

## Practical Tips for Deposing Scientific or Technical Experts

By Jane I. Milas – August 27, 2015

Attorneys in a number of practice areas—construction, products liability, pharmaceutical, medical malpractice, and catastrophic accidents to name just a few—routinely deal with expert witnesses in the prosecution or defense of their matters. Even those litigators whose matters generally do not require expert witness testimony will find themselves dealing with experts at some point in their litigation careers. For both experienced practitioners and less seasoned attorneys alike, effectively working with expert witnesses is often a time-consuming and even daunting task. And taking or defending the deposition of the expert is at the very stressful center of the relationship between attorney and expert.

This article presents some practical tips—“cardinal rules”—for counsel to keep in mind when working with expert witnesses and practice pointers for taking or defending expert witness depositions. They come from lessons learned over the course of many depositions and trial examinations of experts from a variety of fields.

### Who Is an Expert?

First determine whether the witness is an expert witness, a fact witness, or both, under the rules that apply in your jurisdiction. Often, whether a witness is of the “expert” variety is obvious from rules governing expert witnesses. [Federal Rule of Evidence 702](#) is fairly standard: it defines an expert witness as qualified to give an opinion as an expert by virtue of knowledge, skill, experience, training, or education. In a case that involves the structural failure of a building, for example, a structural engineer who analyzed the design calculations and assumptions of the design professionals, and is offering an opinion on the cause of the failure, clearly meets the definition of an expert witness. On that same project, however, an engineer who attended the weekly job meetings and prepared the minutes of those meetings, reviewed the shop drawings for the structural steel fabricator, and approved the drawings by stamping them may be both a fact witness and an expert witness, depending on the particular testimony sought. In the case of a potentially mixed fact and expert witness, it is important that you make an early determination whether that witness is going to be used primarily as an expert witness, so that you can prepare appropriately.

### Know the Rules

It may seem self-evident, but you need to make sure you follow the rules that apply to the particular matter at hand. You may be accustomed to dealing with the Federal Rules of Evidence and Federal Rules of Civil Procedure relating to expert witnesses, but if you are in a state court for the first time, or taking a deposition in a state-court matter, the rules may be very different. Be sure you know and use the rules applicable to the case.

### Know the Distinctions Between Testifying and Nontestifying Experts

The federal rules, as well as the applicable rules in many state courts, differentiate between testifying and nontestifying experts. Why is this distinction something you should keep in mind?

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The differences between these two broad categories of experts are critically important to the practitioner.

Under the federal rules and many state-court rules, the nontestifying expert's work generally is protected from disclosure to opposing parties, unless there are exceptional circumstances. The rules recognize that lawyers may need to use experts as consultants to help understand the complex technical and scientific issues in the case. That is, the lawyers may need consulting experts to help "educate" themselves as part of the lawyers' own preparation, before the lawyers engage testifying experts to opine, educate, and explain to the jury at trial.

As a lawyer, you must manage the genuine desire on the part of most experts to be part of the litigation team, to participate in all aspects of the trial preparation, and to know "what is going on" with the case at all times. This is not as big an issue for the consulting expert who is not testifying, but it can lead to problems with testifying experts who want to discuss your case strategy, goals, case plan, thoughts, and theories. Under some circumstances, your theories and strategies, i.e., your work product, may become discoverable through your testifying expert witness.

How do you avoid this potentially damaging problem? Become familiar with how cases in your jurisdiction have ruled on discovery disputes relating to testifying expert witnesses, so that you have some guidance in your dealings with your testifying experts. When in doubt, resist the pressure from the expert to discuss your theories and strategies and to "talk about the case." In your interactions with the expert, keep the focus on the facts of the case and the expert's opinions, not the lawyer's theories. The testifying expert has a very important role, but it is a specific and limited one. He or she does not need to know everything about the trial strategy, preparation, and process.

### **Control the Expert's Interactions with Others**

Complex litigation often involves several experts from different fields, and the experts generally are aware of the involvement of other experts in the matter. Particularly in the case of testifying experts from closely related disciplines, the experts often want to know what the other experts are doing and thinking. Sometimes they take it upon themselves to discuss the case with other experts. But the lawyer must control the interactions of the experts. Be sure both testifying and nontestifying experts know they should not discuss the case or their opinions with other experts, or with the client, unless you have authorized it and are included.

### **Avoid the "Multiple Draft" Syndrome**

Testifying experts regard the lawyers as their clients, and they want to please their clients. In the case of some experts, this manifests itself in the desire to prepare multiple draft reports, usually attached to an email that says something to the effect of: "Take a look at this and let me know what you think. I can make any changes you want. If it is easier for you, just red-line the changes and send it back to me. I then will finalize it."

