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THE CROSS-EXAMINATION OF EXPERT WITNESSES

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INTRODUCTION

The cross-examination of expert witnesses involves all of the “rules” of cross-examination discussed thus far. For example, if you can impeach an expert with a prior inconsistent statement or a strong bias, that impeachment will likely be the most important part of your cross-examination.

However, experts who are retained to give opinions are often (but not always) “bullet proof” from the usual methods of impeachment, and therefore a more detailed analysis is usually necessary to conduct an effective cross-examination. For starters, the cross-examination of an opponent’s expert should be planned and viewed as part of your larger strategy for defeating the expert’s opinions. Where your opponent has disclosed his or her intention to present an expert witness at trial, you must vigorously prepare on several fronts to refute the opinions of that expert:

- The first line of defense against an opponent’s expert is to seek the exclusion of the expert’s opinions, in whole or in part, on one or more grounds.
- A second line of defense is to weaken the foundation of the opposing expert opinions by refuting, through other witnesses, the factual foundation for those opinions.
- A third line of defense is to weaken the impact of the expert’s opinions, again – in whole or in part – through cross-examination.
- A fourth line of defense is to present the rebuttal opinion testimony of your own expert.

When confronted with an opponent’s expert disclosure, it would be unusual to pursue only one of these strategies. Typically, each strategy is at least considered and the first (seeking

exclusion) and fourth (presenting a rebuttal expert) may or may not be pursued, and if pursued, may or may not be successful. By contrast, the second line of defense (attacking the expert's factual assumptions) and the third (cross-examining the expert) are almost always pursued. The key introductory point is that this cross-examination is not prepared in a vacuum, but rather it is the culmination of all of your efforts to defeat the opposing expert on several levels.

Scientific vs. Non-Scientific Opinions

Keep in mind the differences between scientific and non-scientific opinions as you plan your expert cross-examinations. As used herein the term "scientific" testimony refers to opinions that can to some degree be measured by some objective standards, i.e. the use of statistics. For example, an expert in DNA might opine as to the likelihood that a particular DNA sample could belong to a particular defendant or witness. That opinion is scientific because the result can be tested, or can be validated by reference to research that was done in adherence to the scientific method.

At the other extreme, a party to a commercial case might call a retired executive with experience in the particular industry to testify to typical custom and usage in that industry. That opinion is likely to be the opposite of scientific, as it is likely to consist mainly of anecdotal information.

Somewhere in the middle, an economist might offer an opinion of the amount of income a person will lose over a number of years projected into the future. That opinion will most likely make assumptions in regard to such factors as the:

- Number of years the person would likely have continued to work (“work life”).
- Projected lost income in each future year of the remaining work life.
- Projected replacement income that the person will earn in place of the lost income over the remaining work life years.
- Present cash value of the difference between projected lost future income and projected replacement income.

In this example, the economic expert is likely to express these opinions as a range of probabilities based on the relevant demographic characteristics of the plaintiff. This opinion would include some “scientific” facts, laced with subjective (non-scientific) assumptions about the future. In sum, expert testimony ranges from the purely scientific (which we submit is rare) to the purely non-scientific, with most opinions falling in between.

Identifying the portions of an opinion that are not scientific is often an effective cross-examination technique in and of itself. To the extent possible, you are always striving to make the opposing opinions appear subjective and thus subject to the biases of the witness.

Experts on Marginal Issues

There is another threshold point. We assume in this presentation that the opinion testimony of the expert who is to be cross-examined is vitally important to the particular case, in the sense that it embraces the “ultimate issue’ of the trial. However, this is not always the case, for sometimes an opposing party believes that it must disclose an expert on an issue that is marginally or tangentially relevant at best. In those circumstances, the same rules, tactics

and strategies for the cross-examination still apply, but care must be taken not to overdo the cross-examination to the extent that the expert's opinion takes on an importance that it would not otherwise have or deserve.

The Rules of Evidence Governing Expert Testimony

Planning for an expert's cross-examination begins with an assessment of whether the proffered testimony is admissible, which might lead to a motion, either in *limine* or at trial, to exclude the expert's testimony. At deposition, the expert should be cross-examined on issues related to admissibility as well as the substance of the opinion. At trial, even where the testimony is admitted, the analysis of whether the opinions are admissible might provide fruitful cross-examination questions as to the weight to be given the opinions.

