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OPPOSING EXPERT WITNESSES

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Expert witnesses often play over-sized roles in the development of and in the trial of a lawsuit. Every trial lawyer needs to be familiar with a variety of issues that may arise in any case in which the opposing party intends to present expert testimony in support of a position expected to be taken at trial.

If the opposing party has an expert witness, you can be sure that the expert's purpose is to provide the jury or the judge with some information damning to your case that comes with a tincture of super-reliability provided by the expert's background and qualifications. Once you know or believe that your opposition has an expert, there are a number of things you need to do in an effort to get that damning information away from your trier of fact.

I. Getting the name.

Lawyers are very protective of their experts, and generally refuse to identify them unless and until they are compelled to do so by the court. An all-too-frequent ruse is to assert work product protection under F.R.C.P. Rule 26(b)(4)(D) claiming that while an expert has been retained, the attorney has not yet determined whether the expert's opinions will be presented at trial. While persistence in demanding that opposing counsel disclose the identity and opinions of the expert is one approach, the best approach is to enlist the court's assistance by obtaining a scheduling order imposing a deadline for disclosure of the opposing party's expert and his opinions; the scheduling order should recite that no

Continued on page 15

IN THIS ISSUE:

Uniting Plaintiff, Defense, Insurance, and Corporate Counsel to Advance the Civil Justice System

OPPOSING EXPERT...

Continued from page 1

expert not identified by the deadline will be allowed to testify, and that no opinion not disclosed by the deadline will be allowed into evidence.

II. Getting the opinion.

Just getting disclosure of the expert's name is of little benefit -- you also need to know what opinions the expert is expected to offer and the bases for those opinions. This should also be covered in the scheduling order. F.R.C.P Rule 26(a)(2)(B) requires a witness who is "one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony" to provide an expert report. The details required in the report are listed in F.R.C.P. Rule 26(a)(2)(B)(i)-(vi). Even if the witness is not one from whom a report is required, if the witness is expected to present evidence under Rule 702, 703, or 705 of the *Federal Rules of Evidence*, the party presenting that evidence must disclose the subject matter of the witness' testimony and a summary of the facts and opinions to which the witness is expected to testify. F.R.C.P. Rule 26(a)(2)(C).

If an expert report is not a requirement under the procedural rules applicable in your jurisdiction, push early and strongly for entry of a scheduling order with specific deadlines for and specific requirements for expert opinion disclosures. It is far preferable to have the expert disclosure requirements set forth clearly in a scheduling order, than to simply rely upon opposing counsel to respond fully and fairly to discovery requests.

III. Researching the expert.

Once you have the expert's name and opinions, it is time for you to do some substantial research. Each case is different, and each will be guided to some extent by the expert's qualifications, the nature of the opinion testimony, and the importance of that testimony to the issues presented in the case. The goal is to discover as much as you can about the expert's background, qualifications, bases for the opinion(s), and opinion shortcomings. There are a variety of research tools available. Here are some of them:

1. *Internet.* Google the expert, and use any other search engines at your disposal to learn all that you can about the expert and the expert's background. If the expert has articles in the relevant field that are published on the internet, read them and assess whether those writings are consistent with the proffered opinions in your case. Often, they will not be consistent.

2. *Social Media.* Find out if the expert has been blogging, tweeting, or otherwise making himself/herself or the proffered opinions known in social media. Many experts market themselves on Facebook and LinkedIn, and you may find useful information on those or similar sites.

3. *Attorney organizations.* Many national, state, and local attorney organizations will send a blast e-mail to all of its members inquiring about your opposing expert, for what is usually a very reasonable cost. There is nothing more valuable than getting yourself in touch with another lawyer who has faced the same expert and who will quite likely have a deposition transcript and possibly an expert report to share with you. If you represent a plaintiff and want to learn about a defense expert, contact your state and national AAJ; if you are on the defense side and want to learn about prior work by plaintiff's expert, contact DRI or your SLDO.

