Stephen E. Baril

is a partner in the Richmond, Virginia office of Williams Mullen and is Chair of the firm’s Complex Business Litigation practice. Mr. Baril focuses his practice on complex business litigation, including antitrust, business torts, environmental, intellectual property, and “bet-the-company” litigation. Mr. Baril is listed among Best Lawyers in America for commercial litigation. He is also listed among “Legal Elite” by Virginia Business magazine and Virginia Super Lawyers magazine for Business Litigation. Mr. Baril received a B.A. degree (Phi Beta Kappa; summa cum laude) from Hampden-Sydney College in 1977 and a law degree from the University of Richmond School of Law in 1980. Mr. Baril is a frequent lecturer on trial tactics. He is a leader in state and local bar associations and can be reached at sbaril@williamsmullen.com.

The Art Of Cross-Examining Expert Witnesses

Don’t use a shotgun when you can use a rifle.

AN EFFECTIVE CROSS-EXAMINATION of an expert witness is not formulated during the expert’s direct examination, or even shortly before trial. It requires a well-thought-out plan. Joseph M. White, Effective Cross-Examination of Expert Witnesses, 18 Prac. Litig. 17 (Jan. 2007). The planning process should begin after the opposing expert has been identified, and then should be developed during five stages of trial preparation: initial discovery; depositions; pre-trial motions; final trial preparation; and courtroom adjustments. In fact, your plan should be a sub-part of your overall trial plan, which should be calculated to answer one question: how will I open for my client? Everything you do during trial preparation, including dealing with an opposing expert, should be driven by a dogged pursuit to answer that one question.

INITIAL DISCOVERY • Whether the case is pending in state or federal court, competent counsel should propound the obligatory interrogatories and requests for production of documents in accordance with the rules of court. This exercise should yield the standard fare about the opposing expert: the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; rate of compensation; a bio sketch or curriculum vitae; and all documents
received, reviewed and/or relied upon by the expert in formulating his opinions. Good lawyers propound these basic discovery requests as a matter of course in every case. This practice should be followed early on in complex business litigation. If the case is pending in federal court, counsel will be required to exchange expert witness disclosures and reports at a designated time. Typically, this information is more illuminating than responses to stock discovery requests in state court.

But counsel’s plan for cross-examination should not begin and end with formal written discovery. Informal discovery is also available in several forms and may be just as valuable. For example, the Internet (e.g., Google) can be a resource for all sorts of information about an opposing expert. Many experts use Web sites to advertise their services, and some even post a list of cases or prior testimony on their Web sites. These Web sites can be goldmines. Also, you should consult your client or your own expert witness about the opposing expert. In many commercial contexts, it is truly a small world. Your client or expert may know the opposing expert, or may know someone who has useful information about the expert’s background, prior testimony, and so forth. Experts frequently write or publish on topics in their fields of expertise. This information is publicly available and can be easily located by counsel. It is not uncommon to find an expert who has written extensively in his particular field, yet has published nothing on the subject matter about which he has been identified as an expert witness or is prepared to testify. This can be great fodder for cross-examination.

Counsel should not be bashful about filing a motion to compel discovery when the other side is dilatory in identifying an expert witness or is less than forthcoming in providing the required discovery information. If the motion is well-founded, it should be filed promptly. In many cases, simply filing the motion will prompt a reasonable resolution of the matter without judicial intervention. If not, it will give you an opportunity to start selling your case to the court.

While you are formulating your discovery, bear in mind that the point of discovery is not to satisfy some intellectual curiosity. Rather, the purpose is twofold. First, you want to determine what the expert is prepared to say, and what he bases it upon. But more importantly, you want to determine the areas in which the expert might be vulnerable to cross-examination at trial. Remember, you are developing a plan of attack.