A. The Applicable Federal Rules Of Evidence

Expert opinion testimony is governed by Federal Rules of Evidence 702, 703 and 704. Decisions by the district court whether to admit or exclude an expert under these rules are committed to the discretion of the district judge, and will not be disturbed on appeal unless the court of appeals were to find an abuse of discretion. See, *McEwen v. City of Norman,* 926 F.2d 1539, 1545 (10th Cir. 1991). Historically, federal district courts in the exercise of their discretion were liberal in admitting expert testimony under the well-known "*Frye*" standard, that an expert should be allowed to testify if his or her methodology was "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 289 F. 1013, 1014 (D.C. Cir. 1923).

1. Federal Rule of Evidence 702

Federal Rule of Evidence 702 (as enacted in 1975 and amended in 2000) sets forth the basic test for admissibility of an expert opinion. The Rule provides that:

> 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles or methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[1]

2. Judicial Interpretation of Rule 702 in *Daubert* and Its Progeny.

In 1993, the Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), that Rule 702 required trial courts to apply a stricter test for determining whether an opinion is sufficiently reliable to be allowed to influence the result in a lawsuit. *Daubert* gave four non-exhaustive guideposts to assist district courts in determining whether the proffered scientific expert testimony can be fairly characterized as “scientific knowledge” within the meaning of Rule 702:

a. Whether the theory can be and has been tested;

b. Whether the theory has been subjected to peer review and publication;

c. The known or potential rate of error; and

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[1] Prior to 2000, Rule 702 had ended with the words “or otherwise.” The 2000 amendment added the enumerated three part test for reliability in order to codify the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals*, *infra.*

d. The general acceptance of the theory in the scientific community.[2]

In 1999, the Supreme Court in *Kumho Tire Co. Ltd. v. Carmichael*, 119 S.Ct. 1167 (1999), held that under *Daubert*, Rule 702 "imposes a special obligation on a trial judge to 'ensure that any and all *scientific* testimony … is reliable.'" 119 S.Ct. at 1174. The Court in *Kumho Tire* stated in *dicta* that this gatekeeping function applies to *all* expert testimony, regardless of whether the opinion was based on scientific or other "specialized knowledge" as provided in Rule 702. *Id.*

Following *Daubert* and *Kuhmo Tire*, Rule 702 was amended in 2000 to add the enumerated three part test stated above, which codifies *Daubert* and which is intended to assure the reliability of the expert opinion, both in theory, and in the application of theory to the facts of the case. Thus, in federal cases, there is no longer any question that all expert testimony must meet the enhanced reliability requirements of amended Rule 702.

3. Rule 703. Bases of Opinion Testimony by Experts

FRE 703 provides:

> 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

[2] In *Otis v. Doctor's Associates, Inc.*, 1998 U.S. Dist. LEXIS 15414 (N.D. Ill. 1995), where a damages expert was excluded under *Daubert*, the district court explained that "the most important factor in the *Daubert* analysis is whether the proffered scientific theory can be and has been tested by the scientific method. … 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified.' … Accordingly, a scientific theory that is not supported by appropriate validation is not admissible under Rule 702. … Courts must exclude 'subjective belief or unsupported speculation.'" *Id.*

> inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 703 gives an expert wide latitude by allowing for consideration of facts beyond those that are admissible in evidence in the trial. This allows the expert to bring to the trial all of his or her experience in the particular discipline or industry at issue. For example, business consultants may express opinions based on his or her experiences with other companies in the same industry, so long as this information is the type usually relied on by experts in the field.[3] There is usually no need to introduce evidence about the other companies into the trial because Rule 703 would allow the expert to base his opinions on non-admissible facts.

The wide-open range of facts that could underlie an expert's opinion under Rule 703 presents a challenge for the cross-examining attorney particularly where the opinions are not scientific. Trial lawyers cannot simply accept the expert's antidotal experiences as a basis for an opinion without exploring (at deposition) all relevant facts that supposedly allow the expert to draw the proffered conclusions.

4. Federal Rule of Evidence 704

FRE 704 provides in pertinent part:

> "[T]estimony in the form of an opinion or inference otherwise admissible

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[3] This occurs with some frequency in contract litigation where industry custom and usage is alleged to be relevant.

