Taking an Expert Witness Deposition like an Expert

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I. Introduction

In virtually every environmental/toxic tort case, expert depositions are the critical discovery events in the litigation. Due to the overwhelming importance of expert testimony at trial, it is beyond dispute that the depositions of plaintiffs’ experts often provides the opportunity to make or break the defense case.

Unfortunately, many attorneys believe, or at least approach, the plaintiff experts’ depositions as merely another in the long line of discovery vehicles—a string of little more than the standard who, what, where, when and how inquiries. This mind set should be rejected as false and unproductive. The conduct of an effective, and useful, plaintiff’s expert deposition requires careful thought, diligent planning, and disciplined efforts to both poke holes in plaintiffs’ case while buttressing the defense themes and evidence. Of course, this requires that the defense practitioner long before have settled on the theory of the case and evaluated how each plaintiff expert fits into that theory.

What follows are suggestions as to how to prepare for and conduct an “expert” expert deposition. Much of this seems obvious, but it is important to remember that even old dogs can at least be reminded of the tricks they know, and may even be capable of learning new tricks.

While expert depositions typically occur close to trial, one should be thinking from the inception of the case about plaintiffs’ position and evidence, and what experts they will likely use to advance their claims. Though it is obviously important to address plaintiffs’ allegations and evidence head on, it is equally important to develop the defense theory, claims and evidence so that much of the litigation and trial can be fought on the defense’s battlefield. Accordingly, in evaluating each expert whom plaintiffs intend to use, one must develop a specific game plan for deposing that expert in efforts to obtain concessions and testimony helpful to the defense position, as well as exploring areas of weakness in the expert’s opinions and their foundation.

At bottom, it is critical to ask, “[w]hat am I trying to achieve in taking this expert’s deposition?” There can be many purposes in conducting a deposition, but paramount among these must be a constant and unwavering focus on revealing and exploiting the fallacies in plaintiffs’ claims while demonstrating the ultimate, and hopefully prevailing, strengths in the defense case. Equally important is an assessment of the deposition’s role in executing pre-trial and trial strategy, particularly with respect to motions in limine, motions to exclude improper and unfounded opinions, preliminary evidentiary hearings to test the foundation for any legal/medical/scientific viability of the expert’s testimony, and to provide grist for the defense experts’ own analyses and opinions.

All of this is a long way of saying that one must critically evaluate what questions to ask, the way in which the questions should be asked, the structure and format of the deposition outline, and the evidentiary materials to be used or reserved for cross-examination at trial.

II. What Is Expert Testimony?

Federal Rule of Evidence 702 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.

Thus, an expert is someone who will testify about a subject that is sufficiently beyond common experience. In environmental toxic tort cases, this is fairly obvious—hydrogeologists, toxicologists, epidemiologists, occupational health physicians, industrial hygienists, among others. The expert's opinion has to “assist” the trier of fact. An expert whose opinions are not helpful, or do not assist the judge or jury, is not a qualified expert. An expert's opinions must be based on matters that are perceived by, or personally known to the expert. And, an expert's testimony must be of the type reasonably relied upon by experts in the field on that particular subject—the expert's opinion cannot come out of right field. If the expert does not meet these criteria, he or she may be the subject of a motion to exclude that expert from testifying at trial.

III. When Is Expert Testimony Required?

Expert witness testimony is required when proving a claim, or defense, and calls for evidence which is beyond the ordinary person's knowledge. For example, expert testimony may be required if a plaintiff is trying to prove that a product is defective, or a defendant is trying to defend the product on the basis that it is NOT defective and there is an issue related to medical causation or reliability of scientific evidence. These types of areas are beyond the ordinary person's knowledge and the parties can reasonably rely upon experts with the education, training and experience to testify about them.

IV. When Is Expert Witness Testimony Prohibited?

Expert witness testimony is prohibited when the issue before the Court is one of “law” (e.g. “duty”), the subject matter which has no recognized expertise, or the issues involve matters of common experience or knowledge.

V. Just Do It!

Sometimes, parties decide NOT to take an expert witness's deposition. The reasons for this varies from the cost involved, the fact that the expert is not expected to change his testimony from the hundreds of previous depositions that witness has given in the past, or the expert is simply not that important. However, barring any extraordinary reason not to, taking an expert deposition gives the parties a chance to explore whether any opinions have changed, whether this case presents facts different from those in which the expert has testified in the past, and, perhaps most importantly, allows you the opportunity to explore any basis for excluding the expert from testifying at trial in your case.

VI. Expert Witness Testimony Is the Subject of Close Scrutiny by Courts—Be Aware of the Eight Gates

The rules of evidence in federal and state courts limit the use of expert witnesses. Trial judges stand in the role of “gatekeeper” and have the power to bar certain expert evidence. All courts provide for pre-trial and other hearings outside the jury’s presence where parties are given the opportunity to challenge the reliability of the other parties’ experts. (i.e. Daubert/FRE, Havner, Lockheed, Frye, State Evidence Codes).

Courts have dramatically changed how they evaluate the admissibility of expert witness testimony. For example, courts are split on how to deal with “low dose”/exposure asbestos cases. (See, The “Any Expo-
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Perhaps the most thorough analysis of how courts should evaluate the admissibility of expert witness testimony is the article Eight Gates for Expert Witnesses (36 Hous. L. Rev. 743 (Fall 1999), written by Judge Harvey Brown of the 152nd District Court of Harris County, Texas. In his article, Judge Brown identifies eight “gates” that an expert’s testimony must pass through in order to be admissible. Judge Brown admits that these gates overlap, but that separately identifying them highlights the significance of each. The purpose of identifying the gates is to ensure that decisions by fact-finders are as well informed as possible, and that they are presented with the most accurate information available.

