The Opponent's Expert: Preparing for the Most Important Deposition in the Case†

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I.
Introduction

A law school professor of Trial Tactics was asked by the class to teach the skills necessary to take an effective deposition; the response was frightening. Essentially, she said, there was no skill involved in taking depositions. The lawyer should simply employ cocktail party conversationalist demeanor and strike up a conversation with the witness. The key, the professor said, is simply to encourage the witness to talk, and with sufficient time, by the end of the deposition the lawyer would know everything the witness knew. While that practice may, on rare occasion, work when taking the deposition of a fact witness, it will never work when deposing an opponent's expert. Rather, the key to effectively deposing an expert witness is preparation. Ninety to ninety-five percent of the work needs to be done before the deposition starts.

Expert witnesses are unique in the realm of trial testimony because they can testify as to both fact and opinion. The opinion component of expert testimony is most important to the case and often proves problematic for the trial lawyer because expert witnesses can be difficult to cross-examine, not because they are smarter than other witnesses, but because of their experience as witnesses. It is not unusual to run across experts who have more trial experience than the lawyers in the case.

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† Submitted by the authors on behalf of the FDCC Management, Economics and Technology of Practice Section and the Commercial Litigation Section.

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This article provides some ideas about what lawyers can do to make expert discovery depositions more effective, which will improve cross-examination at trial.

II.
Why Depose an Expert?

Simply scheduling all of the opposing parties' experts' depositions because you "want to find out what they have to say" is not an effective litigation strategy. Rather, the very first question to ask before scheduling any deposition, especially an expert's deposition, is what will this deposition accomplish? Until a lawyer can answer that question definitively, he should not schedule the deposition; doing so would waste the lawyer's time and the client's money.

At a minimum, the following objectives exist for each deposition:[1]

1. Gather basic information about the expert's opinions and the basis for each opinion;[2]
2. Discover "[t]he [d]ata or [o]ther [i]nformation the [e]xpert [c]onsidered";[3]

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[1] *See* Stephen D. Easton, Attacking Adverse Experts (2008). Easton's book is a comprehensive guide regarding examining opposing expert witnesses. Throughout this article, we highlight points made in Easton's book and provide some of his checklists. These are no substitute for Easton's book, which contains a wealth of other very valuable information, analysis and expertise.

[2] *Id.* at 8.

[3] *Id.* at 9.

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3. Identify "[a]ny [e]xhibits the [e]xpert [w]ill use"[4] at trial;
4. Discover "the [e]xpert's [q]ualifications";[5]
5. Locate "the [e]xpert's [p]ublications";[6]
6. Identify "[a]ll [o]ther [c]ases in [w]hich the [e]xpert [t]estified in the [p]ast [ten] . . . [y]ears";[7]
7. Quantify "the [e]xpert's [c]ompensation in the [c]ase"[8] and as an expert witness;
8. Establish a record for use in a motion to strike the expert or a motion addressed to the court's function as a gatekeeper;[9]
9. Establish a record for use at trial to impeach the expert;[10]
10. Establish a record that can be used to drive down the settlement value of the case.

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4 *Id.* at 11.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 12.

9 *Id.* at 202.

10 *See id.*

II.
Preparing for the Deposition through Written Discovery

Depending on the jurisdiction, some pre-deposition disclosures may be required by court rule or by the court as part of an early scheduling order. For example, Rule 26(a)(2) of the Federal Rules of Civil Procedure requires certain disclosures, including the identity of any experts who are expected to testify at trial.[11] In addition, the rules require that all experts prepare reports and that the reports be disclosed when the witnesses are identified.[12] The reports must contain a great deal of information about the expert's opinions and preparation, including the following:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the data or other information considered by the witness in forming [the witness's opinions];
> (iii) any exhibits that will be used to summarize or support [the witness's opinions];
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.[13]

In the absence of a mandatory disclosure rule, counsel should craft discovery to ferret out as much of the basic information listed above as possible that may be used to prepare for the expert's testimony. Some jurisdictions limit the amount of information that counsel may gather by way of interrogatories absent a court order to the contrary.[14] Counsel should review the court rules carefully to be sure that written discovery is as complete as permitted. Counsel also should not delay in issuing the written discovery because time is required not only for the lawyer to review the information gathered, but in the best-case scenario, the defendant's expert should review the information as well.