> is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Rule 704 gives an expert great latitude in framing his or her opinions (assuming Rule 702 is satisfied).

B. Illinois Law

The Illinois Supreme Court in *Donaldson v. v. Central Illinois Public Service Company*, 199 Ill. 2d 63, 767 N.E.2d 314, 262 Ill. Dec. 854 (2002) re-affirmed the application of the *Frye* standard in Illinois, and declined in that case (while leaving the door open for future cases) to adopt the more stringent federal standards under *Daubert*. In *Donaldson*, the Court explained that in Illinois:

- The *Frye* standard, commonly called the "general acceptance" test, dictates that scientific evidence is only admissible at trial if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'
- The proper focus of the general acceptance test is on the underlying methodology used to generate the conclusion. If the underlying method used to generate an expert's opinion are reasonably relied upon by the experts in the field, the fact finder may consider the opinion-despite the novelty of the conclusion rendered by the expert.
- General acceptance of methodologies does not mean universal acceptance of methodologies if there is general acceptance of diverse opinions. However, dubious theories remain inadmissible.
- *Frye* does not make the trial judge a "gatekeeper" of all expert opinion testimony (a direct contradiction of the federal position).
- The trial judge conducts a *Frye* evidentiary hearing only if the scientific principle, technique or test offered by the expert to support his or her conclusion is "new" or "novel." ("For example, DNA analysis does not require a *Frye* hearing because the principle has been found to be generally accepted").

- Illinois does not apply the "modified *Frye* standard called the '*Frye*-plus-reliability' standard."[4]

- Questions concerning underlying data, and an expert's *application* of generally accepted techniques, go to the weight of the evidence, rather than its admissibility.

Illinois law is similar to federal law with respect to FRE 703 and FRE 704.

Questions For Experts

In every case where your opponent discloses an expert, you should be asking *yourself* (in the first instance) whether the opinion is admissible, and if it is admissible, how it will be refuted.

You will likely have two chances to cross-examine the opposing expert – at deposition and trial. Both exams are critically important. Before the deposition, ask yourself each of the following questions:

- What are the expert's opinions?

- What makes this witness an expert?

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[4] As the Supreme Court in *Donaldson* stated: "Under the '*Frye*-plus-reliability' standard, a court considers the following questions: '(1) Can the scientific technique or method employed be empirically tested, and if so, has it been? (2) Has the technique or method been subjected to peer review and publication? (3) What is the technique or method's known or potential error rate? (4) Are its underlying data reliable? (5) Is the witness proposing to testify about matters growing naturally and directly out of research she has conducted independently of the litigation, or has the witness developed her opinion solely for the purpose of testifying? and (6) Did the witness form her opinion and then look for reasons to support it, rather than doing research that led her to her conclusion?'" 199 Ill.2d at 81, citing *Harris v. Cropmate Co.,* 302 Ill. App. 3d 364, 365, 706 N.E.2d 55 (1999), which had, in turn, relied on the U.S. Supreme Court's decision in *Daubert*, *supra.* The Illinois Supreme Court thus rejected *Daubert* but in a footnote, left open the possibility that it would adopt Daubert or otherwise modify *Frye* at a later date. *Id.*

- Is the expert credible on a personal basis?
- How does the expert fit into the case?
- What facts does this expert witness assume to be true as the basis for his or her opinions?
- What facts, if any, did the expert fail to consider?
- What are the bases for the opinion?
- Could any reasonable person disagree with this expert's opinions?

Each of these questions provides a line of questions for the expert's deposition. Thorough pre-trial exploration of these questions will then provide you with all of the questions you will need for a successful cross-examination at trial.

<u>What are the expert's opinions?</u>

At deposition, you must pin the expert down to his or her exact opinions and all of the bases therefore, such that there will be no surprises at trial. To this end, the following questions should be asked:

- Have you told me all of the opinions that you intend to testify to at trial, and all the reasons for those opinions?
- Do you intend to do any more work on this case before the trial, with the intent of adding to your opinions or your reasoning, in any way?

It is important to commit the expert at deposition that he or she will not provide any more opinions before the trial, at least not without informing you before the trial.

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Moreover, the expert should be challenged at deposition to put the opinions into the

proverbial plain English so that a layperson (including you) can understand those opinions. You cannot cross-examine what you do not fully understand. This is no place for false pride.

