

YOUNG LAWYERS

Your First Expert Deposition: Taking the Expert's Deposition

By Craig M. Sandberg

This article is the second in a two-part series of articles designed to aid beginning lawyers as they approach their first expert deposition, as well as serve as a refresher for more seasoned lawyers.

Prior to the expert's deposition, you have painstakingly prepared for that deposition, as discussed in part one of this article series (*PP&D*, Summer 2005). You have been mindful of the five concepts necessary to that preparation.

- Know the area of expertise
- Know your strategy in approaching the expert's deposition
- Know the case law
- Know the expert
- Plan your approach

Synthesizing these five concepts prepared you to take your first expert deposition. Additionally, and this is subject to some disagreement among experienced lawyers, you must consider whether the deposition should be treated as though you were taking trial testimony. To the author, this means the distinct possibility exists that the deposition could be used at trial for, or against, the expert. Therefore, at a minimum, keep it clean—no excess comments, dialogue, or objections.

One key to a successful first expert deposition is to understand the nuances that may be obvious to a veteran lawyer. By keeping the following goals in mind, you will obtain a better estimation of the value of that expert's opinions.

Discover the Expert's History As an Expert

Lawyers often view interrogating experts on their professional history as pedestrian and, as such, often dispense with it hastily. This is an unfortunate mistake. For the astute interviewer, examining the expert's history can be extremely useful. The following are some areas of exploration into the expert's history:

- the expert's current curriculum vitae (CV) (if not, what information would make it current?)
- prior expert testimony (how often, when, and where?)
- prior association with the party and law firm
- testimony for the defense or claimant's side, testimony for the state or insurer's side
- the number of times the expert has given testimony in official proceedings, such as grand jury hearings, depositions, and prior trials

Craig M. Sandberg is an Assistant State's Attorney in the Cook County State's Attorney's Office in Chicago, assigned to the Civil Actions Bureau, where he handles a wide array of litigation on behalf of Cook County and affiliated officers, agencies, and other elected officials in state and federal courts.

- the number of times and the jurisdictions in which the expert has previously been qualified as an expert witness in the field of expertise for which the expert's opinions will be offered in this case
- any subject matter similar to the current case

By exploring the expert's history as an expert, you will know more about that expert's propensity to be involved in litigation (e.g., a professional hired gun), as opposed to practicing in the actual area of expertise. Also, remember to obtain copies of the expert's deposition(s) given in other cases.

Explore the Expert's Qualifications

Your exploration of the expert's history provides the natural transition to exploring the expert's qualifications. One of the best ways for you to aid your case is to test the expert's foundation for knowledge about the subject area. For purposes of demonstration, let us assume that the other party disclosed someone it contended was qualified to offer an opinion relevant to the case. Your goal should be to demonstrate that, while educated and experienced, the expert is not qualified to offer opinions in this case. To do this, you must distinguish between the expert's area of expertise and that form of expertise needed in your case. Alternatively, you may wish to determine limitations the expert possesses to contain the expert testimony in certain areas, such as when the expert report or disclosure is left unclear or leaves avenues open for the expert to explain. This is not unlike developing your argument in motion practice, which is exactly where you will be heading when you move to bar the expert from offering opinions at trial or seek to limit the scope of the testimony. Here are some areas of the expert's qualifications to consider exploring:

- educational history, degrees and certificates, licenses, and professional accreditation attained
- investigations arising out of the expert's professional activities
- membership in professional organizations, activities, and leadership roles in professional organizations
- publications and presentations at training programs (are any applicable to opinions?)
- research activities in the field
- attendance at professional education programs

Develop the Expert's Retention Agreement

Many lawsuits at trial become battles between the experts, which result in a wash to the parties because similarly qualified expert witnesses have left jurors with equally plausible theories of the case. Therefore, the expert's retention is another impor-

tant area to develop in the deposition. Areas of inquiry on the expert's retention include the following:

- Who retained the expert in the case?
- When was the expert retained?
- What was the precise scope of the assignment when the expert was retained?
- Did the assignment change in any fashion? (If so, what were the reasons for the change?)
- What information was the expert given at the time the case was assigned?
- What information did the expert request?
- Did the expert receive all requested information?
- What outside sources of information did the expert consult at any state of his or her consultation?
- When did the expert initiate the investigation?
- When did the expert first reach a conclusion?
- What information has the expert learned since reaching this conclusion?
- Has the expert pursued any further information since completing the investigation?
- Has the expert been made aware of the findings of other experts in this case?
- Has the expert reviewed the findings and opinions of any other such experts?
- Has the expert's work on the case been completed?
- Would the expert have liked to do certain work on the case but did not do so?
- Who pays the expert's bills?

Admittedly, these questions about the expert's retention are not going to cause your opponent to cry for mercy. Your pursuit of that information regarding the expert's retention, however, will likely yield relevant information regarding potential bias, incomplete workup by the expert, or scope issues. For example, if the structural engineering expert only represents defendants or works, without exception, with a particular firm, then the issue of bias becomes important at the deposition and, most assuredly, at trial. Also, if a party in a medical malpractice lawsuit retains two experts to support the position that one of them should have been able to support, based on her exceptional experience, you should explore the underlying reasons for this decision (i.e., is this expert unable to support the other component contentions?).

Explore and Lock In the Expert's Opinions

Now it is time for you to get to the most case-specific element of the expert's deposition—the opinions. First, confirm that the expert has brought the entire file in response to the specific request you made in advance of the deposition. Before the expert's deposition begins, separately segregate and then analyze the various portions of the expert's file to understand what has been included and what has been excluded. This is important because during the deposition you will determine the underlying documents the expert considers relevant to his or her opinions.

Perhaps your opponent failed to provide every relevant document to the expert. If so, get the admission on record. Next, ask the expert if having that document would change his or her opinion. Has the expert been provided all the depositions in the case? Have they been summarized, and by whom? What does the correspondence in the expert's file indicate? Is there instruction about focusing on certain aspects, facts, issues, and themes to the exclusion of other facts? Find out about the expert's time sheets and billing records (rates, bills paid, any outstanding). Finally, did the expert make notes during workup of the file? If so, are they still contained in the file? If not, where are those notes today?

Do not forget to get the expert to define his or her own terminology.

Second, find out who assisted the expert in preparing his or her opinions. How were those opinions developed? Did the lawyer participate in the drafting of the opinion? Who at the expert's office did the real work behind the opinion?

Third, meticulously explore each opinion of the expert and each and every basis for that opinion. Do not forget to get the expert to define his or her own terminology, which will eliminate semantic and definitional debates used to elude attackers. Also, make sure you investigate and critique the methodology employed in arriving at the expert's opinions and assess whether that method employed is reliable and, thereby, admissible at trial. Most jurisdictions have applicable case law addressing a court's gatekeeper function to exclude unreliable expert methodology and opinions.

Finally, determine the expert's response to opposing theories and opinions. This will be beneficial at trial, depending on your jurisdiction's disclosure requirements, and will help formulate or refine your own expert's opinion.

Assess the Expert's Attitude and Demeanor

Your last task in taking the expert's deposition is to take the opportunity to assess how the expert testified. How were the expert's preparation, organization, physical appearance, attitude and demeanor, nervousness, candor, confidence, terminology, and communication? Be objective in your assessment. Just because an expert comes off as a jerk in the deposition does not mean that he or she is unable to put on a game face at trial.

Once the deposition ends, draft a letter or memorandum to your client explaining your opinion of the expert's likeability and jury appeal.

Good luck!♦