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Effective Deposition Strategies/Tactics and Use of Expert Witnesses in Litigation

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Effective Deposition Strategies/Tactics and Use of Expert Witnesses in Litigation

I. Introduction

Whether a case involves scientific or economic issues, effectively using an expert witness is crucial to defending the corporate client. In addition to defending the corporate client's rights, disabling the other side's expert witness is also a sure-fire way either to dispose of entirely or drive down the value of a plaintiff's case. In this presentation, I will first cover the relevant rules of evidence and procedure governing expert witness testimony, as a good understanding of the rules pertaining to experts is crucial to preparing your own expert witnesses in addition to attacking the other sides' expert witnesses. I will then cover strategies and tactics for effectively employing expert witnesses in litigation, including ways to prepare both for your own expert witness's and an opposing expert witness's depositions. Finally, I will review Daubert opinions addressing expert witnesses' failures and discuss the devastating impact such decisions potentially have on the litigation as a whole.

II. Why Are Expert Witnesses Needed?

Expert witnesses are necessary in litigation for a number of reasons. First, and perhaps most importantly, under the Federal Rules of Evidence, lay witness opinion testimony is limited. Rule 701 of the Federal Rules provides that if a witness is not testifying as an expert, testimony in the form of an “opinion” is limited to one that is:

(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Fed. R. Evid. 701. Thus, in cases involving scientific, technical or other specialized knowledge, such as the knowledge possessed by medical or economic experts, an expert is needed to establish a client's claim or defense.

Experts also help to assist the jury in understanding the evidence or determining facts at issue, particularly where the subject matter of the case involves an issue not normally within the purview of the ordinary citizen. For example, an expert may assist in explaining causation of an injury or an accident. See, e.g., McClain v. Coca-Cola Co. Distrib., 2009 WL 2985693, *6 (M.D. Ala. Sept. 16, 2009) (“Ordinarily, expert testimony is required in [Alabama Extended Manufacturers Liability Doctrine] cases to prove that the product is defective and that the defective condition of the product caused the product to fail and injure the plaintiff.”). An expert can also assist the jury in explaining complex transactions at issue like a merger of two companies or an acquisition of a business. Experts are also often needed to establish a party's damages (e.g., the alleged lost profits of a business).

Lawyers themselves may retain experts to assist them in litigation. Such “consulting,” non-testifying experts can be used to assist in developing the attorneys’ own outlines for party depositions, particularly in cases where specialized or technical knowledge is required. Consulting witnesses can also be used effectively in case evaluation before litigation commences or in evaluating another party's settlement demand, made either before or during litigation.

Finally, a court may retain an expert to assist the court in understanding an issue in dispute. Federal Rule Civil Procedure 53(a) provides that “a court may appoint a master … to: (C) address pretrial and posttrial
matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” Fed. R. Civ. P. 53(a); see also Fed. R. Evid. 707 (“On a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.”). In cases involving discovery disputes, and complex electronic discovery disputes in particular, a court may choose to appoint a special master to evaluate how to handle the dispute and ultimately how to rule. Also, in cases involving the enforcement of complex decrees (e.g., environmental issues), a court may involve an expert to ensure that what a party is required to do is actually done, particularly where it would be difficult for the court to evaluate what reports on compliance mean.

III. Overview of the Evidentiary Rules Applicable to Expert Witnesses

Where a party must use an expert witness, the expert witness must satisfy the requirements for admissibility of his or her testimony set forth in the Federal Rules of Evidence. First, Rule 702 of the Federal Rules of Evidence provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Perhaps most importantly, the expert witness's testimony must “help the trier of fact [the jury] to understand the evidence or to determine a fact in issue[.]” This requirement is simply a restatement of Federal Rules of Evidence 401, 402 and 403.

Federal Rule of Evidence 703, and unlike a lay witness, an expert may base an opinion on facts or data in the case that the expert has been made aware of rather than just matters personally observed by him or her. Fed. R. Evid. 703. In fact, under Rule 703, if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. Id. In such instance, however, the “proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” Id.
Under Federal Rule of Evidence 705 and unless the court orders otherwise, an expert may also state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. Fed. R. Evid. 705. Rule 705 goes on to state that the expert may be required to disclose those facts or data on cross-examination. Id.

