

UTILIZING EXPERTS IN AN EXPERT WAY

Part I: Making the Best Use of Expert Witnesses Before Trial¹

By Kelli Hinson and Tesa Hinkley

Expert witnesses play an increasingly common and crucial role in litigation today. In a complex litigation matter, each side often employs several different expert witnesses—different experts for different claims, and sometimes even different experts for different elements of a single claim. In a case involving the breach of a professional duty, for example, it is quite common for a party to retain experts on the separate elements of standard of care, causation, damages, and also perhaps on the particular industry at issue. In today’s legal environment, even the simplest case likely will have some need for expert testimony.

It is not enough, however, simply to find and retain the best available expert for your client’s case (although that can be a challenge in itself). You also will want to maximize the benefit you receive from the expert’s special knowledge and skills and make the most of the fee you or your client will pay the expert. Reaching this objective requires substantial forethought and preparation, beginning the moment you retain the expert.

I. USING AND EXAMINING AN EXPERT AT THE PRE-TRIAL STAGE

Once an expert is retained, you should provide the expert the information she needs to help develop a litigation strategy. Before you send the expert the first piece of paper, or sit down to go over the case, however, you must think about what information you want to share. Pursuant to Federal Rule of Evidence 703, an expert’s opinion should be based upon facts or data perceived by or made known to her at or before the testimony is offered.² The expert may rely on any facts or data that are reasonably relied upon by experts in her particular field in forming opinions, even if the facts or data are not admissible in evidence.³ While the expert may testify without prior disclosure of the underlying facts or data relied upon, a court may require the expert to disclose this information and opposing counsel may request this information and, based on the information, attempt to discredit the expert’s conclusion on cross-examination.⁴ With this in mind, under the current rules, you should provide the expert as much relevant and *non-privileged* information as possible so that she will be well-prepared to form and defend her expert conclusions without jeopardizing the confidentiality of privileged or work-product information.

Also keep in mind that expert witnesses’ hourly rates can rival or even exceed those of the lawyer, so costs can easily get out of control. Because it is often difficult for an expert to know exactly how much time a project will take, it can be difficult for an expert to estimate her fees accurately. To assist your client’s retained expert in this regard, consider breaking large projects

¹ Part II, Making the Best Use of Expert Witnesses At Trial, will appear in the next edition of *Expert Alert*.

² FED. R. EVID. 703.

³ *Id.*

⁴ FED. R. EVID. 705.

into smaller pieces and having the expert report back to you as each piece is completed. This can result in better cost control, less time wasted doing unwanted or unnecessary work, better adherence to and development of reasonable deadlines, and the ability to assess the merits of the case and the quality of the work early on. Ultimately, this will save your client both time and money. These goals need to be weighed, however, against the risk that the lawyer will appear to be overly “managing” the expert’s work product. It is critical for your expert witness to maintain the reality and appearance of an unbiased opinion.

A. Work with Your Expert to Write a Report.

Under the Federal Rules, a retained testifying expert must submit a written report,⁵ although under some states’ rules, a written expert report may be optional.⁶ If you find yourself in a situation where reports are optional, you must decide whether to have your expert prepare a written report. Some factors to consider include:

- If a party does not produce a report, it may be required to tender its expert for deposition before the other side’s expert is designated.⁷
- A written report gives the other side a roadmap to your expert’s opinions and may provide fertile ground for cross-examination.
- Preparing a written report helps your expert think through and distill her opinions, which may result in a better and more efficient deposition.
- A written report may help to keep your expert’s deposition “on topic,” and it also ensures that all of the expert’s relevant opinions are adequately disclosed.

If you elect to have your expert prepare a written report, be sure to discuss what type of report you are expecting. Depending on the nature of the case, the expert report could be a one page synopsis or a lengthy piece. It should include a concise statement of the expert’s findings, set out the facts and data that form the basis of the expert’s conclusions, and fully set out the process and methodology the expert used to reach his conclusions.

In working with the testifying expert to create this report, you must be careful in your communications: remember that under the current rules such discussions may be subject to

⁵ FED. R. CIV. P. 26(a)(2)(B).