**DEPOSITIONS** • As a preliminary matter, counsel should ask whether there is any good reason to depose the expert at all. This is particularly true in federal court, where experts are well paid to prepare elaborate expert witness reports. Even when you have all the information you think you may need about the expert, one reason to take a deposition is to eyeball the expert and get a feel for how he will perform at trial. Frankly, that is as good a reason as any. Once you have decided to depose the expert, always remind yourself that the objective here is not to demonstrate how much you know about the subject matter. It is to find out what the expert has to say and why. Counsel should stick to open-ended questions, like who, what, when, where, and why. Under no circumstances should counsel reveal areas of potential cross-examination.

**PRE-TRIAL MOTIONS** • Counsel should consider the propriety of filing a motion challenging the relevance and reliability of the expert witness under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), Fed. R. Evid. 702, or the equivalent state court rule or precedent. However, the issues in complex business cases normally do not invoke *Daubert* and *Kumho*. That does not mean that the expert witness is not susceptible to a pre-trial challenge. Counsel also should consider challenging the expert’s credentials and qualifications, as well
as the relevance of or need for his opinions. Frequently, an expert may be qualified in his particular field, or his expertise may be implicated in the case generally, but the expert may not have the requisite competency to render the particular opinion in the case at hand. Likewise, an expert who is otherwise qualified and competent to render opinions may be stretched into areas where he lacks core competency (the so-called “prostituting” of one’s own expert). Further, it is not uncommon for counsel to try to “gild the lily” by proffering a qualified expert to render an opinion that goes directly to the ultimate issue in the case.

In such instances, counsel should not be shy about filing a motion to exclude or limit the expert’s testimony or opinions. Bear in mind that the motion might not be successful for its stated purpose (i.e., to exclude or limit expert testimony), but the motion might be effective indeed in pointing out a serious weakness in the other side’s theory of liability or proof of damages. Although the court may deny the motion at the time, the seed can be planted and later harvested with a motion for summary judgment, motion in limine, or a renewed motion at trial when the merits of the motion become clearer to the trial court.

**PRE-TRIAL PREPARATION** • This brings us to the “plotting and scheming” phase—the part that all good trial lawyers relish. Generally speaking, expert witnesses are subject to attack in three basic areas: the expert’s credentials and qualifications; the manner by which the expert arrived at his opinions; and his conclusions or opinions themselves. Counsel might be tempted to flail away in all three areas. This is usually ill-advised. J. White, supra. In fact, it evinces the lack of a plan. Rarely is an expert weak in all three areas. Besides, why go hunting with a shotgun when you could use a rifle? Accordingly, counsel should identify, and then home in on, the expert’s most vulnerable spot.

Another cautionary point is appropriate here. Cross-examining a seasoned expert can be akin to dancing with a bear in open court. Most lawyers do not do either well. Unless you have a death wish, try to avoid this. Like a prizefighter, get off a few good punches and avoid at all costs a body blow, or worse yet, getting body slammed. Also, remember that jurors are instinctively skeptical of expert witnesses. Jeffrey T. Frederick, *The Survivor’s Guide to Expert Witnesses: From Selection Through Trial*, VA CLE (2007); Sanja Kytnjak Ivkovic and Valerie P. Hans, *Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 Law and Social Inquiry 441 (2003). Let that proven fact work in your favor. Hence, the thought of destroying an opposing expert should be forgotten. In most cases, merely neutralizing the expert on cross-examination is more than adequate—a lesson we will return to momentarily.

Working then in descending order of difficulty, it is easy to see why attacking an expert’s opinions or conclusions is the most difficult approach. It should be avoided if at all possible. When it is unavoidable, however, you should consider assigning a specific lawyer to the task. Either way, once you have decided upon a frontal assault, hitch up your britches and let the fur fly!

Next on the scale of difficulty is challenging an expert’s methodology or manner in arriving at his stated opinions. To pull this off effectively, counsel still must have a thorough understanding of the subject matter and the expert’s field of expertise. The task will be easier if you limit your cross-examination to areas in which the expert should agree with you. For example, oftentimes an expert will make certain assumptions in reaching his opinions. If you get the expert to agree that certain basic assumptions are variable in some respect, his ultimate opinions then become challengeable. The danger here, of course, is that the same seasoned expert might, and frequently will, use this opportunity to repeat all of his opinions, thus sabotaging your