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[11] Fed. R. Civ. P. 26(a)(2)(A) (2008).

[12] Fed. R. Civ. P. 26(a)(2)(B) (2008).

[13] Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi) (2008).

[14] *See, e.g.*, Mich. Ct. R. 2.302(B)(4)(a) (limiting the information about experts that counsel may be gather through interrogatories including: the name of the expert, the subject matter about which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion).

In addition to interrogatories, counsel should use document production requests to access any written reports prepared by the expert.[15] Think broadly in terms of the document request, but at a minimum, consider requesting the following:

1. "All [i]tems [s]een or [p]roduced by the [e]xpert";[16]
2. "The [e]xpert's [n]otes and [w]orking [p]apers";[17]
3. "Correspondence [b]etween the [r]etaining [a]ttorney and the [e]xpert";[18]
4. "Drafts of [e]xpert [r]eports";[19]
5. All resources relied upon by the expert in reaching his or her conclusions;
6. "Billing and [p]ayment [r]ecords";[20]
7. "Test or [i]nspection [d]ata";[21] and
8. "Documents from the [e]xpert's [w]ork in [o]ther [c]ases."[22]

III.
Search the Expert's Background

Before deposing the expert, counsel should try to find as much useful information about the expert as possible. The expert's curriculum vitae ("CV") is a useful starting place, but Stephen Easton warns against taking the expert's CV at face value.[23] Lawyers should always verify each item listed on a CV. If a lawyer can show that an expert lied, or even stretched the truth a bit in his CV, counsel can use this information as damaging cross-examination material at trial.

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[15] If the case is in a jurisdiction that does not permit a document request regarding an expert witness, counsel will need to ask for these documents in the subpoena served on the opposing party in conjunction with the deposition notice, as discussed in more detail below.

[16] Easton, *supra* note 1, at 78.

[17] *Id.* at 80.

[18] *Id.* at 81.

[19] *Id.* at 82.

[20] *Id.* at 83.

[21] *Id.* at 86.

[22] *Id.*

[23] *Id.* at 156–60.

Moreover, lawyers preparing for an expert's deposition are no longer limited to the expert's CV or the anecdotal ramblings of a senior partner who recalls the witness from a time now dim to memory. The internet has revolutionized a lawyer's ability to discover information about witnesses. Sitting at a computer in the quiet of the lawyer's office, the lawyer can find a wealth of background information on many experts. The typical Google search, now a routine part of the preparation for nearly every expert's deposition, only scratches the surface of information about the expert that is in the public domain. Often, the expert's CV will lead to websites containing useful information about the expert. A resourceful lawyer should search the websites of organizations to which the expert belongs. There may also be interesting information on the website of the expert's college or university or a home town newspaper. Westlaw and LexisNexis searches for experts are also worthwhile. If a particular expert's opinions are controversial, many times that expert's opinions will be the subject of an appeal. Simply typing in the expert's name into a search engine may produce cases in which the expert's opinions have been challenged.

Attorneys can also search criminal and civil records of the expert. A lawyer without the capability to search these records should consider hiring a private investigation firm to do it. Records regarding the expert's criminal background, litigious nature, or bankruptcy history may be useful to set up opportunities to impeach the witness at trial.

Additionally, many for-profit companies exist to assist litigators in finding expert witnesses and information regarding opposing experts. Using an internet search engine, searching for "expert witness database" will bring up links to many of these companies. Some provide services for free; others charge a fee.

Trade associations can also be an excellent source of background information. Many clients, particularly manufacturers, belong to trade associations. If the members of the trade associations face particular types of litigation, they may track opposing experts and be able to provide useful information.

These potential sources of information are not an exhaustive list. In fact, a lawyer's only limits are his or her imagination with respect to places to look and the client's ability to pay for the investigation.

