



Basic Principles to Consider

By Lana Alcorn Olson

Preparation tips and strategies for those embarking on this wild and wonderful aspect of our profession.

Ten Things I Wish I'd Known Before My First Expert Deposition

Deposing an expert witness for the first time is a big step in anyone's legal career. It is in equal measure exciting and daunting. Questioning someone with a Ph.D., M.D., or C.P.A. can be intimidating, even for a seasoned lawyer. I've

had the pleasure of deposing a number of experts over the years, and I know that I do it a lot better now than when I deposed my first expert years ago. To help those of you embarking on this wild and wonderful aspect of our profession, I thought that I'd share with you my top 10 list of the things that I wish I'd known back when I deposed an expert for the first time. No matter the

expert's field or the type of case, a lawyer should consider some basic principles before deposing an expert witness.

1. Start Preparing Early

Plan to spend a lot of time preparing for an expert deposition. A lot. Read the expert's report so much that you know it by heart. Get your hands on the expert's previous testimony and read it to find out if contains things that you can use in your case. Several great data bases exist that you can use as resources, including the DRI Expert Witness Database. Search Westlaw or Lexis to find out if the expert's testimony has been excluded in whole or in part before. If so,



■ Lana Alcorn Olson is a partner with Lightfoot, Franklin & White LLC in Birmingham, Alabama, practicing civil litigation with a concentration in toxic torts/environmental law and employment law. Ms. Olson is an active member of DRI's Toxic Torts and Environmental Law and Women in the Law Committees and is a member of the DRI Publications Board.



call the lawyer who got the expert's testimony excluded and ask if he or she can send the motion, opposition, and order from that case to you if they aren't available online. If no one in your firm has deposed the expert before, find someone who has and ask that lawyer about his or her experience with the expert. Most of the time, defense lawyers are happy to share their experiences and insights with other defense lawyers. Read the relevant publications that your expert has cited. Make sure that you know the applicable regulations and industry standards for the particular issue that the expert should deal with. Professional organizations often provide this information on their websites. And of course, "Google" your expert. Almost every expert has a website, and many times, you can find interesting nuggets to use in a deposition.

2. Work With Your Expert

I always set aside a good bit of time to walk through an opposing expert's report with

my expert. If possible, I try to do it in person or at least in a video conference. Often, these reports include things that you need to *see* to understand them fully, and it's hard to do that over the phone. A good expert will walk you through the opposing expert's opinions, point out issues that you may want to investigate, and even help you craft particular questions to ask the witness. I also prefer to have my expert attend the deposition if possible. It's a big help to me, and it's nice to have an opposing expert that even if you don't know it all, someone in the room during the deposition does!

3. Don't Assume That a CV Is Truthful

Most of the time, experts don't lie on their resumes, but on a couple of occasions I found out that they did. You're more likely to find an exaggeration or two in a CV. Regardless, nothing is better than catching someone fudging his or her record. In one case, I had an expert who claimed to have chaired a particular subcommittee of an industry group years ago. My expert also was involved in this group, and I asked him to find out whether this fact was true. It wasn't. Although the expert was a member of the subcommittee, he never chaired it, and he was forced to admit that in his deposition. He suddenly became much more cooperative once he realized that I'd done my homework.

4. Put an Expert in a Box

I distinctly remember my first deposition. I was deposing a chemist. I floundered around trying to figure out how to outsmart him. I didn't really have a good plan going into the deposition and it showed. My mentor, who was kind enough to sit through this deposition and to offer feedback, gave me a great piece of advice after watching me struggle for about an hour—advice that I have never forgotten. He said, "Put him in a box." What he meant was to make sure that by the end of the deposition I knew exactly what the expert would testify about and what he would *not* testify about. And equally, what he wasn't qualified to talk about. Ask an expert what he will offer opinions about and what he will not offer opinions about. Ask him what he will rely on and what he has not relied on. In other words, limit the expert as much as you can. Put him "in a box"

that you can keep him in during a trial if he tries to stray. For example, this chemist talked about the way that chemicals break down or degrade in certain general circumstances. But he wasn't a groundwater expert, he wasn't a toxicologist, and he wasn't a medical doctor. He had no idea where the plaintiffs lived or which way the groundwater flowed. He hadn't done any work or calculations to try to determine how long it would have taken under the specific set of case circumstances for particular chemicals to break down and reach the plaintiffs' properties. I put him in a box by having him admit that he was not qualified to speak about these areas, and he didn't have sufficient facts to offer opinions other than his one general chemistry opinion. Keeping him in the box helped us defend the case because the plaintiffs did not offer other experts to fill in the "gap" linking the general chemistry principles and the principles as they applied to the specific plaintiffs.

5. Ask an Expert Who and What Is Considered Authoritative in the Field

Often, experts on both sides of a case know each other. If they will admit it, I always like to induce the opposing expert to agree during a deposition that my expert is a respected scientist and to elaborate on that theme. Similarly, if my expert will rely on a treatise, study, or some other reliable source, I try to induce the opposing expert to agree that it is authoritative in the field. These admissions become great nuggets to use down the road.

6. Don't Let an Expert Push You Around

An opposing expert may have more knowledge than you in the field of his or her specialty, but you're the lawyer, and the deposition should move at your pace. Some experts don't like it when lawyers ask them basic questions, and they let you know it. I once had an expert tell me, "Well, if you don't know the answer to that question, I'm not sure why they let you take this deposition." I knew the answer, but I wanted to hear the expert's response because I didn't think he would define an important term the way my expert and every other respectable scientist did. I could have let the expert intimidate me with these kinds

of statements, but I didn't. And you can't either. You probably won't know as much as the expert does, and he or she knows it. But you're the lawyer, and you get to ask the questions. Ask the questions that you need to ask and don't let anyone push you around. That doesn't mean that you have to bully an expert or get into an arguing match. Quite the opposite. If you are polite,

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but firm, that's the best way to stand your ground and will ensure that a jury will like you if you have to show them the deposition testimony. Also, make sure that an opposing expert actually answers your questions. Lots of experts will try to avoid answering a question by talking about what they want to talk about. If an expert doesn't answer your question, ask it until you receive an answer. Again, be polite and firm. Say things such as, "Mr. Expert, I'm sorry but I need to know the answer to this question." If all else fails, make your record and, if it's important, call the judge.