Nothing is more damaging to the credibility of a testifying expert than having that expert grilled at deposition on the various drafts of the expert's report, and whether the report reflects the expert's independent opinion and conclusions or is really the product of the attorney. Even worse is the expert who testifies that he or she wrote 10 drafts of the report but only can "find" the final version. When you retain experts, make sure they understand that you want their report to be their independent opinion, and that you do not want multiple drafts in which the experts' opinions and conclusions are revised by others. If they have questions about the scope of their engagement or the level of detail you expect in their report, or have factual questions relating to the issues, they should call you to discuss. Be sure the experts understand that they must keep all of their work product. Managing the desire of experts to send you drafts of their opinions for your "review and approval" is one of the most difficult, but most necessary, aspects of working with testifying experts.

### **Cardinal Rules for Taking an Opposing Expert's Deposition**

The time has come when you are preparing to depose the other side's expert witness. You hope that the opposing lawyers have made some mistakes in their witness preparation. But being a good lawyer, you assume the expert has been appropriately prepared. You, in turn, are ready. Remember these practical tips for taking an expert witness deposition:

- Learn as much as you can about the witness before the deposition. You should take advantage of discovery available under the applicable rules relating to expert witness disclosures and production of the expert's file and the expert's report. The magic of the Internet and social media sites provide other potential sources of information on the expert.
- Use your own experts to help you prepare for the deposition. For example, have your experts review the deponent's report and file and suggest areas of inquiry.
- Think about what you want to accomplish in the deposition and let that guide you in your preparation. Generally, you want to fully explore the expert's education and training, including any special licenses and certifications. You also want to understand exactly what the expert understood the scope of his or her engagement in the matter to be: What was the expert asked to do, review, evaluate, examine? How did he or she go about that task? What information was the expert given? What did the expert review and what did he or she use in coming to his or her conclusions?
- Review the expert's file with him or her. Make sure you understand what was significant to the expert in forming his or her opinion and why it was significant.
- Review the expert's report, if there is a written report. Explore whether there are other drafts and how they differ one from another (if local rules permit inquiry into drafts). Understand whether anyone other than the expert had any input with respect to the report and, if so, what that input was.

- Explore exactly what opinions the expert is prepared to give in the matter and the bases for any opinions.
- Before the deposition, consider whether the expected testimony of the expert might lead you to challenge the reliability and relevance of the testimony. For example, when the expert has used a novel theory or test, you may seek to challenge the admissibility of the testimony. Under the federal rules and many state-court rules, judges have a duty to act as gatekeepers in admitting expert testimony. Cases such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), set out factors that the federal courts consider in handling an expert challenge. Many state courts have adopted the same or similar factors to determine whether proffered expert testimony is reliable and relevant. If there is a potential to challenge the admissibility of the expert's testimony, you will want to ask questions at the deposition relevant to the factors the court may consider in a *Daubert*-type hearing.

### **Cardinal Rules for Defending Your Expert's Deposition**

Defending your own expert's deposition starts before the deposition is even noticed by the opposing party. It begins at the moment the expert is retained. All interactions with the expert should be viewed as fodder for questions at a deposition. By keeping that in clear focus, you will avoid the temptation to discuss trial strategy and theory with the expert, to let the expert discuss the case with others without your direction and control, or to revise and rewrite the expert's reports. No lawyer wants to sit through a deposition and realize too late that she has lost control of her expert. By avoiding these pitfalls, you can focus the expert's deposition testimony on his or her actual expert opinions and analyses.

Other practical tips in defending your expert's deposition include:

- Remind the expert that his or her job at the deposition is to be as truthful and accurate as possible. This cannot be said too often. When opposing counsel asks your expert what you told him or her, a very good answer to hear is that you told the expert to tell the truth.
- Review with your expert the general rules for answering questions. Emphasize the need to listen carefully to the question, understand the question, and then answer the question that was asked. Experts like to explain and expound. They sometimes regard a deposition as a classroom. It is important that the expert understands the question-and-answer process in the controlled setting of the deposition.
- Before the deposition, make sure you fully understand what opinions the expert holds and is prepared to offer. If you have a report from the expert, you may feel confident you know all the opinions the expert holds relating to the matter at hand, but that may not be the case. The expert, for example, may have included in the report the opinions that he or she thought were relevant to the scope of his or her engagement, but the expert may have

formed additional opinions based on information he or she developed or was provided during the course of the matter. You don't want to hear about those opinions for the first time at the expert's deposition.

- Give the expert the opportunity to tell you of any reservations, concerns, or questions he or she has relating in any way to the case, the information provided, or the tests performed, so these can be fully vetted and dealt with before the deposition.

Working with expert witnesses can be one of the most challenging, but professionally rewarding, aspects of a case. A thorough understanding of the applicable rules of practice and evidence, and a practical and thoughtful approach in your interactions with your experts, will serve you well.

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