At trial, you will be surprised how often an expert may attempt to subtly change the opinions that were previously attested to based on the parties' evolving views of the case. Where this is done, you should not hesitate to bring out the change in opinions. Before doing so, however, you should ask questions that verify:

- That the expert was previously retained and previously issued a disclosed report that purported to contain all of his opinions.
- That the expert gave a deposition in which the expert testified to all of his opinions.
- That the expert agreed at the deposition not to provide more opinions without notifying you before trial.

With that foundation, you are prepared to either seek the exclusion of the expert for violating the disclosure rules, or if that motion is unavailing, to cast the impression that the expert has made a last minute, last ditch change in his opinions. Beware, however, that if the Court allows the changed opinion, the opponent can rehabilitate the expert to show that the change was supported by new analysis and/or new facts that were not previously available or inadvertently overlooked. There is a substantial risk that this type of cross-examination could backfire with a jury if you are seen as trying to suppress the truth.

What makes this witness an "expert" in this case?

Very often, and depending on the results of your deposition, the question of whether this

witness is an "expert" should be a pervasive theme of your cross-examination at trial. This line of questions begins, but does not end, with the expert's stated qualifications that must be provided in the interrogatory answer or expert report. All too frequently, a cross-examining attorney at trial gives too much deference to an expert's credentials. The attorney might mistakenly believe that because the trial judge has admitted the opinion testimony, that the issue of whether the witness is an expert has been decided. That view ignores the weight as opposed to the admissibility of the opinion testimony. The finder of fact may question, and should be encouraged to question, just what makes someone an "expert" who is qualified to express opinions, and not facts?

Courts are skeptical of excluding experts on the basis of their alleged lack of qualifications, so long as there is some connection between the expert's experience and the issue in the case. [5] Nonetheless, the issue should be thoroughly examined in deposition with a view to seeking exclusion. Whenever an expert's qualifications are challenged, the trial judge must decide whether disqualification is warranted under Rule 702 or its state law equivalent, or whether the challenge merely goes to the "weight" that the finder of fact should give to the expert's opinion. In the cases cited in footnote 5, for example, the courts held that the

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[5] See, e.g., *Rio Grande Valley Gas Co. v. City of Edinburg*, 59 S.W.3d 199 (Texas 2000) (Rejection of challenge to an attorney's qualifications as an expert on "corporate structure" was not an abuse of discretion, even though the attorney was principally a probate and estate planning lawyer who "admitted to having no experience with, expertise in, training for, or publications regarding corporate structure issues involving the natural gas industry, multi-tiered business entities, municipal franchises, or fraud," i.e. the issue in the case, and that she had not focused on corporate law for ten years, and devoted only 20-25% of her time to corporate law at the time of trial.); see also, *Ajir v. Exxon Corp.***,** 1999 U.S. App. LEXIS 11046 (9th Cir. 1999) (court rejected a challenge to the testimony of a real estate appraiser as allegedly going beyond his expertise, where the appraiser reviewed the language of real estate sales contracts and testified to the effect of contract language on the property's value).

challenges should go to weight as the courts were satisfied that the expert met a minimal threshold of qualifications.

Admitting the expert's opinions over a qualifications challenge does not, however, remove the subject from being fair game on cross-examination at trial. The deposition might reveal that while the expert has general experience in the field, and thus is "qualified" enough to take the stand, he or she might have little firsthand experience in dealing with the particular issue in the case. A technique to discredit the witness is to build up his or her experience in *other areas* where the experience is substantial, and then ask the expert to agree that those other areas are not at issue in the present case.

Beyond simple qualifications, the *Daubert* line of cases provide a checklist for questioning the expert on his or her expertise where the opinions are supposedly scientific. Where the opinions are non-scientific, applying the *Daubert* criteria through your questions serves to expose the subjective nature of the opinions.[6]

For example:

> *You testified that in your opinion, it is the regular practice and custom of companies that sell quick service restaurant franchises to respect the market territory of its franchisees and to refrain from opening any new restaurants that might take sales*

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[6] In Illinois, the party opposing the admissibility of an expert opinion, who believes that the opinion would be excluded in federal court under *Daubert*, should make a record of an objection based on *Daubert* criteria. Therefore, in deposition, experts in state and federal cases should be questioned on the factors cited above and appropriate motions in limine should be filed where appropriate. The expert should not be allowed to generalize in response to *Daubert* questions. The questioner should insist on specific facts, to be supplied by the expert, to address the criteria for admissibility stated in Rule 702.

away from the franchisee – that's your opinion, right?