IV.
Preparing Deposition Checklists

Some lawyers prepare for an expert's deposition by developing a list of topics that need to be covered during the deposition.[24] Note that not all items will apply to each case. Additionally, a list is not a substitute for critical analysis of what the lawyer needs to prepare to depose a particular expert in a particular case or for the careful review of the information gathered.

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[24] *See* EASTON, *supra* note 1, at 161-65 for one such checklist.

A. *Engage Your Own Expert*

Odds are that both sides have engaged experts about the specific or general subject matter of interest. The retained expert can do more than prepare a set of opinions and prepare for testimony. Instead, that expert should review interrogatory answers, the opposing expert's report, and any information produced in response to document production requests or developed by the internet search. Also, the retained expert should assist the attorney in preparing an outline for the opposing expert's deposition.

In particularly critical areas, the retained expert may provide general areas of examination or even specific questions that will ensure that all areas that need to be explored are in fact explored. This effort adds cost, but it has benefit and reward if it leads to a successful challenge to the opposing expert's testimony because of flawed methodology or the unreliability of proffered opinions. In the right case, the retained expert may attend the deposition and assist in the cross-examination as it happens.

Easton offers a checklist of information the retained expert can teach the lawyer who is preparing to depose the opposing expert.[25] Some of those topics include "[t]he [a]pplicable [s]cience or [o]ther [t]echnical [k]nowledge,"[26] "[w]hy and [h]ow the [a]dverse [e]xpert is [w]rong,"[27] and information about the opposing expert's work and reputation.[28]

B. *Secure Depositions, Reports, and Other Literature From and About the Expert*

An expert witness's prior testimony can be invaluable when preparing for a deposition because it gives the lawyer insight into how the expert testifies and how he has addressed similar factual circumstances, and it can identify assumptions the expert is likely to make from the facts gathered. Some of the same sources that are mentioned above, such as Google searches, LexisNexis and Westlaw searches, and answers to discovery requests may lead the lawyer to the expert's prior testimony, but there are other sources that may be helpful as well.

First, the lawyer may have access to the expert's prior depositions through a firm's expert bank of prior testimony or through organizations like the Defense Research Institute ("DRI") and its state affiliate organizations.[29]

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[25] *Id.* at 187.

[26] *Id.*

[27] *Id.* at 188.

[28] *Id.* at 187-88.

[29] If you are a member of DRI, you can go to the website at *http://www.DRI.org*, log in, go to "Membership Services," and click on "Expert Witness DB" to gain access to DRI's collection of information on more than 65,000 experts. One nice feature of the DRI database is that it tracks the name of attorneys investigating a particular witness. You can use this information to contact those attorneys for further guidance or insight as to a particular witness.

Many organizations also have an email service that allows members to send an email inquiry to all of the organization's members asking for information about a particular expert. For example, the Michigan Defense Trial Counsel uses an email list that it sends to its members regarding particular experts.

The Google search, responses to interrogatories, and the expert's CV may also include a list of cases in which the expert offered opinions. If the list contains enough information, contact with the lawyers involved may provide access to transcripts, or at the very least, some insights about the expert based on prior experiences.

It is not enough, however, for the lawyer conducting the deposition to turn the information over to a legal assistant for review and summary. The lawyer conducting the deposition needs to read all the deposition transcripts, reports, and other literature involving the case. The lawyer questioning the witness needs to know the case and the expert well enough to sort through the information, to cull out what is useful, and determine how to use the information strategically. Reviewing and analyzing the material improves the lawyer's preparation by allowing for more detailed and probing follow-up questions. Finally, it may permit early recognition of prior inconsistencies.

A very useful tool for analysis of an expert's prior testimony is one of several computer programs that permit full-text searching of transcripts for information about which there is a concern or interest. CaseMap and Summation are just two of the many programs that provide this litigation support.[30] Most of these programs have deposition or transcript storage capabilities that allow a lawyer to search the transcript for key words or phrases. The programs also allow the lawyer to organize and store portions of the transcript for later use, such as in a deposition outline or trial brief.

