

PRESENTATION FOR VBA WINTER MEETINGS

THE VIRGINIA APPROACH TO EXPLORING BIAS IN EXPERT WITNESSES

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I. The Problem of Bias in Expert Witnesses

A. What is the problem?

- Society is becoming increasingly dependent upon technology that the average lay person cannot understand.
- Advances in scientific knowledge and methods are becoming increasingly important in the context of litigation (e.g. DNA testing, computer models, statistical analyses).
- More and more often, what was once considered “simple civil litigation” is transformed into a “battle of the experts.”
- This increase in use of experts in litigation has made the issue of dealing with expert bias more prevalent and more important.

B. What are its sources?

- The increased use of experts in all forms of litigation, combined with the liberal definition of the term “expert” has led to an explosion in the number of experts and a similar increase in the number of fields in which an expert may be called upon to render opinions.
- The practice of compensating experts for their professional time and expertise has become increasingly lucrative, particularly in the scientific and medical fields.

- The advent of expert referral services and their marketing of services to one side of the docket or the other has led to “pigeon-holing” of individual experts as “pro-plaintiff” or “pro-defendant.”
- The critical role of the expert in today’s litigation has led to an increased emphasis on discrediting an opponent’s expert’s opinions, methods, credentials, **and motives**.

C. How have courts handled the problem in the past?

- Courts have traditionally allowed for broad exploration into a witness’ potential bias, but have generally not considered bias as a factor in determining whether an expert’s opinions are admissible at trial.
- There is a concern on the part of some that the wide latitude granted by the courts into examination of expert bias will lead to increased reluctance on the part of experts to offer valuable testimony for fear of embarrassment or loss of personal privacy.

II. The Supreme Court’s Decision in *Lombard v. Rohrbaugh*

- The Supreme Court of Virginia held in Lombard that it was permissible to cross-examine an expert witness regarding the amount of money he was paid by the defendant’s automobile insurance carrier. The Court stated:

The general rule prohibiting the mention of insurance in such cases may collide with another rule concerning a litigant’s right to cross-examine a witness concerning interest, bias, prejudice, credibility, or relationship to the parties.

Lombard v. Rorbaugh, 262 Va. 484; 551 S.E.2d 349 (2001).

- The Court’s decision in Lombard appears to cement the idea that a party’s ability to cross-examine an expert witness on issues of bias is almost inviolate, and even goes so far as to allow inquiry regarding a party’s liability insurance if the evidence is also probative on the question of bias. The Court held that

We reaffirm the general principle that evidence as to whether a defendant did or did not carry liability insurance is generally irrelevant and inadmissible in a trial to address issues of

negligence, causation, and damages. However, consistent with our prior cases and the majority view in the United States, we hold that testimony concerning liability insurance may be elicited for the purpose of showing bias or prejudice of a witness if there is a substantial connection between the witness and the liability carrier.

- The Court also noted that:

The bias of a witness, like prejudice and relationship, is not a collateral matter. The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness [O]n cross-examination great latitude is allowed and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out.

Lombard v. Rohrbaugh, 262 Va. 484, 551 S.E.2d 349 (2001) (quoting Henning v. Thomas, 235 Va. 181, 366 S.E.2d 109 (1988)).

- Prior to the Lombard decision, inquiry regarding compensation of experts was frequently limited to an expert's compensation for offering opinions as a percentage of total income. However, the Supreme Court in Lombard upheld the propriety of cross-examining the defendant's expert as to the *dollar amount* that the expert had been paid by the defendant's insurance carrier over a two year period.

- The Supreme Court, applying the reasoning set forth in the Lombard decision, has also allowed cross-examination of an expert in a medical malpractice action regarding testimony the expert had provided in an unrelated medical malpractice action regarding the same defendant physician. The Court stated that "the probative value concerning this potential bias outweighed any prejudice to [the defendant physician] resulting from the jury's knowledge that she had been a defendant in an unrelated lawsuit." Sawyer v. Comerici, 264 Va. 68, 563 S.E.2d 748 (2002).

- The import of these two decisions is that when it comes to exploring the potential bias of expert witnesses, the courts will allow great latitude.

- The court's decisions in Lombard and Sawyer do NOT address the ability of parties to use subpoenas *duces tecum* to obtain financial and/or tax records of expert witnesses for the purpose of determining

the amount of money they earn in a year from providing litigation services.

