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The One Question That You Must Always Ask

In the deposition of any expert witness, one specific query now can set up your cross later.

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Litigation
A Practice Focus

Cross-examination of the opposing party's expert at trial can make or break your case.

Unfortunately, it also can be an uphill fight. Rule 702 of the Federal Rules of Evidence establishes that an opposing expert's "specialized knowledge will assist the trier of fact." Before the expert even offers his first opinion, the judge will have proclaimed him "qualified as an expert," probably in an impressive array of subjects mirroring the principal issues that the jury must consider.

If your opponent did her homework, her expert will gain the jury's trust on direct and practically dare you to cross-examine him aggressively. If you're lucky, your team identified a few weak assumptions and flawed conclusions before you took a deposition, which you used to extract a few good admissions.

You'll make some headway with those at trial, but your opponent's no dummy—she's worked with the expert to explain away the problems you identified, and even helped the expert turn a few of what you thought would be your best criticisms against you.

You need help. You need someone the jury will believe and someone the opposing expert can't easily refute, and you need this person *now*!

Fortunately for you, the top practitioners in every field stand ready to assist you. The rich diversity of academia, the rapid development of new theories, and the free exchange of ideas practically guarantee that somewhere in the literature, a widely accepted text undermines the opposing party's presentation.

So how can you use that material to your advantage?

A Learned Treatise

One answer lies in the books. Federal Rule of Evidence 803(18)—the "learned treatise" rule—establishes that "[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice," are admissible.

Such works are considered sufficiently trustworthy to be exempt from the hearsay rule because, in the words of the advisory committee's note, "they are written primarily for professionals and are subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake." The publication itself cannot be admitted as an exhibit, though nonverbal excerpts that cannot plausibly be read into the record, such as charts or pictures, can probably be provided in tangible form.

Thus, with a proper foundation, you can confront the opposing expert with writings of the most learned practitioners in his field that critique, undermine, or refute him. Better still, the statements you will use against the opposing expert need not have been provided previously—most courts do not require you to show learned-treatise material on your exhibit list or other pretrial disclosures because you will not be admitting an exhibit—and you need not even allow him to rebut or explain them.

All the rule requires is that the passage be "called to the attention of [the] expert witness on cross-examination." Once you call an excerpt that otherwise complies with the rules of evidence to the attention your opposing expert—generally by reading it to him—it will be admissible as substantive evidence.

Learned-treatise excerpts can be extraordinarily persuasive evidence. They invoke the name, authority, and reputation of the leading experts in the field—who may even be household names—at little cost. Their status as neutral materials that were not prepared for litigation enhances their credibility and tends to offset any advantage your opposing expert's live testimony may have over readings from a published text.

Four Hurdles

Rule 803(18) establishes four hurdles that must be cleared before a statement from a learned treatise can be admitted into evidence.

First, under the rule, the statement must be "called to the attention of an *expert witness* upon cross-examination or relied upon by the *expert witness* in direct examination" (emphasis added). If you try to get learned-treatise material in through a fact witness, you've blown

it. As the advisory committee explained, because of the danger that jurors would "misunderstand and misappl[y]" authoritative publications, the use of treatises as substantive evidence is limited "to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired."

Second, the statement must be "contained in [a] published" text. The requisite publication differs from defamation law's standard of any communication to a third party. As the U.S. Court of Appeals for the 5th Circuit noted in *United States v. Jones* (1983), "The learned treatise doctrine is confined to published works that have been subjected to widespread collegial scrutiny."

Consequently, the prior inconsistent testimony of an opposing expert, though in a sense "published" in a transcript, does not satisfy the learned-treatise rule. By the same token, draft articles, working papers, lecture notes, and informal correspondence, though arguably "published" works, probably will not qualify. Yet the rule's specific identification of "treatises, periodicals, [and] pamphlets" does not exclude other media, provided that the rule's other criteria are met.

