

BY MARK R. SEIDEN

The deposition of an opponent's expert witness can play a pivotal role in a federal lawsuit. It provides counsel's initial opportunity to test that expert's methodology and conclusions, leading to a possible challenge of that witness' self-proclaimed status as an "expert," and an opportunity to explore potential inconsistencies or deficiencies that can be further exposed at trial.

Because the testimony of an adversary's expert witness can make or break a case, thorough preparation for the deposition is essential. Preparing for such a deposition provides an excellent opportunity for a junior associate to take the lead and make a meaningful contribution to the outcome of the lawsuit.

The logical place to start is through review of the expert's curriculum vitae (or CV) submitted as part of the expert report. The CV generally provides a synopsis of an expert's background, education, skills, certificates and licenses, employment experience and publications relevant to the opinions to be offered in the action. It is important to understand that a CV can serve as a marketing tool for the expert as well as a tool by counsel to bolster his witness' qualifications in the battle to have him deemed an expert by the court.

Accordingly, the CV is a good place to start, but further research into a resume of a proffered expert is prudent. The CV submitted by an expert witness may not include information harmful to the credibility or opinions at issue (e.g., the expert may fail to identify prior actions in which he took an arguably contrary position). Therefore, conduct independent research to gather complete information about the expert that may have been omitted from the CV.

Tools beyond the CV that can be helpful in such research include courthouse files, Google and other Internet search engines, online newspapers, library Web sites, findlaw.com, law.com and various topical Web sites (the National Library of Medicine's site at www.nlm.nih.gov for medical topics, for example).

Subscription sites such as Westlaw and Lexis also can prove useful in locating information about an expert witness, including articles penned by the expert and proceedings in which he has previously testified.

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Career Development

DEPOSING AN OPPONENT'S EXPERT



In addition, other vendors maintain databases of expert depositions, trial transcripts, CVs, articles written by experts, details of cases where an expert's "expert" status was challenged and state license discipline records pertaining to expert witnesses.

Counsel who have opposed the expert in other cases should be contacted if possible. These attorneys may be able to provide valuable insight regarding an expert's strengths and weaknesses, prior testimony and in some instances may even be able to provide relevant documents, such as deposition or trial transcripts containing the testimony of that expert on a similar matter.

In an ideal scenario, you will be able to find past testimony by the expert that is contradictory to the opinions offered in the current expert report, setting up a slam-dunk impeachment opportunity. However, inconsistencies in prior testimony are usually much more subtle, so all available prior testimony by an expert should be reviewed carefully in preparation for the deposition.

Guideline

When reviewing the substance of an opposition expert's proposed testimony, an initial guideline should be the applicable Federal Rule of Evidence regarding experts.

Federal Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, 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.

Accordingly, before deposing an expert, thoroughly break down the expert's report. First, ask the following questions: Are the opinions based upon fact or supportable data, or are the expert's opinions mere speculation and conjecture?

Second, research the expert's reliance materials. Are they peer reviewed? Accepted in the industry? Do the reliance materials actually support the conclusion the expert espouses? Researching a variety of learned books and treatises on the testimonial subject may reveal opposition theories which poke holes in the expert's assumptions or conclusions.

In some cases, an expert will complete a statistical or other mathematical exercise as the basis for his opinions (e.g., damages calculation). Re-run these numbers to verify that the expert's calculations are correct. Even in cases where an expert uses a universally accepted methodology, a calculation error or misstatement can cost a client millions of dollars if left unchecked and unchallenged.

Finally, analyze whether the expert's statements are consistent with the facts of the case. Sometimes an expert may attempt to "recycle" an old expert report submitted in a previous matter and simply alter it to fit the circumstances of the current case—this can provide an easy opportunity to exploit inconsistencies between assumptions in the expert's report and the specific facts of your case.

Once all this research is finalized, sit down with your own expert or consultant to develop effective cross-examination questions that may be used to undermine the opposing expert's opinions. Also, work with your expert to develop hypotheticals that stretch the opposing expert's theories into areas that test their viability.

This is just a basic outline of how to prepare for the deposition of an adversary's expert witness. View this article as a set of ideas to be used as a foundation for successfully preparing for an expert deposition. There are many other resources available, including books, online sites and CLE classes that will help to develop the skills necessary to prepare for and ultimately take an effective expert deposition.