IV. Researching the field.

It is not enough to learn about the expert, the opinions, and the bases for those opinions; you are going to have to become something of an expert yourself in the expert's field. This requires additional internet research, review of articles, papers, and books in that field, and often some quality time with your own expert. *The Reference Manual on Scientific Evidence* is a wonderful resource, as it contains reference guides on statistics, multiple regression, survey research, estimation of economic losses, epidemiology, toxicology, medical testimony, DNA, and engineering practice and methods. It is worth a look for anyone getting ready to do battle with an expert witness. The primary goal of field research is to determine whether the expert's opinions are mainstream, outliers, or demonstrably false. As you will see below, simply proving that the expert's opinion is outside the mainstream is not enough, by itself, to justify its exclusion. But it is an important fact to know, because it may point to methodology problems in the expert's process. Flawed or improper methodology is the gold standard for expert opinion exclusion. Review everything that you can get your hands on bearing upon the expert's field, and upon how experts in that field typically reach and support opinions.

V. Expert discovery.

Most of your investigation about your opposing expert should be conducted unilaterally by researching

the expert and researching the field. But you should also take advantage of every opportunity provided by the rules to obtain expert-related information.

1. Interrogatories. Under the laws of some states, absent a court order, you may only discover information about your opposing expert through interrogatories inquiring into the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion. That should be enough to inquire into by interrogatory. The federal rules do not contain this limitation on the scope of expert discovery, probably because the expert report requirements require disclosure of that as well as other important information.

2. Requests for Production. The federal and most state rules do not specifically allow a party to seek documents related to an expert's opinions or related to the bases for those opinions, although most jurisdictions have some version of F.R.C.P. Rule 45 that permits non-party document discovery. The best way to obtain documents from an expert is through a Rule 45 subpoena *duces tecum* accompanying the expert's deposition notice. It is important to request that the expert produce everything reviewed or relied upon in reaching each proffered opinion.

Remember this: The better the question is, the harder the expert will try not to answer it.

3. Depositions. F.R.C.P. Rule 26(b)(4)(A) specifically permits a party to depose any expert whose opinion may be presented at trial. This is likewise permitted in most states either by rule or by practice. The expert deposition is a critical stage of a case. If it is your intent or expectation that you will be able to get the expert's opinion excluded from evidence, virtually every bit of the groundwork for that exclusion will occur during the deposition. The expert's deposition should be the culmination of a massive amount of preparation on your part.

First, prepare a comprehensive request for production to the expert and serve it in a subpoena *duces tecum* or in a note to counsel accompanying the deposition notice. You will want the expert's entire file in your case; any expert reports prepared or depositions given in other cases; any resources or references consulted in reaching each proffered opinion; any documents related to the methodology utilized to reach each opinion; any articles the expert authored that relate to the subject matter of each opinion; and any demonstrative evidence the expert has prepared or has relied upon in the case. In federal court, Rule 26(b)(4) protects from disclosure drafts of the expert's report and some of the communications between the expert and opposing counsel; everything else is fair game as long as it is relevant and proportional to the needs of the case.

Second, prepare a comprehensive deposition outline. In preparing the outline, you must have already carefully reviewed all of the expert research and field research, and any prior reports or depositions of the expert. You must have already determined whether the expert's opinions have reliability or fit deficiencies, and you must be prepared to expose those deficiencies at the deposition. The preparation of the deposition outline should be the most laborious task you perform in all of your expert-related discovery efforts.

Third, during the deposition, make sure that the expert gives you a full, clear, and unequivocal answer to every question -- you will not be able to use the answer for your purposes if you allow wiggling or weaseling. Remember this: The better the question is, the harder the expert will try not to answer it. Be patient, be persistent, be clear to the witness that there will be no new question until the last one has been fully and clearly answered. Do not let opposing counsel interfere with your examination; be prepared to call the court on the first occasion that opposing counsel attempts to coach the witness or to otherwise interfere with your examination. Especially if your case is in federal court.

Finally, at the conclusion of your questioning, ask if there is anything else that the expert needs to do or plans to do between the deposition and trial. This will often help you stave off a new opinion ambush at trial. If you have done your job well, the deposition transcript will have all of the information you will need when you get ready to move to exclude the expert's opinion testimony.

