an expert in some areas. Some of these areas may be required to render an opinion on the issues in your case.
 13. Require the expert to support any opinions that are given by citing articles or other information upon which the expert relies to form the basis of his or her opinion.
 14. See if the witness has hands on experience in the area about which he or she is testifying.
 15. Ask if the expert has considered specific facts of which you are aware. If the expert has not considered such facts in forming the basis of his or her opinions, get the expert to admit that it would have been helpful to consider those facts.
 16. Ask the expert if he has conducted any testing and if testing has not been conducted, get the expert to agree that such testing would be beneficial.
 17. Change some of the assumptions relied upon by the expert and get the expert to admit that his or her opinion would be different based on the altered assumptions.
 18. Get the expert to admit that he or she did not consider other alternatives or conduct a differential diagnosis.
 19. Get the expert to concede that your expert is equally or more qualified in that expert's area of expertise.
 20. Conclude the deposition by making sure that the expert has given all of the opinions that he or she intends to render at the trial of the matter.
- B. Trial – You know the drill here. If you have not succeeded in disqualifying the opposing expert, your job at trial is to get in and out with as many pithy, direct body blows as you can score. You rarely advance your case by engaging the opposing expert in a debate on cross examination.