



Young Lawyers: Raising the Bar

Top 5 Tips for Preparing to Depose an Opposing Party's Expert Witness

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Tip #1: Start Digging

The logical first step—but perhaps the most important—in preparing to depose an opposing parties' expert witness is conduct an exhaustive search on him or her. The goal is to gather as much information about the expert as you possibly can, as you never know what you may find or what may ultimately prove to be helpful during deposition or at trial. Here are some ideas to get you started:

Your preferred legal search engine is the perfect place to gather some initial information. If the opposing party's expert has testified at least of handful of times before, you can likely pull an expert witness analysis report by a simple search. Of course, you will want to pay particular attention to any prior challenges to the expert's testimony, but do not overlook searching for the expert's name in briefs, expert reports, transcripts, and court opinions. If your firm has library staff, they are often extremely helpful when it comes to gathering this type of information, which will save you time and the client money.

Perhaps the most valuable information you can collect on any expert is obtained from speaking with persons who have had experience with him or her in the past. While sending out a firm-wide email is a good first step, think about how you can expand your search further. Have you considered whether any of your connections through DRI may have had experience with this expert before? Have you posted to the DRI communities' pages and asked for information? Have you checked with your local defense or bar organizations and the individuals you know through those organizations? What about former colleagues, or law school classmates? There is a good chance that if you utilize your extended network that someone will be able to provide some insight on the expert.

Everyone has social media these days—even expert witnesses. While this is typically one of the first things attorneys gravitate toward when researching lay witnesses, sometimes they forget to do the same for the expert witnesses. The expert's personal website and LinkedIn page often provide a wealth of

knowledge about the expert, but do not forget about Facebook, Twitter, and Instagram, too.

Tip #2: Obtain—and Understand—All Materials Cited and Relied Upon by the Expert

After obtaining all the information you can about the expert, the next step is to educate yourself about the expert, including reading the reports or literature supporting the opinions. While you will not become an expert yourself on the specific subject matter or underlying science, your goal is to better understand what, why, and how of the expert's work. The best – and easiest – place to start is with any standards or articles cited in the expert's report, and then look to the expert's publications listed on his or her CV. There are some key things to look for when digesting this material.

First, if the expert relies on any code sections or industry standards, you should obtain a copy of the code as was in effect on the relevant date, such as when the incident occurred. Keep in mind that codes or standards are regularly updated, and while many annual updates are mundane, sometimes there are changes that significantly affect your case. You also need to review the codes and standards to be prepared to discuss any issues in interpretation or application by the expert.

Next, if the expert uses any tools or is performing any tests, be sure to identify all protocols or procedures for using the equipment or properly conducting the test. If a piece of equipment requires calibration prior to each use, be prepared to ask the expert if each calibration was documented. Chain of custody, following testing protocols, and documented evidence of compliance are essential.

Finally, understanding the information relied upon or scientific basis for opinions allows you to both identify potential holes in the expert's report and discuss it on relatively even ground with the expert. If an expert applies the facts of your case to a scientific study conducted by someone other than the expert, you need to obtain the study and understand the methodology and conclusions within it to ensure the facts of your case or incident fit within this other study relied upon by the expert. The expert may use a self-created mythology not supported or used by other members of his or her profession, and the best place to identify these issues is within the cited materials.

Do not be intimidated by scientific reports or technical data beyond your knowledge base. An excellent way to understand the materials you are reading or reviewing is to discuss them with your own expert – after all, your expert likely is doing the same work to evaluate the opposing expert as well. Discussing unfamiliar or uncomfortable science with your expert will help you grasp the terminology, methods, and general background, and serve you well both in the deposition and at trial.

Tip #3: Keep *Daubert* (or the Applicable State-Law Standard) in Mind

In many cases, the groundwork for successfully challenging and seeking exclusion of an opposing party's expert witness begins at the deposition. As you prepare for the opposing party's expert's deposition, think about the applicable standard, whether that is *Daubert* or another similar standard under state law, and what elements you will need to establish in later moving to exclude or limit the expert's testimony under that standard.

In federal court, Federal Rule of Evidence 702 and *Daubert* require that (i) the expert be qualified to give an opinion; (ii) the opinion be reached using a reliable methodology; and (iii) the expert's testimony be relevant to the trier of fact. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 589 (1993).