Even where an expert witness's testimony satisfies the requirements of Federal Evidence Rules 401 to 403 and 702(a) and 703, the expert witness must satisfy the remaining three subparts of Rule 702. As noted by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the court is the “gatekeeper” for expert testimony. Nevertheless, as stated by the U.S. Supreme Court, this gatekeeping role is not intended to supplant the adversary system or the role of the jury:

Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Daubert, 509 U.S. at 596. Instead, a court “must assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning or methodology properly can be applied to the facts in issue.” See U.S. v Ala. Power Co., 730 F.3d 1278, 1282 (11th Cir. 2013) (quoting U.S. v Frazier, 387 F.3d 1244, 1261-62 (11th Cir. 2004) (en banc)).

Under this standard, certainty is not required. The focus instead is on the reliability of the principles and methodologies used by the expert witness, not on the conclusions generated by the witness. In light of this standard, a lawyer thinking about how to attack an expert witness's testimony should consider the following issues:

- Can the expert witness’s theory be tested?
- Is the expert witness’s theory subject to peer review and publication?
- Whether the known or potential rate of error is acceptable.
- Whether the theory is generally accepted in the scientific community.

Focusing on these issues will hopefully provide the court with the right ammunition to exclude an expert witness “too far out on a limb” rather than simply a directive by the court to “vigorously cross examine” him or her.

IV. Overview of Expert Witness Disclosures

A. Timing of Expert Witness Disclosures

Under the Federal Rules of Civil Procedure, in addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. Fed. R. Civ. Proc. 26(a)(2)(A). Although many district courts issue a pretrial scheduling order addressing the timing for such disclosures of expert witnesses, in the absence of such an order or stipulation of the parties, pursuant to Rule 26(a)(2)(D), the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or
(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party’s disclosure.

B. Substance of Expert Witness Disclosures

Unlike in many states, the Federal Rules of Civil Procedure require that expert witnesses “retained or specially employed to provide expert testimony in the case” provide written reports. See Fed. R. Civ. Proc. 26(a)(2)(B). More specifically, Rule 26(a)(2)(B) provides:

Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness 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. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. Proc. 26(a)(2)(B). Similarly, the Federal Rules of Civil Procedure are specific as to which experts may be deposed and when.

More specifically, Rule 26(b)(4)(A) provides:

Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.


For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party’s duty to supplement extends both to information included in the report and to information given during the expert’s deposition. Any additions or changes to this information must be disclosed by the time the party’s pretrial disclosures under Rule 26(a)(3) are due.


All of the requirements in the Federal Rules of Civil Procedure certainly make it easier for a lawyer to be better prepared for attacking the other side's expert witness at a deposition. They also make it less likely (although certainly not impossible) that the other side will be able to surprise you with new or unknown expert opinions at trial.

C. What Information Is Protected?

Significantly, in the 2010 amendments to the Federal Rules of Civil Procedure, protections regarding draft reports and communications between a party's attorney and expert witnesses were added to Rule 26. Thus, since 2010, “Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.” See Fed. R. Civ. Proc. 26(b)(4)(B) (emphasis added). Similarly, “Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any
witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications.” Fed. R. Civ. Proc. 26(b)(4)(C) (emphasis added).

Notably, however, this rule only applies to disclosures in federal courts and many states have rules similar to Federal Rule 26 that contain no such protection. In addition, there are exceptions to the protections concerning communications between attorneys and expert witnesses. Specifically, Rule 26(b)(4)(C) excludes from protection:

(i) Communications relating to compensation for the expert’s study or testimony;
(ii) Communications relating to the identification of facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or
(iii) Communications relating to the identification of assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.


Disclosures of mere “consulting” experts are also protected under the Federal Rules of Civil Procedure. Rule 26(b)(4)(D) provides that:

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.

Fed. R. Civ. Proc. 26(b)(4)(D). Exceptions to this rule, however, do exist. Discovery concerning a witness conducting a physical or mental examination under Rule 35(b) is one exception. Fed. R. Civ. Proc. 26(b)(4)(D)(i). The other exception exists where “exceptional circumstances” make it “impracticable for the party to obtain facts or opinions on the same subject by other means.” Fed. R. Civ. Proc. 26(b)(4)(D)(ii).