You base this opinion on what you say is your ten years of experience working with ABC Company and five years of experience as a consultant, right?

As a consultant, you have done work for ten different clients in the quick service restaurant industry, is that right?

And so your experience is based on 11 restaurant systems, right?[7]

Now, there are hundreds of restaurant franchise systems in this state, right?

[you might want to name some of the larger systems he has not worked for]

Did you conduct any tests to see if your opinion is true?
[Here, the expert might respond that he conducted a telephone survey. If that is the case, you need the entire survey in discovery, and once you have it, at trial the task would be to show that the survey was not statistically significant].
You have never published this theory, have you?

You have never read this theory in any publication by any other author, have you?

You don't know whether other consultants agree with you, do you?

[Again, if the expert claims that he has spoken to others that agree , the goal would be to establish the statistical inadequacy of the sample].

You don't know how many, of the hundreds of similar franchising companies, how many of these companies adhere to what you say is the normal practice, do you?

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[7] This question will probably elicit an answer that in addition to the systems he has done work for, he has "heard" about other systems or has read about other systems – to which you would follow-up:

-- *but you only have personal experience with the 11 systems, right?*

-- *you don't know for sure what the other restaurant systems do, do you?*

-- and of course, you would elicit all articles and other sources for the opinion, at deposition.

And you don't know how many of these companies do not adhere to this policy, right?

In fact, you have no idea how many do and how many don't …

Is this expert personally credible?

Closely related to challenges to qualifications per se are challenges to the expert's credibility. For example, in a current case that has received considerable publicity in franchise circles, the credibility of a noted franchise industry consultant has been challenged on the *alleged* grounds of personal business failures, alleged exaggeration of his professional qualifications and experience.

Other challenges to credibility would include an expert's previous testimony that allegedly contradicts the current opinion. Whether this type of challenge rises to a level to warranting exclusion is doubtful. A related test of the expert's credibility is his or her bias resulting from the fact that he or she has been paid for working on the case. Most experts are able to defuse this potential bias by explaining that they simply charged their normal fees and that, since they are very busy, they did not make any unusual profits. It is worth asking, however, if any portion of the expert's fees are contingent on the outcome, since having a personal stake in the verdict would evince a much more serious bias problem.

Still another credibility issue might arise where the expert testifies frequently in similar cases and derives a substantial portion of his or her income as a professional witness. If the expert has worked with the same lawyers before, the appearance of bias is also increased, and in that situation, a successful attack on the expert's credibility can spillover to discredit

opposing counsel.

Another credibility issue arises if the expert lacks first hand knowledge of the subject matter of the opinion. For example, there have been appraisers who did not personally inspect the subject property and accountants who did not personally exam the subject business records. Whenever this happens, the following questions are in order:

So instead of inspecting the property yourself, you looked at pictures, didn't you?
And those pictures were taken by someone who wanted to sell the property, right?

OR

So instead of reading the records yourself, you relied on Mr. Smith to do so, didn't you?
And Mr. Smith is not here to testify, is he?

Where these questions are successfully posed at deposition, the expert may be counted on to rectify the problem before trial. However, the expert is vulnerable to having formed his opinions before doing the homework.

<u>How does the expert fit into the case?</u>

The answer to this question may be obvious from the nature of the disclosed opinions, but it is not always obvious, and deserves careful thought. For example, a party charged with discrimination in denying a franchise sale to an African American disclosed a prominent franchise industry consultant as an expert on the question of whether the franchisor had good business reasons, apart from race, for denying approval of the proposed sale. For the disappointed buyer's attorneys, who were seeking to prove that race motivated the denial,

the most important point of the cross-exam was to show that the expert was just speculating as to the reasons for the alleged racist conduct:

> *You say that it would have been logical for ABC Company to deny Mr. Tucker this franchise because …*
>
> *You make your living as a "consultant" to franchise companies, right?*
>
> *That is, franchise companies pay you by the our for your business advice, right?*
>
> *But no one from ABC Company called you for advice before they told Mr. Tucker that he could not have the franchise, did they?*
>
> *And certainly you never called ABC Company while they were trying to make this decision to offer your advice, right?*
>
> *You don't know the exact reasons why they did what they did, right?*
>
> *All of these reasons that you give are **your** reasons, right?*
>
> *You don't know what they were thinking?*
>
> *By the way, a person could agree with your reasons but still be a racist, right?*
>
> *Your reasons have nothing to do with whether someone let Mr. Tucker's race be the reason for their decision, right?*

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Fighting the expert on the merits of his opinions would have been a serious mistake, for even if the plaintiff could show that the expert's logic was faulty and that other experts disagreed, that type of attack would have merely led to the conclusion that reasonable persons could disagree on the "business reasons" from the perspective of managing a franchise system. Far better for the plaintiffs to portray this expert as offering pure speculation as a last ditch effort by the defendant to distract the jury.

Another benefit of asking how the expert fits into the case is that often, an opposing expert

can be forced to agree with key aspects of your own case, or the opinions of your own expert.

What are the expert's assumptions?

The expert's report should disclose the assumptions for his or opinions, but identifying the assumptions (and the basis for those assumptions) is a key task for the cross-examining attorney at the deposition stage. Note that in the deposition of an opposing expert, a primary goal is to lock the expert into the grounds for his or her opinion, and therefore, non-leading questions are necessary. A typical sequence of questions at an expert **deposition** will be:

> *In your report, you state ….*
>
> *Tell me what that statement means…*
>
> *Tell me everything that you rely on to support that statement…*
>
> *In giving this opinion, you are making an assumption that … [state the assumptions one at a time – and repeat until all assumptions are given for each opinion]*

Once the assumptions are identified they can be challenged and the expert is potentially vulnerable. To the extent you believe that the expert erred in assuming a particular fact to be true, ask the expert "*would your opinion change if*" the facts were corrected. If the expert agrees, then the expert is vulnerable if you can establish that the changed fact is true.

Note that experts often resist giving "hypothetical" answers as to whether their opinion would change under different facts. When confronted with that reluctance to answer, you can regain control by confirming for the record that the expert *cannot* answer the question

without further study; and also by having the expert explain why the question cannot be answered. In addition, an expert that will not budge even if the facts are changed risks the appearance of being inflexible and lacking objectivity.

What facts did the expert fail to consider?

A more aggressive goal in deposing the expert is to identify facts that he or she did not consider in reaching his opinions, and asking if those additional facts would change the disclosed opinions in any way. This puts the expert in the same dilemma as if the assumed facts are changed.

A variation of this arises where the expert has based an alleged scientific opinion on limited data. If you believe (or are uncertain) that more data would require a change in the opinion, then at deposition you should ask, first, *whether the expert considered the additional data*, and secondly, *whether the additional data changes the opinion*?

What are the bases for the opinion?

Presumably the expert has cited authority other than his or her own experiences as the basis for the opinion. Those grounds must be examined at deposition, and to the extent possible, contradictions between the expert's opinions and ascertainable standards in the field should be pursued in cross-examination at trial.

Closely related is the expert who took shortcuts and did not follow all the steps that would be needed to form a reliable opinion.

Could any reasonable person disagree?

In deposition, it is usually worth asking an expert if he or she is aware of any contradictory opinions in the field. Often, the expert will agree that there are competing opinions, and offer reasons why he or she disagrees with those competing opinions. The task in deposition is to narrow down the precise reasons for the disagreement.

On the other hand, an expert that claims that he or she is not aware of competing opinions is vulnerable to later impeachment when you present competent evidence of competing opinions. (see FRE 803 (18) for impeachment by learned treatises).

Trial Considerations

Your cross-examination at trial will revolve around the same questions set forth above and will vary in each case depending on what you learned at deposition. A key issue in planning your trial cross-examination will be whether you intend to present a rebuttal expert on the same issue. Obviously, if you have your own expert, then you need not necessarily push as far in cross-examining the opposing expert. Your goal is to set up the opposing expert so that he or she cannot contradict your expert.

One final caveat. Very few lawyers have ever won an argument with an expert in the expert's field. Your strategy and goal must be the indirect attack.