⁶ For example, New York and Georgia’s rules regarding the scope of expert discovery do not specifically require an expert report; the allowed discovery includes the identity of the expert, a description of the subject matter of the testimony, the substance of the facts and opinions on which the testimony is based, and a summary of the grounds for each opinion. N.Y. C.P.L.R. § 3101(d) (McKinney 2004); GA. CODE ANN. § 9-11-26(b)(4) (2006). Similarly, Texas allows a party seeking affirmative relief to choose not to furnish an expert report when the expert is designated. TEX. R. CIV. P. 195.3(a)(1).

⁷ See, e.g., TEX. R. CIV. P. 195.3(a)(1).

discovery. Make sure the expert understands this—especially if she does not have a lot of experience as an expert witness.

B. Prepare for the Deposition of Your Client’s Testifying Expert.

The deposition of your client’s testifying expert can be a critical point in the case. Depending on the performance of the expert, your client’s position may be significantly strengthened or weakened. Moreover, some courts might allow his deposition testimony to be used *against* your client, whether you decide to call the expert at trial or not. For example, in *Collins v. Wayne Corp.*, the Fifth Circuit allowed an expert’s deposition testimony to be used against the bus manufacturer that hired him as an adverse party admission under Federal Rule of Evidence 801(d)(2)(C).⁸ According to the court, because the manufacturer hired him to investigate and analyze a bus accident, the expert was an agent of the manufacturer for that purpose; and because the expert’s report and deposition were part of the investigation for which he was hired, they were admissions by the manufacturer.⁹ This case seems to suggest that an expert would almost always be the agent of the party who hired him for purposes of the rule on party admissions. A similar case in the Federal Claims Court held that if an expert testifies at trial, his prior deposition testimony in that case is an admission of the party that retained him, unless that expert is withdrawn before trial.¹⁰ The Third Circuit, however, refused to apply a blanket approach in *Kirk v. Raymark Indus., Inc.*, holding that an expert’s testimony cannot be used as an admission against the party who hired him without the court first finding the expert is an agent of the party – *i.e.*, that he was authorized to speak on behalf of the party and that he agreed to be subject to the party’s control.¹¹ The Court of Appeals in Houston, Texas recently held that, because expert witnesses are hired to testify about their own expert opinions and such opinions are theoretically supposed to be impartial, there is no control by the retaining party and, thus, an expert’s statements are not party admissions.¹²

In any event, you should be mindful of this issue when you are preparing for the deposition of your client’s expert. To help ensure that this deposition goes smoothly and serves only to strengthen your client’s position, you should prepare the expert for the substantive portion of his deposition and also provide general advice regarding the procedural aspects of a deposition and tips on how the expert can best perform.

1. Prepare Your Client’s Testifying Expert for the Substantive Portion of His Deposition.

⁸ *Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980).

⁹ *Id.*

¹⁰ *Glendale Fed. Bank, F.S.B. v. United States*, 39 Fed. Cl. 422, 425 (Fed. Cl. 1997).

¹¹ *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 163-64 (3d Cir. 1995); *see also Koch v. Koch Indus., Inc.*, 37 F. Supp. 2d 1231, 1245 (D. Kan. 1998), *aff’d in part, rev’d in part, Koch v. Koch Indus., Inc.*, 203 F.3d 1202 (10th Cir. 2000) (following Third Circuit’s rejection of blanket rule that expert witness is agent of the party who hires him for purposes of Federal Rule of Evidence 801(d)(2)(C)).

¹² *McCluskey v. Randall’s Food Markets, Inc.*, No. 14-03-01087-CV, 2004 WL 2340278 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *but see, Yarbrough’s Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210 (Tex. App.—Beaumont 2001, no pet.).

Your client's expert should be well-versed regarding all the relevant facts of the case and knowledgeable regarding all aspects of his conclusions. Although you likely will have communicated often with the expert regarding the facts and the expert's conclusions, meet again shortly before the deposition. Be sure to discuss any sticking points with the expert and make sure that he can address any potential weak spots in your client's case both comfortably and credibly.

Also make sure that your expert has—and can articulate—an adequate and reliable basis for his opinion. No matter how educated and otherwise qualified your witness is, he must provide a reasoned basis for his opinions. “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.”¹³ The court will exclude an expert's conclusion if it finds “there is simply too great an analytical gap between the data and the opinion proffered.”¹⁴

You must also address the expert's previous record. Discuss any cases in which the expert has testified previously and the outcomes of those cases. Ensure that the expert remembers what he has testified to in the past, and if there is some arguable conflict between any prior testimony and his expected testimony in the current case, make sure that the expert can articulate the factual differences that led him to reach differing conclusions. Few things are more embarrassing than having your expert witness confronted with prior testimony that seems to support your adversary's case.

