

TOXICOLOGY REPORTER

Cross-examination of an Expert



Using Scientific Abstracts or Reports

Case Consultation

A Case Assignment

A typical assignment would be to provide review and consultation focused on the validity of science-based assertions or necessary foundation reflected in the opinions put forward in the disclosure, written report, or affidavit of a potentially adverse expert witness. This consultation often includes options regarding the examination of that expert.

Background: Deposition and Voir Dire

Deposition of the expert

There are at least three good reasons to consider depositing an expert:

- You know little or nothing about the expert's approach to case-analysis and his/her ability to defend the approach taken, case-assumptions, case-calculations including BAC and TAC, and knowledge of and/or reliance on scientific studies.
- You want to establish the nature, scope, and limits of the expert's case-analysis as presented in a written report and/or you want to "marry" the expert to a flaw in the case-analysis or written report.
- You want to settle the case and hope to indirectly affect the negotiations by diminishing the perceived impact of the expert's testimony.

When should the expert be deposed? As a general rule, as late as possible ... after you have obtained a detailed report

or exhausted all related attempts to define the expert's opinions and/or anticipate the expert's testimony as well as the expert's reaction to your questions.

Voir dire

A voir dire is an under-utilized technique. While you might be hesitant to disclose your approach to cross-examination at a pre-trial deposition, you should be much less concerned when conducting a voir dire.

<i>What's in his file?</i>	<i>What's not there?</i>
<i>What has he done?</i>	<i>What has he charged?</i>
<i>What does he know?</i>	<i>How does he react?</i>

Compared to a discovery deposition, a well-devised voir dire can have a much greater impact. The expert is usually not able to effectively rehabilitate his/her lack of case-specific knowledge or approach to case-analysis: "*Isn't it true that when I questioned you about 20 minutes ago, you were not able to ...?*"

Background: Cross-examination

Develop and stick with your plan ... and build your credibility. An example skeletal outline of a *safe* approach to cross-examination follows:

Consider the voir dire

- The expert's case file
- The expert's activities
- The expert's case-knowledge
- The expert's reliance on case-assumptions
- The expert's case opinions
- Uncertainties associated with the case analysis
- The relevant scientific literature
- More reasonable explanations

Orient the jury to the elements of your cross-examination, build credibility with the jury, point to what may be an expert's *slanted* approach to case analysis-assumptions-and-opinions, use case-specific information and scientific literature, and control the expert.

Control the expert

When you cross-examine an expert, are you able to effectively use different types of control techniques? For example:

- Isn't it true that ...
- Didn't [*witness*] testify that ...
- Isn't it true you didn't ...
- Are you able to ...
- Please go to the board and ...
- Are you familiar with ...
- Why didn't you tell the members of the jury ...
- Have you ever published anything in ...

Reading chapters from a book and then simply talking with an expert does not work!

The Use of Scientific Abstracts or Reports

Getting the abstracts

Most experts will use computer-based programs to recover and review scientific abstracts.

Abstract information

Abstracts will usually provide the name of the author's of the scientific article, the journal or book or report containing the article, the address of the authors, and the full abstract or summary of the article.

Linkage to the expert's opinion or foundation and use of the scientific abstract

The expert should explain and illustrate how the scientific literature is related to the reliability of the expert's opinion or foundation, how the expert might be examined at deposition, voir dire, or trial, and how the information can be effectively presented even if the expert asserts a lack of familiarity or authority or there is objection to the use of the information.

You do not have to get the expert to agree that an article or book or study is generally regarded as authoritative in order to effectively use the information in that resource material. You do not even have to establish that the expert is familiar with the author or article or journal. An example approach follows:

Are you familiar with ... [author/reference/etc.]?
Establish resource-related relevance and credibility
Do you agree with the following statement, " ..." ?
Anticipate answers and be prepared to follow-up with case-relevant illustrations

Example Abstracts or Reports:

Alcohol and Falls



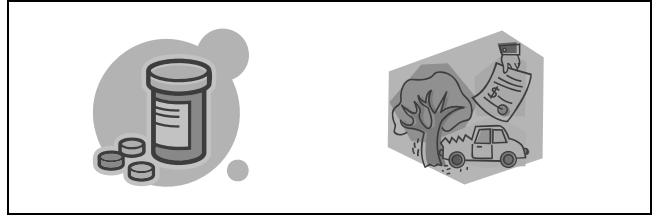
J Stud Alcohol. 1983 Mar;44(2):231-45.

The role of alcohol in accidental falls.

Honkanen R, Ertama L, Kuosmanen P, Linnoila M, Alha A, Visuri T.

Fifty-three percent of patients injured in accidental falls in the evening in Helsinki and 15% of time-, site- and sex-matched control pedestrians were alcohol-involved. Relative risk of injury, if 1.0 at zero BAC, was 3 at BACS 60-100 mg/100 ml, 10 at 101-150 mg/100 ml and about 60 at BACS above that.

Drugs and MV Accident



Accid Anal Prev. 2004 Jul;36(4):631-6.

Psychoactive substance use and the risk of motor vehicle accidents.

Movig KL, Mathijssen MP, Nagel PH, van Egmond T, de Gier JJ, Leufkens HG, Egberts AC.

SWOV Institute for Road Safety Research, Leidschendam, The Netherlands.

The main outcome measures were odds ratios (OR) for injury crash associated with single or multiple use of several drugs by drivers. The risk for road trauma was increased for single use of benzodiazepines (adjusted OR 5.1 (95% CI: 1.8-14.0)) and alcohol (blood alcohol concentrations of 0.50-0.79 g/l, adjusted OR 5.5 (95% CI: 1.3-23.2) and ≥ 0.8 g/l, adjusted OR 15.5 (95% CI: 7.1-33.9)). High relative risks were estimated for drivers using combinations of drugs (adjusted OR 6.1 (95% CI: 2.6-14.1)) and those using a combination of drugs and alcohol (OR 112.2 (95% CI: 14.1-892)). Increased risks, although not statistically significantly, were assessed for drivers using amphetamines, cocaine, or opiates. No increased risk for road trauma was found for drivers exposed to cannabis. **The study concludes that drug use, especially alcohol, benzodiazepines and multiple drug use and drug-alcohol combinations, among vehicle drivers increases the risk for a road trauma accident requiring hospitalisation.**

A Consultation Assignment

Given the case-specific facts and legal issues, Dr. Pape will search-recover-review-and-summarize relevant scientific literature and illustrate the application of scientific studies to case analysis, the formulation-presentation-defense of case opinions, and the appropriate examination of an expert witness.

The consultation process is much more than providing written materials and answering questions. The goal is to add to your knowledge base, confidence, and presentation of case-relevant scientific issues ... including your ability to effectively control the examination of an expert witness.

Call Dr. Pape at (800) 736-0503