Third, the text must address "a subject of history, medicine, or other science or art." That language differs from Rule 702's definition of proper subjects of expert testimony—"scientific, technical, or other specialized knowledge"—but functionally, if a text addresses a subject about which an expert has been qualified to testify, the text will almost certainly be considered a work in "a subject of history, medicine, or other science or art."

Fourth, the text must be "established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." It is not enough that the statement come from a text published in an authoritative compilation, such as a respected journal. Rather, you must establish that the text from which the statement is excerpted (that is, the article rather than the journal) is authoritative in its field.

Reliable Authority

Establishing such reliable authority is the critical hurdle. If you fail to do so, the statement will not be admitted as a learned treatise—even if the text might otherwise qualify as a party admission or fall within some other hearsay exception.

The first way to establish the reliability of the text—through "the testimony or admission" of your opposing expert—is the best. It is dispositive under the rule, and if executed efficiently, it excludes opposing counsel from the debate. This keeps the focus squarely on the inconsistency between your opposing expert's views and those of a published authority that he has acknowledged to be reliable.

The second method of establishing reliability—through "other expert testimony"—is a safe and practical alternative only if the "other expert" has also been called by your adverse party. Under those circumstances, your opponent is not likely to challenge the proposition because to do so would necessarily undercut one of her experts.

It might seem tempting to establish the reliability of the text through your expert and then to use the text against your opponent's expert, and it is at least theoretically possible to do so. But that approach is unlikely to yield satisfactory results. Many judges are understandably disinclined to foist your expert's view of reliability onto your opponent's expert, so a battle of the experts over the reliability of the text is therefore likely. That battle will, at best, distract the jury's attention from the substance of the text, and at worst, it may prevent you from using the text as a learned treatise.

The third method, judicial notice, is rarely invoked in practice and even more rarely applied successfully. Rule 201 establishes that judicial notice is proper only for facts that either are "generally known" or "cannot reasonably be questioned." Thus, if the opposing expert will not concede that the text is a reliable authority, it is doubtful that a court would take judicial notice of its reliability (unless, of course, the opposing expert's position is particularly ill-informed or especially recalcitrant).

What, then, is the one question you must ask the opposing expert during his deposition? Simple: "What are the most reliable published authorities in your field?"

To generate as expansive a list as possible, you should pose open-ended follow-up questions ("Any others?"). And to lock in the testimony, you should ask the expert why he considers each work reliable.

If you have already identified prominent texts that tend to refute your opposing expert, you'll want to ask whether he considers them reliable before you confront him with the contradictory portions. It is most natural and most effective to ask the expert these questions when he's expansive in his responses. That's usually during the segment of the deposition dealing with his résumé and qualifications.

Between the deposition and the trial, track down the publications the expert identified, scour them for excerpts that undermine his analysis, and prepare to enjoy using them at trial.

For example, in one recent breach-of-contract case we presented a lost-value damages analysis based on a discounted-cash-flow model. Our opponent presented a relative-valuation model based upon multiples, especially the price-earnings ratio of our client's stock.

At deposition, I asked the opposing expert what the most reliable texts in his field were. He identified a graduate-level textbook I'd never heard of. I was unfamiliar with the author, my expert never mentioned him or his book, and neither expert relied upon the work.

There's no way I would ever have known the text existed if I hadn't asked, but you can bet I got my hands on a copy. After I did, I found statements such as "Multiples are easy to misuse and manipulate" and "The price-earnings ratio is the most widely misused of all multiples."

At trial, while exploring the expert's qualifications on voir dire, I asked him to confirm that the textbook was reliable and authoritative; he did. Later, during the substantive cross-examination, I applied the learned-treatise rule to weave the damaging quotes into a line of questions, driving home the theme that the expert applied a multiples analysis, instead of a more reliable discounted-cash-flow analysis, to generate his client's desired result.

The outcome? A multimillion-dollar judgment in favor of a very happy client.

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