2. Prepare Your Client's Testifying Expert for the Non-Substantive Portion of His Deposition.

Although it is likely that your client's retained expert will have testified in a deposition before, you cannot rely on an expert's previous litigation experience. Instead, you should ensure that the expert understands your approach to litigation and is prepared by you for an upcoming deposition. You should prepare the expert for the procedural aspects of the deposition and provide pointers on how to be a strong witness. To do this, review the deposition's format and discuss generalities such as where each person will sit and how the questions will be asked.

You also will want to provide a few tips for the expert to help her improve her performance. For example:

- Remind the expert to always tell the truth; she will be testifying under oath and her credibility is key to persuading the jury.
- Encourage the expert to be well-rested and alert the day of the deposition. Remind her to ask for breaks if needed so that she will remain alert throughout the entire deposition.
- Remind the expert to pay close attention to every part of a question. Opposing counsel may try to trick the expert by beginning a question with an introductory

¹³ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

¹⁴ *Id.*

clause that assumes a fact is true, even if the expert does not know the fact to be true. The expert should not agree with the body of a question if she does not agree with every part.

- If the expert believes that a question is inconsistent with the facts, advise the expert to make this point clearly on the record. For example, if opposing counsel asks a question regarding a hypothetical situation, the expert should consider whether her answer assumes facts that were not present in the hypothetical. The expert should ask opposing counsel whether she is to assume that additional facts are present before answering.
- Remind the expert to limit her opinions to her designated area of expertise. She should resist the temptation to express opinions on other topics. If she is asked about aspects of the case about which you have not asked her to form an opinion, she should simply state that she has not developed any opinion on that subject. This is especially important in cases in which multiple experts are retained and each is asked to form an opinion in a particular area. You should be careful to make sure that the opinions of the various experts hold together as one consistent theory and do not fundamentally contradict one another.
- Advise the expert to answer questions whenever possible using layman's terms rather than technical jargon. While opposing counsel may be familiar with relevant technical terms, the judge and jury who ultimately will resolve the issues will not likely be familiar with such terms. Work with the expert prior to the deposition to point out phrases or words that may be unfamiliar to a jury. This advance preparation will help the expert convey her message clearly and in a way that is readily understood by a judge and jury.
- Advise the expert to be aware of opposing counsel's attempts to characterize or re-characterize the expert's answers. The expert should use care in answering questions that begin with phrases such as "So, you are telling me that . . ." or that end with phrases such as ". . . Isn't that correct?" Let the expert know that she does not have to accept opposing counsel's characterization of her opinions or of the facts. Instead, she can simply restate her answer.
- Opposing counsel may attempt to ask the expert to agree that a particular work is an authoritative source. Advise the expert not to agree that any particular work is authoritative unless the expert has had a chance to review the work recently.

C. Deposing the Other Side's Expert

You can obtain information about or from another party's retained testifying expert by using various discovery procedures, such as: (1) required disclosures; (2) an oral deposition; (3) a request for production with an oral deposition; and (4) a deposition upon written questions.¹⁵

¹⁵ FED. R. CIV. P. 26(a)(2)(A)-(B), (b)(4)(A); 30(a)(1), (b)(1); 31(a)(1).

While you should utilize these other discovery methods, this article focuses on the examination of an opposing testifying expert through deposition.

1. Decide Whether to Depose the Expert Witness.

While many lawyers take it as a given that they must depose the other side's experts, there may be situations when that is not the best strategy. If the expert's opinion is fully set out in an expert report and you feel confident that the judge will limit the expert to the opinions and conclusions disclosed in the report, you should at least consider not taking the expert's deposition. Cross-examining the expert allows the expert to have a "dry run" at responding to your questions and to be better prepared at trial. A deposition also allows the expert to add to the opinions set out in his report. Because the additional opinions have now been "made known" to you, those new opinions likely will be admissible at trial, when they otherwise may not have been.¹⁶

2. Set a Goal for the Deposition and Prepare Accordingly.

Taking the deposition of an opposing expert allows you to accomplish several different goals, but it may not be possible to reach every goal in every deposition. Thus, it is important for you to identify (with your client's input) the goal for a particular deposition and then make that a priority. For example, if your client hopes to settle a case before trial, you might use the deposition of an opposing expert to point out the weaknesses in the opponent's case and bolster your client's settlement position. Or, if your client believes the case will proceed to trial, you might use the deposition primarily as a means to conduct discovery and to prepare for trial, but you might save some of your best cross-examination points for trial. Once you have determined your goal for the deposition, you can formulate your strategy.