VI. Excluding expert testimony.

Rule 702 of the *Federal Rules of Evidence* is essentially a codification of the *Daubert* standard. Under the rule and the standard, a qualified expert's scientific or technical opinion testimony must help a trier of fact to understand the evidence or to determine a fact in issue; it must be based on sufficient facts or data; it must be the product of reliable principles and methods; and the expert

must have reliably applied the principles and methods to the facts of the case. The *Daubert* decision provides the framework for assessing whether the opinion testimony is scientifically (or technically) reliable.

The *Daubert* standard asks:

1. Whether the expert's technique or theory can be or has been tested -- that is, whether it can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
2. Whether the technique or theory has been subject to peer review or publication;
3. What is the known or potential rate of error of the technique or theory when applied;
4. About the existence and maintenance of standards and controls; and
5. Whether the technique or theory has been generally accepted in the scientific community.[1]

These five queries on *Daubert*'s "non-exclusive list" have been supplemented with five more:

6. Whether the expert is proposing to testify about matters growing naturally or directly out of research he conducted independent of the litigation, or whether he developed his opinion directly for purposes of testifying;
7. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
8. Whether the expert has adequately accounted for obvious alternative explanations;
9. Whether the expert has been as careful as he would be in his regular professional work outside his paid litigation consulting; and
10. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[2]

None of the factors is by itself dispositive, but all are relevant to the determination of the reliability of the expert testimony. If you have properly prepared for the opposing expert's deposition, you will have covered each of these factors there.

Be aware that there are some experts that a court will determine are "qualified by experience" who may be allowed to express opinions without demonstrating that they have followed a *Daubert*-compliant methodology. Treating physicians are a good example, but many judges, especially in state court, will fall back upon the "qualified by experience" rationale to admit testimony that they probably should not be letting through the gate.

The first inquiry is whether the expert is qualified to offer the proffered opinion(s). If you focus only on the witness' qualifications, your challenge will probably fail because it is the very rare expert who does not possess some technical or scientific knowledge that will be helpful to the jury. Focus instead on whether the expert's qualifications actually furnish a basis for explaining the proffered opinions: "The issue with expert testimony is not the qualification of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question."[3] Never assume simply from the gloss of extensive background and experience in a certain field that an expert is qualified to opine on the specific issues for which the opinion testimony is to be offered.

Never assume simply from the gloss of extensive background and experience in a certain field that an expert is qualified to opine on the specific issues for which the opinion testimony is to be offered.

The second area of attack is the same area covered by *Daubert*–reliability. Each of the ten factors is important, but they must each be analyzed in respect of the methodology employed by the expert in reaching each proffered opinion, instead of in respect of the opinion itself. If you have an opposing expert who proposes to testify that plaintiff's lung cancer was caused by consuming eggs, the trial court cannot properly exclude that testimony simply based on your argument that egg consumption does not cause lung cancer. Instead, to justify the exclusion, you must focus on the expert's methodology and demonstrate to the court the methodological flaws in the expert's reasoning that caused the opinion to be unreliable. You should be able to demonstrate the methodological flaws by reference to each of the *Daubert* factors.

1 F.R.C.P. Rule 702, Advisory Committee Comments, 2000 Amendments (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

2 *Id.*

3 *Berry v. City of Detroit*, 25 F.3d at 1342, 1351 (6th Cir, 1994).

The third area of attack is fit, a rarely encountered area. Fit refers to the situation in which the expert is clearly qualified to express the opinion, and has followed a reliable methodology to reach that opinion, but the opinion is not relevant to any issue in the case. Suppose that the qualified expert in the case I hypothesized above, based on a reliable methodology, proposes to testify that consumption of eggs is associated with colorectal cancer. That opinion doesn't "fit" in the case because the plaintiff had lung cancer. This is an obvious example; the cases in which fit has been successfully invoked are not usually so clear.

Most experts are sufficiently qualified, and most are prepared to express a relevant opinion. In almost every case the most fertile area for challenge will be methodology. That is where you should focus the larger part of your efforts in all but the most unusual cases.