V.
"Discovery Only" depositions

The most important reason to take an expert's deposition is to discover how the witness will testify at trial. Most court rules provide for the taking of a trial deposition, and often testimony is preserved for trial in that manner. Usually, however, the lawyer does not plan to use the deposition at trial when counsel provides notice of the deposition to the opposing party's expert witness. No lawyer enjoys it if, after the discovery deposition concludes, opposing counsel tries to turn the deposition into something he intends to use at trial.

The Federal Rules of Civil Procedure do not specifically discuss the concept of a discovery only deposition; most states' court rules probably do not address that concept either. However, in *Petto v. The Raymond Corp.*,[31] the Michigan Court of Appeals excluded the

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[30] CaseMap can be found at *http://www.casesoft.com/casemap/casemap.asp*, and Summation can be found at *http://www.ctsummation.com*.

[31] 431 N.W.2d 44, 46 (Mich. Ct. App. 1988).

deposition of an opponent's expert that was taken for "discovery only" and refused to admit it at trial as testimony. There is no similar case interpreting the federal rules. However, the same reasoning likely applies to the federal rules. One of the purposes of discovery is to learn what evidence the other party intends to present at trial and to have a fair opportunity to refute it; failing to allow a party the time to consider an expert's opinions before cross-examination does nothing to further this objective.

In a jurisdiction that has not developed case law on the subject, it is recommended that the issue of discovery only depositions be raised at the scheduling conference or similar pre-trial scheduling event. The court can include in its scheduling or case order that expert witness depositions be for discovery only. At a minimum, this will alert counsel as to whether opposing counsel intends to employ a strategy that turns a discovery deposition into one that will be used at trial.

Sometimes, opposing counsel will notice the expert's trial deposition to begin at the conclusion of a discovery deposition. Upon receipt of such a notice, counsel must file a motion for protective order.[32] Absent extenuating circumstances, the judge will likely understand the problems facing a defense attorney and intervene if the opposing party schedules the expert's trial deposition at the same time as the discovery deposition or immediately after.

VI.
The Deposition Notice

A careful lawyer does not delegate to a secretary or legal assistant the responsibility of preparing a deposition notice. No one wants an examination submarined by a drafting error. If the jurisdiction recognizes a discovery only deposition, make sure the caption or title of the notice clearly indicates the nature of the deposition. Second, make sure the deposition notice requires the witness to bring all pertinent materials to the deposition so counsel can thoroughly examine the witness's opinions. Third, make sure the notice complies with applicable court rules. For example, court rules may require a subpoena to compel production of the documents at the deposition. Rule 30(b)(2) of the Federal Rules of Civil Procedure requires that the documents listed in the subpoena also are listed on the notice.

Some of the documents the lawyer might want to request include the following:

1. All communications between the expert and counsel, including engagement letters;
2. All notes or other communication regarding communications with witnesses;
3. All documents relating in any way to the expert's opinions;

[32] *See* Fed. R. Civ. P. 26(c).

4. All documents relied upon or consulted in any way in forming opinions;
5. All professional publications of the expert;
6. An updated and complete copy of the expert's CV; and
7. Documents that will identify other cases in which the expert has testified, the number of times the expert has been retained by counsel who has hired him in this case, the amount of money the expert has derived from expert testimony, or services in the last ten years.

VII.
Goals for the Deposition

Once counsel has decided to depose the expert prior to trial and has scheduled the deposition, counsel must set goals for the deposition. When thinking through those goals, it is critical that counsel remember that an expert's testimony has heightened importance in the trial, as only an expert can offer opinions on the ultimate question in the case. Easton offers the following set of goals for examining the opposing party's expert:

[1.] Discovering what the expert will say at trial, what he will point to in support of those statements, what other work he has done in the case, and what other evidence is available for your use to impeach the expert at trial.
[2]. Locking the expert to his positions (i.e., eliminating room for him to wiggle away from his deposition testimony based upon more careful analysis or later developments).
[3.] Confirming areas where the adverse expert agrees with your expert.
[4.] In areas where the expert refuses to reasonably agree with your expert, pushing the adverse expert to ridiculous positions.
[5.] Securing other admissions from the expert.
[6.] Testing the expert's ability to withstand cross-examination.[33]

[33] Easton, *supra* note 1, at 200–01.