V. Expert Witness Deposition Tips and Best Practices

A. Preparation Before the Deposition

Effectively deposing another side’s expert witness or proffering your own expert for deposition requires a great deal of preparation before the depositions ever begin. First, before any deposition, you need to know your objective(s). Is the deposition for discovery only? Rebuttal or impeachment? Is the testimony needed for motion practice (e.g., summary judgment)? If so, what specific testimony is needed?

Second, make sure you know the facts and the law applicable to your case and, if preparing an expert, make sure he or she knows them, too, by providing relevant pleadings, depositions and research. Third, prepare a deposition outline, including writing out questions and referencing key exhibits. Finally, use binders or folders to organize the exhibits needed at the deposition with highlighting on one copy to increase your efficiency during the deposition.

B. “Coaching” Versus Preparing Expert Witnesses

If you are proffering an expert witness for a deposition, pre-deposition preparation is also essential. There is, however, a fine line between coaching and preparing, particularly for expert witnesses, who are not only familiar with litigation but are also being paid to offer their testimony. Preparing equals suggestions regarding how to answer questions; coaching equals telling the witness how to answer a question or shade the truth. In one “extreme” example in a patent dispute – Apple v. Samsung (May 2014) – Judge Koh accused the attorneys of “thoroughly prepping” a patent expert to testify that he had always agreed with Seventh Cir-
cuit Judge Richard Posner’s interpretation of Apple’s “quick links” patent. Ultimately, Judge Koh excluded the expert witness’s testimony, stating “[i]n his report, [the expert] does not adopt [Judge] Posner’s construction. And then he gets up on the stand and says he adopted it from Day One … I’m going to strike what he said. I think he was primed to say that, and that’s improper.” See Beth Winegarner, Quinn Slammed for Witness Coaching By Apple-Samsung Judge, Law360, April 28, 2014, available at https://www.law360.com/articles/532400 (last accessed July 10, 2017).

Apart from potentially getting crossways with a court regarding coaching an expert witness, there are practical implications of coaching. Jurors (and opposing counsel) can sniff out strained or forced opinions provided by an expert witness. Coaching an expert witness also underestimates the intelligence of jurors. Jurors will disbelieve witnesses they think were coached. In turn, an expert’s loss of credibility resulting from such coaching could undermine other areas of the case.

In light of this, attorneys and experts should work within the confines of the expert witness’s expertise and what the expert witness believes and understands. The expert witness should never stray from the truth, and he or she should be prepared to address the “bad facts” or evolving facts head on. It is okay to “shape” testimony as long as the expert witness is not dishonest, deceitful or testifying in a manner not reflective of what he or she believes (e.g., suggesting that it may be more effective to say something one way and can be done without being dishonest). Attorneys must listen carefully to their expert witnesses in preparation for their testimony, and should offer suggestions on helping the expert witness avoid technical jargon that will ultimately confuse the jury (or bore them). Some of the best experts are like teachers, and they use analogies or illustrations to explain effectively difficult concepts in a manner that jurors and courts can understand. Adequate preparation of an expert witness also requires an honest assessment of the expert witness’s skills and areas of expertise and a discussion of avoiding going beyond his or her area of expertise, in which case the expert witness may ultimately be discredited (I will discuss one example of this below).

Although many expert witnesses have been deposed on multiple occasions and are very comfortable in such a setting, any preparation discussion should include confirmation of how the deposition will be recorded. Many expert witness depositions are videotaped. An expert witness’s dress, demeanor and attitude on camera will provide visual clues and messaging to the jury, which will ultimately go to that witness’s credibility, even apart from his or her substantive testimony. Making sure an expert witness understands and is prepared for these dynamics is therefore essential to expert witness preparation.

Finally, a practical suggestion regarding communications with expert witnesses. Although email is certainly convenient, picking up the telephone and talking to the expert witness is preferable (even despite new protections in federal rules). Advocates can (and often will) take emails with expert witnesses out of context to your client’s ultimate disadvantage. Indeed, the less paper that is generated, the better, as there will be less fodder for the other side’s lawyer to use at the expert witness’s deposition.

C. Effective Deposition Techniques: The Attorneys’ “Tool Box”

Once you have prepared for the deposition of an expert witness, there are a number of techniques that can be used to maximize the impact of the expert witness’s deposition on your case. As with any deposition, attorneys should use boilerplate opening questions to “box in” the expert witness regarding the understandability of questions to prevent any “escape” attempts in the future through the expert witness’s use of affidavits or other testimony. The expert witness should be asked what he or she did to prepare for the deposition, and follow-up discussion should be had on any gaps in the expert witness’s preparation or analysis.

