LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, SEPTEMBER 15, 2022

PERSPECTIVE

Expert depositions in preparation for trial

By Dan L. Stanford

At about 60 to 90 days before trial, preparing for and scheduling expert depositions becomes a key component of every jury trial. Although I have observed over the years that expert testimony rarely, if ever, determines the outcome of any case – including legal malpractice cases – countering expert deposition testimony presented by the opposition remains an essential part of trial preparation.

In my view, there are three different potential approaches to consider in preparing to take expert depositions. Many lawyers, especially young lawyers, take a basic approach to deposing the opposing experts. That is certainly the approach I was taught as a young lawyer. Second, consideration must be given to not only taking the basic deposition, but challenging the testimony given by the expert. Finally, I have learned, sometimes the hard way from seasoned trial lawyers, of a potential third possible approach to expert depositions, namely working hard to try and get favorable testimony from your opponent's experts. This article will explore all three techniques.

The basic expert deposition

Many lawyers treat the depositions of opponent experts as a pure discovery tool meant simply to elicit the basic information and opinions, perhaps with the hopes of countering the testimony at trial. There is certainly nothing wrong with this basic approach, as it can be accomplished with less effort up front and makes for shorter depositions.

Expert depositions taken under this approach are completed by simply going through the following outline of questions:

- When were you retained?
- What have you done?
- What have you reviewed?
- What opinions do you have?
- What is the basis for each of your opinions?
- Have we now gotten all of your opinions about which you intend to testify at trial?
- Do you anticipate doing any further work between now and the time of trial?

That outline allows you to elicit all of the experts' opinions and anticipated trial testimony, which can then be shared with your experts and addressed at the time of trial. One potential downside to this basic approach is that it does little to create any leverage for any hoped-for pre-trial settlement. Since the vast majority of cases do settle, with many settling on the proverbial "courthouse steps," consideration should be given to going beyond the basic expert deposition into one or more of the following methods.

Challenging expert testimony

Many books and articles have been written about ways in which to challenge expert testimony. Unfortunately, the means for accomplishing that goal remain limited. The approach must obviously vary from case to case, and more significantly, from expert to expert, even within the same case.

> 'Reaching out quietly to colleagues in your field should be used well in advance of the deposition to obtain tools that can be used in this approach that's meant to actually obtain favorable testimony from your opponent's experts.'

Assuming you determine you cannot exclude an expert's testimony, your next effort can be to attempt to weaken the foundation of the expert's opinions. This can be attempted in various ways.

In a nutshell, you can attempt to attack the expert's qualifications or credentials, impartiality and bias, the facts or assumptions the expert is using, or the technique or approach used by the expert in coming to his or her opinions.

Although successful attacks on qualifications are rare, they can be effective. In a recent legal malpractice case involving a failed cannabis business, both the defense's standard of care expert and their damages expert had absolutely no experience in the cannabis industry. Multiple, detailed questions provided by my experts disclosed their complete lack of qualifications. Successful attacks on the qualifications of an expert have a welcome side benefit: you will also weaken the credibility of the lawyer who called the expert.

In that same case, these experts had worked for the defense firm in 10 or 12 cases, having been paid thousands and thousands of dollars to previously come to the same conclusions as in the current case. Clear bias, just like experts who work exclusively for one side of our bar or the other.

You can also attempt to attack the facts or assumptions the expert or opposing counsel are using in coming to their conclusions. To the extent you can show the expert, in deposition, other facts or critical hypotheticals that might make a difference, this can undercut the opinions offered.

Finally, you can attempt to attack the technique or approach

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used by the expert in arriving at the opinions expressed. This involves questioning the expert about materials, documents or witnesses not considered during his or her work on the case in order to demonstrate a lack of consideration of key information. You would then repeatedly ask the expert, "Would your opinion change if you had known this?" As a practical matter, I seek in every case to avoid my experts being attacked in this area by simply sending opposing counsel a letter well in advance of the depositions offering them the opportunity to send my experts anything and everything they think should be considered by them. These letters are copied to my experts and retained in their files to undercut any argument that my experts failed to consider any evidence.