We suggest you consider two additional goals for the deposition:

1. Obtaining the background information necessary to attack the expert's ability to testify through either a *Daubert*[34] or other foundational challenge.
2. Learning the sources of the information forming the bases of the expert's opinions so that counsel can review them to make sure the expert is using the source properly.

Other objectives likely exist specific to a given case. It is important to think critically about the purpose of the deposition and the information sought through this effort.

VIII.
Preparing a Deposition Outline

Working hard to prepare for a deposition is useless if a litigator does not ask a particularly important question or fails to explore an area of the witness's opinions or the bases for those opinions. Not all lawyers agree as to how to avoid such a calamity, but one way to do so is to prepare and use a detailed deposition outline.[35] Like law school course outlines, the deposition outline has to be useful for the lawyer making it. Regardless of an outline's sophistication, it should generally address the following questions and, as always, should be modified to address other case-specific issues:

1. Is the expert prepared to give his or her final opinions? Are these opinions held to a reasonable certainty?
2. "Does the expert plan to do any additional work before trial?"[36]
3. Has the expert been promised any information that has not been provided?
4. "Has the expert done all the work considered necessary to reach the conclusions in his or her report?"[37]

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[34] *See* Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579 (1993).

[35] *See* Easton, *supra* note 1, at 203-36 for a sample deposition outline. Because this outline is so detailed, it may not be necessary to inquire into every category in all cases. However, in preparing for the deposition be sure to review every category and make sure to have at least considered the information.

[36] Chip Rice, *Expertly Depose Opposing Experts*, The Recorder (Dec. 2, 2005), *available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1133431508792* (last visited February 24, 2009).

[37] *Id.*

5. "Does the expert's written report contain all of the opinions that he or she plans to give at trial?"[38]
6. "What has the expert discussed with counsel?"[39]
7. "Were any limitations placed on the expert's work?"[40]
8. "How much time has the expert spent on this matter?"[41]
9. "How much is the expert being paid?"[42]
10. "How was the expert's report prepared?" [43]
11. "Is the expert's [CV] complete and accurate?"[44]
12. "Has the expert previously served as an expert witness?"[45]

IX.
Questioning the Witness

Lawyers tend to be a proud lot. Some of that pride needs to be checked at the door of the deposition because the objective in the deposition is to find out everything about the expert. As a result, there really is no dumb question at a discovery deposition. There may be inartfully worded questions, but the beauty of any cross-examination is in the eye of the beholder, and if it works, how smooth it was is irrelevant. One examination method that is frequently successful starts with broad questions, narrowing to specifics over the course of the examination. Lawyers often talk about obtaining "sound bites" that can be used at trial. Usually, these sound bites are picked from answers provided after a series of questions leading to a tightly worded question that offers the sound bite desired. The savvy expert will recognize traps as they are laid, and it is not unusual to receive vague and evasive answers. To get past those vague and evasive answers, the interrogator must continue to probe until there is little wiggle room left. The interrogator should exhaust every area and finish the deposition with a closeout question designed to pin the expert down and leave him without room to evade direct questions at trial. Examples of a closeout questions are

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

1. Are you ready to give your final opinions in this case?

2. Do you have any other qualifications, expertise, or experience that you rely upon to express opinions in this matter?

3. Do you hold these opinions to a reasonable certainty?

4. Is there any other information you have asked for that has not been supplied that may affect your opinions?

X.
Conclusion

Given their ability to provide opinion testimony, expert witnesses take on a very prominent role at trial. In order to be prepared to meet and refute this evidence, a great deal of effort is required to prepare for the expert's deposition. There is no substitute for preparation, as thorough and exhaustive pre-deposition preparation is the key to taking a deposition that will prepare the lawyer to handle the expert's testimony at trial.