VII. When and how to challenge.

If the expert's testimony is required to establish one or more elements of your opponent's case, the best practice is to file a motion to exclude that expert testimony ahead of or contemporaneously with a motion for summary judgment, assuming that the expert is expected to provide the only evidence in support of one or more elements of your opponent's case. If the court denies the motion to exclude, renew it in a pre-trial motion in limine. If the motion in limine is denied, object to the offer of the expert testimony when the witness appears at trial, and make a record at that time containing the same arguments you made in the previous two motions. Those previous arguments were not preserved for appeal when the motion to exclude was denied or when the motion in limine was denied. If the court overrules your trial objection, set forth your argument again as part of your motion for judgment as a matter of law at the close of your opponent's case, and do it again in your JML motion at the close of all of the evidence. You will not be able to appeal the admission of unreliable or otherwise inadmissible expert testimony unless you protect and preserve your record at every stage.

VIII. Cross-examination at trial.

Your motion to exclude was denied, your motion in limine was denied, your objection at trial was overruled, and counsel for your opponent has just elicited the expert's opinion testimony, which was very unhelpful to your case. Your best chance to win at trial is to conduct an effective cross-examination of the expert.

Know and remember from the outset that you–not the witness–will be doing the testifying on cross-examination. This is where all of your pre-trial investigation, research, and discovery will pay off. You must carefully design your cross-examination so that the witness is not allowed to do anything more than agree with your statements. You want the jury looking at you for information, and at the opposing expert only for confirmation.

The expert will not like this. Most like to pontificate, elaborate, and explicate on cross, trying to make themselves look brilliant and you ignorant by comparison. You must not allow this, because it will often work. There are a number of ways to deal with a non-responsive or volunteering expert, but asking the court for help is not one of them. When you get a non-responsive or argumentative answer, ask the question again, clearly. If you get the same non-response or argument, go to the board (or the Elmo) and write your question out, and ask if the answer is yes or no. If the expert refuses to say yes or no, and if you feel like you have some credibility with the jury, you can then ask "Is there some reason you are not willing to answer that question yes or no?"

The reason for all of this is control. You must exercise control, and not let the expert slip out from under control. You maintain control by making short declarative statements that you know the witness must agree with, and have the expert agree with each statement. Do not frame a question in such a way as to allow the expert to elaborate upon, or explain an answer or to make a speech to the jury. You lose control when you allow that. Do not ask why, what, or how; you know the answers, simply make a list of all the things favorable to your side that you know the expert will agree with, and get the expert to agree with each one. Do not ask anything for which you do not know what the expert's answer will be, unless the unknown answer doesn't matter to your case. The latter usually applies only when it is the question, and not the answer, that imparts the information you want the jury to understand.

Invariably, the expert will refuse to agree with you on something. When this occurs, the expert must be impeached. You have deposition testimony from the expert that contradicts this refusal to agree with you; otherwise you would not have asked the question in the first place. There is one, and only one, way to impeach the expert with the deposition testimony. Ask the judge

for permission to approach the witness and, when it is granted, proceed as follows:

Q. I took your deposition on _____, 2016?

Q. You were under oath?

Q. A court reporter was there?

Q. This is a copy of the transcript of your deposition?

Q. And at page 45 of that deposition, did I ask this question and did you give this answer: _____ _____?

DO NOT ask: "Do you remember giving a deposition in this case?"

DO NOT ask: "Do you remember telling me _____ at your deposition?"

DO NOT ask: "Didn't you testify differently at your deposition?'

Why not ask those questions? Control.

Remember also during your trial preparation that you must make your record on your expert challenges through cross-examination. The expert report and deposition transcript that formed the substance of your record on your pre-trial motion to exclude and motion in limine will likely not be admitted in evidence and will not be part of the trial record. Whatever record you want to argue from in support of your Rule 50 motions and on appeal, you will need to make through your cross-examination.

I commend to your attention Professor Irving Younger's article on the Ten Commandments of Cross-Examination. Read the Commandments. Learn them. Live them. And always remember and follow Younger's general advice about cross-examination: "Be brief, be succinct, sit down."

IX. Post-trial.

If you have done your job at trial, you should have a good record to support your post-trial motion for judgment as a matter of law, and, if that doesn't succeed, for appeal of the erroneous admission of the expert testimony.

CONCLUSION

In many cases, the trial of a case comes down to a "battle of the experts." If you diligently prepare and execute a proper challenge to your opponent's proffered expert testimony, you may find that you are able to win your case without the battle ever having to be fought. ΔΔ

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