Making their expert yours

Over the years I have had the experience (I really hesitate to call it a "pleasure") of learning firsthand from aggressive and experienced trial lawyers who go beyond the two approaches discussed above and actually work hard to not only get the basic information from experts, but actually work to get favorable testimony from my own experts. Great trial lawyers, I have found, will work hard to make your experts theirs. This can only be accomplished through a lot of hard work and planning. And, to be sure, it is not possible to accomplish with every expert. You must work hard to get documents, previous expert reports and previous expert testimony.

Document subpoenas

Historically, experts are asked to bring their entire file to the scheduled deposition, which works just fine to accomplish the basic discovery deposition outlined above. However, it does not allow for a deeper, more aggressive approach.

Instead, some 30–45 days prior to the scheduled deposition, I serve a detailed document subpoena on each of the opposing experts, asking for a long list of documents and information going way beyond simply "the expert's file." The requests include such things as a "list of all previous expert engagements, including the identity of counsel retaining the expert," "all previous written expert reports," "copies of all previous expert testimony in either deposition or trial," and "copies of all articles or seminar materials written." Such background information is critical to this third deposition approach.

I am rarely, if ever, successful in actually obtaining the documents through the subpoena process, but it does allow me to negotiate an early production of documents with opposing counsel and identify for them and their experts all the documents I want, again going beyond the basic "expert file" in the case. Usually, one week to 10 days before the deposition is sufficient time for the agreed-upon production. However, you cannot simply rely on this approach and must dig further for additional information.

Seek background information from colleagues

In addition to demanding documents and previous expert work from opposing experts, you must also reach out to colleagues and ask for help. Both plaintiffs organizations and defense organizations can be very helpful in supplying both expert reports and previous expert testimony given by many expert witnesses. Reaching out quietly to colleagues in your field should be used well in advance of the deposition to obtain tools that can be used in this approach that's meant to actually obtain favorable testimony from your opponent's experts.

How to put this approach into action

How does this approach work and what do you do after gathering all of the information? First, if you thoroughly research the background of the opposing expert, you are likely to find a goldmine of things they have written, said or testified to in the past that can be helpful in your case. Any expert who has ever worked for both plaintiffs counsel and defense counsel will have likely left a trail of contradictory statements or opinions, all of which can and should be used by you to not only undercut the effectiveness of this current testimony, but in fact, bolster your client's case.

Under this approach, once you have gathered all of the helpful articles, comments, testimony or written reports used by a particular expert, I recommend you proceed with a deposition that begins with 100% leading "yes or no" questions that not only show you are in command, but exposes the duplicity in the expert's opinions. And, this approach goes from the very beginning, including the basic background questions, through multiple questions you have devised from the expert's previous history. "Your name is Dr. Smith, true?" "You've been licensed in the state of California since 1984, correct?" And, on and on through specific, detailed or written questions about things the witness has said in the past, getting them to agree or disagree to concepts.

However, to be successful, this technique requires an additional approach I actually also like to use in defendant lawyer depositions and adverse witness depositions. The key is to ask questions, sometimes for hours, to which you already know the answers, but without marking any exhibits as proof. Get the witness on the record either confirming some factual statement or denying it, and then only later go through and mark as exhibits each article, each prior expert report or each prior testimony that proves the previous questions you asked. Whether the expert initially agreed or disagreed with the subjects of your leading questions, you have obtained favorable testimony.

If your research and circumstances justify this deep dive approach, I would highly recommend that you videotape the expert's deposition and plan on playing portions of it directly to the jury by calling this witness at trial via videotape, pursuant to Evidence Code 776. Successfully doing so will create powerful support for your client's case.

I must conclude with a couple of cautionary words. First, remember this approach will not work with every expert witness, every time. In fact, with most "damages experts," I simply revert back to the basic deposition approach discussed above. However, when it does work you will be satisfied and rewarded like never before in your practice.

Finally, after successfully executing this expert deposition approach, and before concluding the deposition, don't forget to go back to the questions outlined in the basic approach above and obtain the basic information about the expert's current opinions.