As you prepare for the deposition, review the witness's resume, prior publications, and prior depositions, and consider whether the witness's education, work history, knowledge, and skills render him or her qualified to testify as an expert witness on the particular topic at issue. Come up with potential gaps or weaknesses in his or her experience that you can attack at the deposition and use to establish that he or she is unqualified under the first *Daubert* prong. In assessing the reliance materials cited by the expert witness, consider whether the expert has reviewed all of the relevant literature and data, and whether those materials are flawed or incomplete, and determine whether the expert's opinions were formulated based on cherry-picked, incomplete, or inaccurate information. Additionally, consider the analysis outlined in the expert witness's report, including whether it is one typically used in the literature and by other experts in the field, or if it is novel and invented for the litigation. These considerations, among others, bear on the reliability of the expert's methodology, and provide fertile ground for challenging the expert's opinions at the deposition and later in a *Daubert* motion. Finally, in analyzing the expert's reliance materials and report, consider whether the studies and data the expert relies upon fit the facts of the case and whether the expert's opinions will be helpful to the judge or jury trying the case; based on these considerations, you may determine that the expert's opinions lack relevance to the case entirely, in which case, you can shape your deposition strategy to elicit testimony in support of a *Daubert* challenge based on lack of relevance.

Importantly, because the *Daubert* case law varies among jurisdictions and courts, research the *Daubert* (or similar state-law standard) precedent in the applicable court before the expert's deposition. This way, you can anticipate how the court may view certain factors pertaining to qualification, reliability, or relevance, and can emphasize or deemphasize those factors in preparing your deposition outline. Additionally, if there are certain "buzzwords" the court uses in its *Daubert* rulings, you can carefully weave those into your outline.

Tip #4: Start with the Expert's Opinions, Not Their Resume

One of the most seasoned experts I have ever come across once told me that he knew whether he was going to be in for a difficult deposition based on the first question the attorney asked after the general admonitions. Generally, if the attorney started asking about his resume, he knew he was in for a fairly easy deposition. If, on the other hand, the first question went to the merits of or the basis for the expert's opinion, he knew he was in for a more difficult deposition.

There are several reasons why asking about the expert's opinion first is a great tip. First, when an attorney spends the first part of the deposition going over the expert's training and education, it gives the expert time to calm down and settle into the deposition. Asking about their opinions or the basis for those opinions right away keeps them on their toes from the outset.

Second, if done correctly, asking a well-crafted question right out of the gate can indicate to the expert that you have at least a basic understanding of the expert's field and can call them out if they step out of line. For example, if you were questioning a biomechanical engineer, asking questions that indicate you have some basic understanding of physics at the top of the deposition may keep the expert in check for the remainder of the deposition. When an expert understands that the attorney questioning them has a basic understanding of the science, they are less likely to give outlandish responses because they know the attorney has enough knowledge to call them on it.

Third, just because you do not ask about the expert's training and qualifications upfront, does not mean that you cannot revisit them later in the deposition. Indeed, if you are laying the groundwork to challenge the expert's qualifications or methodology, it is often helpful to weave these questions into a broader line of questioning on that basis. In other cases, the expert may have testified a hundred times in the same area and given similar opinions every time. When that is the case, it may not be worth it to extensively question an expert's resume, particularly in a jurisdiction where the amount of time for depositions is limited or where this type of questioning would play better at trial. In fact, in some cases, it may be the better strategy to withhold this type of questioning for pretrial motions or for cross-examination because it prevents the witness from having too much time to adequately prepare a response.

Whether you choose to ask these questions or not, it is still important to review the expert's resume in detail. It is always important to understand the training and education of a given expert, what articles they wrote, what associations they are part of, etc. Whether to use that information during a deposition depends on the case and the witness, but you should give some thought to when you ask these types of questions and whether your timing plays well into your overall strategy.

Tip #5: Don't Try to Out Expert the Expert

One mistake younger attorneys can make in approaching an expert deposition is setting unrealistic expectations for what can be accomplished through the deposition. While older lawyers may have regaled you with “war stories” of winning a case by using a superior grasp of the technical issues to make an opposing expert flip, or recant their opinions, this outcome is not the norm. In most instances, an expert deposition is not an opportunity to hit a home run and win the case. Rather, a successful expert deposition is one in which you learn the full scope of the expert’s opinions, the basis of those opinions, and uncover areas where the expert’s testimony can be effectively challenged through cross examination at trial.

Almost always, an expert witness has superior education, experience, and knowledge of her subject area of expertise. This reality should guide the approach to deposing an adverse expert. Prior to the deposition, you should research and study the relevant field to gain familiarity with the topic and the specific issues in the case. Consulting with your own expert can certainly be helpful in this regard. However, even with thorough preparation, the expert will still have the upper hand as to a command of the specific subject matter.

As an example of how this issue can manifest, an expert deponent may use overly technical terms in her answers as way of demonstrating an unassailable understanding of the subject matter. Even if the attorney believes he understands the jargon being used and feels capable of challenging the expert using the same terms, engaging in an overly technical discussion is unlikely to be the most effective approach to questioning. Instead, take things slow and ask the expert to explain the concepts in laymen’s terms. Ultimately, it is better to appear inexperienced and in need of further explanation of the expert’s answers than to mistakenly assume you understand the technical jargon, which could lead to ending the deposition without fully exploring the expert’s conclusions.



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