7. Figure Out What You Need for a *Daubert* Challenge

In an ideal world, you would have an expert's testimony excluded before a trial. To have a chance of doing that, you must know the right questions to ask to "*Daubertize*" him. That means doing your research and figuring out what the applicable standards are. Know what the elements are for a *Daubert* challenge. Find examples in case law in which courts have excluded similar types of expert testimony, and make advance plans to offer "sound bites" to support exclusion in your case.

One of my favorite examples from my experiences involved the underlying methods and data used by a plaintiff's expert in his "epidemiological study" in a toxic tort case. This particular expert had testified dozens of times and was truly a "professional" expert witness: smooth, cool under fire, and someone who normally does *just* enough to bypass a pretrial *Daubert* challenge, which makes excluding his testimony difficult. However, we dug and dug and got our hands on the actual database that he used to maintain his data and to run his statistical analysis. We quickly realized that the data that he relied on, which was gathered by his assistants and clearly did not meet quality control standards, contained so many blatant errors and inconsistencies that it rendered the entire data set unreliable. We picked a few of the better examples and led him through a strategic line of questions during his deposition that made for a terrific sound bite in our *Daubert* motion:

Q: Dr. Smith, when doing a scientific study, it's important to use the same level of intellectual integrity and thoroughness in the courtroom as you would in your everyday work as an epidemiologist, right?

A: Yes, I'd agree with that.

Q: You wouldn't want to be less rigorous, or use less reliable data, would you?

A: You should always strive to be as rigorous and use the best data you can.

Q: And you'd agree with me, wouldn't you, that an analysis is only as good as the data on which it rests?

A: Again, we always strive to get the best data we can.

Q: Ok. Well, let's talk about the health questionnaires you used for this survey, Dr. Smith. With the exception of those questions asking where the "exposed" individual lived in relation to the ACME plant, were the two questionnaires the same?

A: Yes.

Q: Is it important for them to be the same?

A: Yes.

Q: Why is that?

A: We are trying to compare the prevalence of the symptoms in the two populations.

Q: Look at question number six on the control population survey and question six on the exposed population survey. Are they the same?

A: Well, no, they are not exactly the same but they cover the same topic.

Q: In fact, one survey asks an "open-ended question"—essentially just a blank space to write an answer—while the other asks a "close-ended" question where the person answering is provided a list of specific types of cancer as options to select, doesn't it?

A: Yes.

Q: Why is that doctor?

A: I don't know. You would have to ask my assistant. They both should have been the same.

Q: These are the two surveys you relied upon for your opinions here, right?

A: Yes.

8. Always, Always, Always Videotape!

Although videotaping depositions is almost a routine these days, some lawyers still don't do it. With an expert, I think that it is critical to videotape. I can't tell you how many times I've had an expert become unglued at some point in a deposition. He may roll his eyes or become frustrated and angry. Admittedly, sometimes I may provoke a little bit of the anger. He may laugh at something that isn't funny. He may make a gesture that makes a difference to a case but isn't captured on the written page. He may make an inappropriate side-comment that on paper wouldn't seem that bad. Captured on video, all of this can be golden. Whether you use a video during a trial, for a jury exercise, or so that your client has a sense of what to expect from the other side's expert for purposes of evaluating a case, videotaping expert depositions is worthwhile.

9. Include a Subpoena Duces Tecum

You need to know everything that an expert reviewed and relied on for her opinions. Ideally, you would have all of this before deposing her through expert disclosures or requests for production. But I never risk it. I always send a very thorough subpoena duces tecum with my expert deposition notice. You'd be amazed at the stuff

that some experts show up with, some of which can be very helpful. Most often, what an expert brings is not Bates-numbered. If it's not, have it Bates-numbered when you receive the copies and keep a log of when you received it and what you received. I also always go through, on the record, what the expert brought with her and why and mark it as one or more exhibits. Also, make sure to ask an expert if there is anything that she did not bring that is responsive to your request, and why; for instance, did she discard it? An expert once told me that he did not bring a very pertinent treatise that he relied on for some important basic principles because "it was too heavy." In those circumstances, make a record and follow up with a letter requesting that the other side produce the material.

10. Figure Out How You Will Handle Expert-Related Costs Before a Deposition and Commit it to Writing

I learned this lesson the hard way as a young lawyer. I assumed that each side would pay its own experts for their deposition time. The other side had a different idea. Not only did it send me a bill for the time that its expert actually spent testifying during the deposition, but also for his extensive "preparation time," the time that he spent gathering documents to respond to the duces tecum subpoena, and for his travel expenses. Federal Rule of Civil Procedure 26(b)(4)(E) empowers a court to require the party seeking an expert's deposition to pay the other side's expert costs. However, if the parties want to agree to some other procedure, they are free to do

so. In most cases, I try to get the other side to agree that we will each pay for our own expert-related costs. If the other side will not agree to that, then I try to get it to agree on what each side will and will not pay for with respect to the depositions in writing beforehand.

So, these are my top 10 pointers for expert depositions. Even with all the advice available to you, you will learn best by doing. When you finish taking an expert deposition and you receive the transcript, make sure to ask someone with more experience deposing experts than yourself to offer you feedback on the deposition. Good luck, and go get 'em! 