If you determine that you wish to use the deposition as a way to further your client's settlement position, you should plan to cross-examine the expert aggressively. This will enable you to get the exact admissions that you seek, but it will also reveal your attack and thus will allow the expert and opposing counsel to formulate better responses before trial. Conversely, if you seek to use the deposition primarily as a means to prepare for trial, you can simply ask for the expert's opinions and the basis for his opinions. This will enable you to understand the opposing viewpoint and limit the scope of the expert's testimony at trial, but because you have not revealed your own position, the opponent is more likely to remain unaware of its vulnerability.

In either case, this is another opportunity to use your own expert in an expert way: you should use her to assist you in preparing for the deposition of the other side's expert. Of course, your client's expert can familiarize you with the opposing expert's methodology and conclusions. In addition, your client's expert should be able to provide you with a simple framework for asking questions of the adverse expert. Ask her to identify the key points of disagreement with the opposing expert and then formulate questions to highlight these disagreements.

3. Use the Deposition to Learn about the Opponent's Case.

¹⁶ FED. R. CIV. P. 26(e)(1).

Deposing an opposing expert provides you with a valuable opportunity to learn more about the opponent's case and thus to better prepare to meet any challenges or expose any weaknesses. You can best gather information from the expert by asking open-ended questions, such as those that start with "who," "what," "when," "where," "why," or "how." By asking open-ended questions, you will force the expert to explain what was done and the rationale for his conclusions. You can then follow-up on these questions by asking other open-ended questions such as: "How do you know that?" or "Why is that true?"

When you switch from information gathering to cross-examination, however, you should use more leading questions. Leading questions are helpful to establish the answers to questions about which you already know the expert's answer. Leading questions also can be used to maneuver the opposing expert into a corner when his analysis is flawed.

4. Ask Questions That Will Demonstrate the Flaws in the Expert's Work.

The expert's deposition provides an opportunity for you to point out the weaknesses in the opponent's case. Specifically, deposing an expert will allow you to expose any flaws in his theories or procedures (or learn why you are incorrect in your analysis of the expert's opinion). If you have effectively pointed out a flaw or an error in the expert's work, you may be able to get him to admit that his analysis is not correct or that a certain assumption is not fair to your client.

Hypothetical questions provide yet another avenue to expose weaknesses in your opponent's case. You can use hypothetical questions to test the limits of how far the expert will go to support his conclusion. Doing so often will discredit an expert who takes such an extreme position that he appears narrow-minded. There is a risk, however, that you will push the expert to take an extreme position, and the jury will still believe him, so be careful with this strategy.

5. Consider Eliminating Questions About the Expert's Résumé.

Attorneys often spend a significant amount of time at the beginning of an expert deposition covering the facts on the expert's résumé. But unless the expert is truly inexperienced, asking a lot of background questions only enhances the credibility of the witness, wastes time, and gives the expert some time to ease into the deposition process. You may be better served if you launch right into the meat of the expert's opinion and analysis.

On the other hand, some circumstances may lead you to decide that questions about an expert's résumé are necessary or helpful. For example, if your research into the items listed on the expert's résumé has exposed information that could lead to a conclusion that the expert "padded" his résumé, you should ask questions designed to expose this and thus weaken the expert's credibility. Also, when the expert is more relaxed and is talking about his prior experiences, you may be more likely to get him to concede certain general points that are helpful to your case.

II. CONCLUSION

This article provides an overview of issues to consider to best utilize a testifying expert and to cross-examine an expert retained by an opposing party in the pre-trial phase. In the next issue of *Expert Alert*, we will provide some additional tips on using and examining testifying experts at

trial. Hopefully, with the suggestions in these articles, you will be able to increase your expertise in handling expert witnesses.

BIO:

Kelli M. Hinson is a partner at Carrington, Coleman, Sloman & Blumenthal, L.L.P. in Dallas, Texas. Ms. Hinson's practice includes a wide variety of complex commercial litigation cases, but focuses on professional and executive liability. Tesa Hinkley is an associate at Carrington Coleman. She practices in the area of complex commercial litigation.