- At least one U.S. District Court has found that the potential for bias may be a factor in deciding whether a proposed expert may offer opinions at trial:

The court in this case must also consider the fact that there is at least an underlying, though probably unintentional, potential for bias. It is imperative for expert witnesses to be independent. ... [T]he fact that [the expert] has worked with [the plaintiff corporation's] president, since the time [the expert] earned his degree at Princeton, the potential for bias increases to some degree.

Virginia Vermiculite, Ltd. v. W.R. Grace, Inc., 98 F. Supp. 2d 729 (W.D. Va., 2000).

III. Practical Effects of *Lombard* on Expert Witnesses

- It appears that the Supreme Court's decision has placed great value on the ability of a party to develop and use information regarding the potential bias of an expert witness.
- There is some concern that experts will be unwilling to provide litigation services if they will be forced to disclose detailed financial information, either in response to a subpoena or in a deposition.
- **In some cases, experts who refuse to provide information regarding income from giving opinions and testimony have been forced to produce personal income tax records to counsel for the party against whom the expert is offering his opinions.**
- Courts are less willing to accept "I don't know" as an answer to questions about an expert's income from providing opinions and testimony.

- However, it is not always easy to have the trial court compel an expert to produce income tax records. **The following exchange between an expert and an attorney in a discovery deposition was used successfully to convince a court that counsel was entitled to obtain an expert's tax records:**

Q. "Doctor, how much money do you make per year doing medical/legal work?"

A. "I couldn't tell you other than to ballpark it as a category of an estimate somewhere around 15% of my total income."

Q. "So will you know specifically what you made in medical/legal work last year?"

A. "No, I couldn't tell you . . . I don't have a mechanism of knowing what individual elements may account for what amount of money."

Q. "What is your best estimate of what you've earned per year for the last three years doing medical/legal work?"

A. "I'd say in the range of – if I had to ballpark it, I'd say probably somewhere between 50 and 100,000 on a given year."

Q. "Do you think for the year 2000 you were closer to 50 or 100,000?"

A. "Probably closer to the 50 because of the prolonged illness. That was typically a low year, but I honestly don't know."

- In that case, the expert's vague answers, when coupled with prior inconsistent testimony regarding income from litigation services, served as adequate grounds for the trial court to order the expert to produce his tax returns for prior years.
- While the Supreme Court has not determined that an expert's tax records are always discoverable, there is a perception that the Court's decision in Lombard makes every expert's personal financial information "fair game."
- **If a party wishes to obtain an expert's financial or tax records, it must be demonstrated that the witness is evading or refusing to answer clear and direct questions regarding that witness' income from litigation-based work. If it can be shown that the witness is not being honest and forthright, the trial court may order the expert to produce financial information pursuant to a subpoena *duces tecum*.**

IV. Possible Solutions to the Expert Bias Problem in Virginia

A. Lawyer-based solutions

1. Proposed “gentleman’s agreement”

- There have been discussions between the plaintiffs and defense bars regarding the possibility of voluntarily limiting inquiry into the details of an expert’s financial information.
- The proposed agreement would require **court approval upon a showing of good cause** in order to obtain written discovery regarding other cases the expert has offered testimony in, the expert’s fees in prior cases, and an expert’s fees for case review and medical examinations.
- **This proposed agreement, while it seeks to avoid embarrassment of potential witnesses and encourage reputable experts to provide expert opinions when needed, also acts to provide refuge for witnesses who are looking to profit by selling their opinions to the highest bidder.**
- This agreement, if implemented, could severely limit otherwise proper examination and use of bias information that the courts have described as **“always a relevant subject of inquiry.”**
- If courts do not use bias as a factor when vetting the reliability of an expert’s proposed testimony, cross-examination remains the only tool for exploring the credibility of experts.

2. Other alternatives

- Attorneys should “manage” their use of experts, with the knowledge that overuse of an expert who consistently provides favorable testimony for one side over the other will open that expert to criticism on the basis of alleged bias.

- Caution should be exercised when using expert referral services, because those relationships are fertile ground for cross-examination and credibility attacks.

B. Expert-based solutions

- Experts should use caution when accepting cases, and should be aware that the acceptance of payment for professional services opens the door for exploration of whether the expert is truly independent.
- An expert who testifies almost exclusively for one side should be able to offer a compelling explanation for why his or her testimony is so lopsided.
- Experts must be aware that using litigation as a primary source of income can be hazardous to their reputations and should understand that they should accept such cases with care.

C. Court-based solutions

- Unless and until courts decide to make bias a part of the “gatekeeper” function of assessing reliability of expert opinions, the use of bias as a method of criticizing experts is likely to continue to increase in prevalence and intensity.