In light of the expert rules discussed above, at least in the federal context, the expert report itself is perhaps the most important and fruitful area of inquiry at the deposition. First, the report provides the
substantive opinions of the expert, which may be suspect and contain gaps that will offer perhaps the most (and best) evidence in support of a motion to exclude. The expert’s opinions should obviously be discussed completely and thoroughly. The report, however, also provides a list of other occasions when the expert witness has testified, including other engagements for this particular client (going potentially to fee bias or client bias). The expert should also be asked if he or she has ever been excluded by any court and the deposition should include a discussion of any cases or information to that end, including any information discovered prior to the deposition. Finally, the expert witness’s report also provides a biographical sketch of the expert witness, which can be used to expose a lack of qualifications in an area or an opportunity to “box” the expert witness in to one area of expertise to the exclusion of other relevant and necessary areas.

VI. Impact of Excluding an Expert Witness


One case that demonstrates the devastating impact of the exclusion of an expert witness’s testimony is Knowlton v. Bankers Life. In Knowlton, a former Bankers Life Branch Manager (with a 25-year career) was replaced when the state insurance commissioner raised unfair and fraudulent trade practices issues. The plaintiff sued Banker Life for fraud and breach of contract, alleging that the company lied about other opportunities with the company, such that he allegedly turned down other third-party offers of employment, and alleging that he was unable to find any other “management level” opportunities. The plaintiff proffered an expert economist and a rehabilitation counselor to support his contention that he had $430,000 in economic damages.

Bankers Life filed a motion to exclude the experts, in which it (1) challenged the vocational counselor’s opinion that Mr. Knowlton’s (a 25-year manager) “best residual opportunity” was as an entry level sales agent/representative and (2) challenged the economist’s calculation of the present value of the plaintiff’s residual income (used as an offset of other damages when calculating economic loss measure), based solely on the vocational counselor’s opinion. The district court granted the motion, in part, excluding the plaintiff’s existing economic loss calculation from evidence. Knowlton, 882 F. Supp. 2d at 136. Thereafter, the parties ultimately resolved the dispute before the trial began after a number of years of litigation.

More specifically, the court found that the “2007 [Expert] Report and the 2011 [Expert] Report offer a study in contrast ... In 2007, the counselor opined that Knowlton’s earning as a sales agent would continue to grow significantly until retirement age, reaching in excess of $70,000 annually. ... However, in his 2011 Report, the counselor, without explanation, changed course and opined that Knowlton’s income as a sales agent would only ‘approach the median’ level ‘over the course of his remaining work life.’” The court concluded that “the counselor’s opinions that Knowlton would likely achieve the 90 percent level of earnings in his lost opportunity at the other insurance company and less than the median in his residual lost opportunity as a sales agent at another company or elsewhere in Maine were not the product of an application of any expert methodology derived from the counselor’s education, training, or experience.” Knowlton, 882 F. Supp. 2d at 135 (emphasis added).

Importantly, at his deposition, the vocational counselor admitted that he had no experience in the area of predicting income levels. Thus, the court found no reliable methodology to explain the counselor’s opinion, stating “[t]he only explanation I can identify is the transparent one: he is attempting to maximize [the Plaintiff’s] recovery.” Knowlton, 882 F. Supp. 2d at 135. The court went on to preclude the plaintiff from offering “expert” opinion testimony to the effect that [plaintiff’s] likely placement in the range of earnings is the ninetieth percentile for one job and below the median for the other.” Id. This, in turn, had a drastic effect on the economist’s testimony.
Turning to the economist’s opinions, the court stated that “[t]he restrictions imposed on the counselor’s testimony have obvious implications for the economist’s calculations. [Plaintiff] has presented these experts as a package to provide the jury with a basis for calculating his economic loss.” Knowlton, 882 F. Supp. 2d at 135. The court went on to say that “[i]t is perfectly apparent to me that the economist has a lot of expertise to offer the jury with respect to how a proper economic analysis should be performed. However, I am not persuaded that it is reasonable to plug in the counselor’s predictions about one job likely providing well above median earnings and the other likely providing earnings exclusively at the median and below.” Id. at 135-36.

