

Preparing for Your First Expert Deposition

By Craig M. Sandberg

This article is part one of a two-part series designed to aid beginning lawyers as they approach their first expert deposition and also serves as a refresher for more seasoned young attorneys.

Up until this point of your client's lawsuit, you have done everything right to either prosecute or defend your case and have no intention of changing that fact simply because it's time to depose the other side's expert. Hopefully you already have determined the necessity of taking the expert's deposition in order to critique the expert report, freeze the expert's testimony, obtain admissions, or merely assess the expert. While you are confident in your witness deposition skills, you have never taken an expert's deposition and are unsure how to proceed.

Remember, expert testimony is oftentimes the cornerstone of a lawsuit because it may provide the framework for all the evidence in the trial. Ineffective expert testimony can eviscerate a case, leading to either summary judgment or a directed verdict. The factors affecting your ability to obtain effective expert testimony include sources both in and out of your control (i.e., the facts of the case and the skill of both the expert and the interrogator). Below are five steps to take an effective expert deposition and obtain the best possible results for your side.

Know the Area of Expertise

The first step in preparing for the expert's deposition is to develop your limited expertise in the subject area in which the expert will be offering his opinion. Determine whether your budget permits retaining a "consulting" expert to aid you in understanding the area of interest and its relation to the facts of the case. Getting a consulting expert on board early in the case will help with virtually every aspect of the case that touches upon this expert's specialty area. By example, in a medical malpractice lawsuit, many of the fact witnesses will be providing the necessary facts upon which the expert will rely—in addition to the patient's chart. It is of utmost importance that you are educated about information relevant to proving malpractice before any of those witness depositions take place. Armed with the aid of the consulting expert, you can ensure that all the relevant and indispensable testimony will be elicited in those depositions.

The consulting expert can also play the invaluable role as an educator. When taking an expert's deposition, you can almost assuredly expect that the expert knows more about the specialty area than you do. Therefore, to get you to the most equal footing at the deposition, a consulting expert can oftentimes

become that equalizer. In the event you cannot afford to retain a consulting expert and feel obliged to supplement your education, look to outside sources to support your client's position. These outside sources can range from expert deposition testimony in a similar case to "learned treatises" to various Internet sites.

Know Your Strategy in Taking the Expert's Deposition

Having determined that you are going to take the deposition of the opposing party's expert, you must know the reason why you are taking that deposition. As discussed in the introduction, you may have made the decision to critique the expert report, freeze the expert's testimony, obtain admissions, or assess the expert. While all these reasons merit taking the deposition, each reason has its own underlying goal. For instance, an economist's deposition in a business litigation case may provide you and your client with the necessary tools to engage in effective alternative dispute resolution. If you are litigating a patent infringement case and take the deposition of your adversary's technical expert, you are likely doing so to discredit their opinions by showing an unproven methodology or that the conclusions are unsupported. The deposition of an accident reconstructionist regarding traffic light sequencing may ensure that a court will grant your motion for summary judgment in an automobile accident lawsuit. Keeping your objectives in mind throughout your preparation, as well as the deposition, will allow you to get the most out of it.

Know the Case Law

The case law of the jurisdiction will guide you in framing parameters of an expert's deposition. While the area of law regarding expert witnesses is not as elusive as the tax code, nuances gleaned from more recent cases that interpret the existing law can oftentimes be used as both a sword and a shield. It is your job to be more prepared than your adversary, and familiarizing yourself with the law is a great tool in your arsenal.

As a general proposition, expert testimony is admissible if offered by "a witness qualified as an expert by knowledge, skill, experience, training, or education," and "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."¹ The starting point for interpretation of Rule 702 is *Daubert v. Merrell Dow Pharm., Inc.*² In *Daubert*, the United States Supreme Court ruled that when scientific opinion testimony is offered, a federal district judge must act as a "gatekeeper" and evaluate the reliability of the scientific expert's specialized knowledge and the methodology employed in forming opinions, before admitting opinions into evidence. The Court suggested that a trial court should determine whether the scientific theory or technique on which the expert's opinion is based (1) can be or

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has been tested, (2) has been subjected to peer review and publication, (3) has a known or potential error rate and standards controlling the technique's operation, and (4) is generally accepted in the relevant scientific community.³

The Court further refined its opinion in *Kumho Tire Co. Ltd. v. Carmichael*⁴ and held that all experts shall be allowed to give opinion testimony only after the district judge performs her role as a gatekeeper to bar the introduction of opinions based on unreliable specialized information or methodology, and determines that the expert's opinion is in fact reliable and trustworthy.

Don't forget to check your jurisdiction's statutes, local rules, standing orders, and the likes of which may create additional hurdles to qualifying an expert witness. Prepared with knowledge about what your adversary must prove to qualify the expert in the relevant field, you can attempt to undermine the expert's qualifications with the goal of barring some or all of that expert's opinions.

Know the Expert

Using today's technology and expert witness research consultant services, practitioners can know more about seasoned experts than ever before. The Internet and fee-based services can assist you in developing a strategy for the expert's deposition. Uncovering testimony in prior cases can sometimes demonstrate inconsistent testimony by the expert or reveal that the expert was previously not qualified as an expert. Prior testimony may show that the "expert" in the field has not actually participated in the field in a decade and is, therefore, out of touch with the state-of-the-art technology at issue in your case. Or perhaps the expert derives an overwhelming portion of his income testifying for a particular industry or particular side of the litigation equation.

Examine the expert's background. This requires you to obtain the expert's current curriculum vitae (CV). Remember that, whether inadvertent or not, a CV may not be wholly accurate. It's your job to size up for consideration the expert's background. That means you should confirm the status of professional licenses, obtain copies of the expert's publications (at a minimum, pulling those publications that appear on point to the case at hand), transcripts of testimony, and other paper on the expert. You should contact attorneys who have previously deposed the

expert to find out their experience (i.e., did the expert appear truthful, evasive, or overly polished?).

Examine whether the expert has been involved in the area of controversy related to her subject specialty. Make sure you have requested in advance a copy of all correspondence with the expert and all documents relied upon when deriving the opinion(s). And, upon receipt, review the contents, including letters of engagement or retention that may disclose financial bias. Keep in mind, however, that this file will not likely contain the notes, tabs, and comments used in preparation for the deposition, so make an eleventh-hour request for a fax of recently prepared notes and/or make sure to ask that the expert bring the entire file to the deposition.

Try to peel back the layers of the expert's experience to identify deficiencies that may make this expert incompetent to render opinions in this case. While the expert may be brilliant, highly credentialed, and experienced, those characteristics are insufficient to qualify him as an expert in the case if his opinion is outside his area of expertise.

Plan Your Approach

Remember the old maxim, "You catch more bees with honey than vinegar." In preparing for the expert's deposition, keep in mind that the expert is doing the job that she was hired to perform. You are not there to beat up the expert or disparage her professional reputation—you are there to test her opinion, methodology, background, qualifications, and publications. So be prepared to let the witness explain things and lead you through the technical aspects. Because you will be prepared, you will not shy away from this examination and, instead, probe for more explanation. The more effort you spend preparing, the easier it will be to take your first expert's deposition. Good luck!♦

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Endnotes

1. FED. R. EVID. 702.
2. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).
3. *Daubert*, 509 U.S. at 593-94.
4. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999).