On the eve of trial, the court gave the plaintiff “final opportunity to prepare a reasonable calculation of economic loss through these witnesses,” but stated that “he [would] have to do so without using … transparent projections designed to maximize damages in the absence of any expert methodology,” Knowlton, 882 F. Supp. 2d at 136; see also id. (“Knowlton has already been provided with ample opportunity to supply the Court with a reliable expert methodology that would justify those particular projections and he has come up short. The opportunity for salvaging those particular projections no longer exists.”).

In addition to demonstrating how an opinion such as this one can ultimately lead to the resolution of the case, this case demonstrates how one expert’s opinion, which relies wholesale on another expert’s opinions, can be affected by the exclusion (or limitation) of the underlying expert’s opinions. Thus, it serves as a reminder (in particular to those proffering expert testimony) for the need to have effective coordination amongst experts, such that one expert’s opinion does not improperly rely on defective underlying opinions or facts to his or her opinions’ ultimate exclusion.


Another case that demonstrates how the exclusion of an expert witness’s testimony can affect the ultimate outcome of a case is Wilson v. Recreational Water Prods., Inc. (“RWP”). In Wilson, the plaintiff alleged that his permanent disability (a lung injury) was caused by an “explosion” of chlorine gas when he opened a canister of pool chlorine tablets. At his deposition, the plaintiff admitted 8-9 prior uses of the same tablets with no similar incidents. Nevertheless, he proffered a University of Alabama chemical engineer to discuss the properties of chlorine, the product packaging, and the allegedly defective warnings on the product packaging. RWP filed a motion to exclude, arguing that the engineer was not qualified – by education, training or experience – to discuss product labeling and warnings and that the engineer’s testing of the container was flawed (because it did not follow ASTM testing protocol). The plaintiff responded that the engineer’s experience working with hazardous chemicals and understanding those hazards was sufficient to qualify the engineer as an expert. The court granted the motion to exclude and, ultimately, the court granted RWP’s motion for summary judgment. See Wilson v. Recreational Water Prods., Inc., No. CV-12-J-2721-NE, 2014 WL 223062 (N.D. Ala. Jan. 21, 2014).

With regard to causation, the court found that although “the engineer ha[d the education, training and background to testify as to the effect of mixing chlorine and water in a closed container … [w]ithout knowing whether a drop or a cup of water entered the container, or if any water was ever introduced to it, there [was] no basis for his belief a stronger warning concerning prevention of allowing water to enter the container is in order.” As such, the court held that the expert could not testify as to how a stronger label may have prevented the plaintiffs’ injuries. With regard to the reliability of the engineer’s testing method, the court stated:

The engineer took a new container of the same product, cleaned it out, held it upside down in a sink filled with water, and looked for bubbles. To replicate pressure inside the container,
he squeezed while holding it upside down in the sink. Nothing about this test for pressure or whether the container was actually airtight is capable of replication, subject to peer review, or has any level of acceptance in the scientific community. He agrees he could not testify to a jury regarding whether the packaging was “airtight.”

In light of this finding, the court held that “Daubert and its progeny require the court to exclude any testimony concerning whether the chlorinating tablet container was or was not air tight.” Wilson, No. CV-12-J-2721-NE, slip. op. at 15.

Finally, with regard to the relevance of the engineer’s testimony, the court stated that “the issue of whether a redesign of the packaging could have prevented the injury here to be irrelevant” because “the engineer’s testimony concerning the need for different packaging requires a finding that the current packaging is insufficient, and that finding necessarily requires evidence that plaintiff read and heeded the warnings that were on the packaging[.]” Accordingly, the court did not allow testimony regarding redesigning and packaging, stating that “such testimony … is irrelevant given the evidence actually before the court.” Wilson, No. CV-12-J-2721-NE, slip. op. at 17.

Although plaintiff’s decision to use an expert that was opining on matters outside of his area of expertise contributed to this result, it was also the plaintiff’s decision to rely on expert testimony that did not fit the facts of the case that resulted in the case being dismissed.

**VII. Conclusion**

As the above anecdotes demonstrate, effectively attacking the other side’s expert witness testimony is a very effective way to dispose of a case. On the flip side, retaining and preparing your own qualified and targeted expert witnesses is essential. Whether you are proffering an expert witness or deposing or cross-examining the other side’s expert witness, preparation is essential. Hopefully, this presentation has provided a framework to assist you in using expert witnesses effectively to win your case, as winning – within the confines of the truth – is always more fun!