Gate No. 1: The witness’s testimony must “assist” the trier of fact and be “helpful”—the most basic tenet in Rule 702 of the Federal Rules of Evidence. If the fact-finder is equally competent to examine and evaluate an issue, the Court should not admit the expert’s opinions. However, this standard is liberally certified to permit the testimony in a close case.

Gate No. 2: The expert must be qualified on an “opinion-by-opinion” basis, and thereby pass the “qualifications” gate. Rule 702 allows expert testimony in scientific, technical, or other specialized areas, provided that the witness is qualified as an expert “by knowledge, skill, experience, training or education.”

Gate No. 3: The expert evidence must be relevant and have a valid connection to the issues in the matter. Relevance is shown by proof that some logical connection exists between the evidence and the proposition to be proven—the evidence must be probative.

Gate No. 4: The expert’s opinions must have been developed in a manner that is methodologically reliable—Rule 401 and 402. Opinions that are not reliable are not considered “knowledge” and, therefore, do not assist the trier of fact. A methodology that can be, or has been, tested is reliable. A theory that has been the subject of peer review and publication can be reliable. And, a theory that is generally accepted is reliable.

Gate No. 5: The expert’s extrapolation from the basis of the opinion to the conclusion must be sound. This “connective reliability” test focuses on the expert’s reasoning. An expert’s reasoning must be explained on the record in detail. Unless the expert explains the connection between his or her methodology, or underlying data, to the conclusion or opinion, then the opinion should be inadmissible. The opinion will not be admissible if the expert’s methodology is sound but his or her reasoning process applying that methodology is not sound or demonstrated.

Gate No. 6: The foundation of the expert’s opinion must be reliable—“foundational reliability.” To pass the foundational reliability gate, the court must review the reasonableness of the expert’s assumptions and the reliability of the data, studies or foundation of his or her opinion. Daubert recognizes that expert testimony must rest on a reliable foundation. Hence, courts are to examine not only the methodology used, but also the foundation for the underlying principles. The opinion is unreliable if the substantive foundation for it is itself unreliable.

Gate No. 7: If an expert relies upon foundational data which is inadmissible evidence not relied upon by other experts in the field, the expert’s opinion should be inadmissible. This requirement serves as a check and balance on the trustworthiness of the expert’s opinions and their foundation. Effectively, the rule serves as a hearsay or authentication exception. If the data the expert relies upon are not customarily relied upon by other experts in the field, the court may reject the expert’s testimony.

Gate No. 8: Evidence may be relevant but potentially misleading and, thus, create unfair prejudice—Rule 403. The basis of this rule is to exclude unreliable evidence. “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible

VII. With an Expert Challenge In Mind, How Do You Take an Exceptional Expert Deposition?

Now that you know the eight gates of admissibility of expert testimony, and with that in mind, you are almost ready to take the expert’s deposition. Many lawyers view expert depositions as simply “another deposition” in the case. However, expert opinions elicited at deposition can make or break a case. You may win at the motion stage simply by successfully poking holes in your opponent’s expert’s testimony.

1. Develop Your Theme—You’ve Already Done That, Right?

It cannot be stressed enough that the first thing to do when you get a case is to establish a theme. By the time of the expert deposition, you should have an idea of what that expert is going to testify about, and what his or her opinions are. You also know what evidence you need to elicit to advance your theme.

2. Who Takes the Deposition?

You need to decide who will take the deposition. This decision might be based on many factors, including the client’s desires, the firm’s desires, cost, institutional knowledge of the case/expert, and who will ultimately be trying the case and examining the witness at trial.

3. Prepare, Prepare, and Prepare Some More

Nothing takes the place of thorough preparation. The first, and most important thing, is to know your case cold. You need to know the facts and the science. Speak to your experts about where you might gain an advantage, or what areas should be explore. Review treatises and scientific studies so you understand the science and won’t be put off by a technical answer you aren’t expecting. Research the expert on the internet, by speaking with colleagues and co-counsel, and by reviewing as much published literature written by the expert that you can get your hands on. Review previous depositions and exhibits so you know what the expert is expected to say on certain topics. Then, if he or she doesn’t conform with prior testimony, you will be ready to impeach at deposition (or trial).

4. Prepare an Outline

Now that you have you case theme, and the facts of the case down cold, and you have done all the research possible, create an outline based on what you have learned. Separate the outline in sections so that it follows logically. Double or triple space so that it’s easy to read. And, if you have prior testimony on a particular topic, make sure to reference the page/line of where the expert had testified on the topic (and what he or she has said) in case you need to impeach or clarify a point. Decide which style works for you. (i.e. bullet points; writing out the actual questions) Remember to review the eight gates when preparing your outline so you make sure to include questions related to the expert’s qualifications and credibility. Ask questions related to the expert’s bias—i.e. how much is he or she being paid by the hour?, how much money has he or she made in testifying in litigation?, when was he or she retained by your opposing side?, how many times has he or she been retained by this particular firm?

5. Exhibits

Evaluate whether there are documents which you would like to ask the witness about and how those fit into your theme. Include a Request for Production of Documents with your deposition notice which seeks all documents contained in the expert’s file, or any other document that the expert relied upon in forming his or
her opinions. You might have a cooperative opposing counsel who agrees to give you a copy in advance of the deposition. If you do get the file in advance of the deposition, study the documents and incorporate them into your outline. If not, take time to review the file before you start the deposition and have a copy made, if possible. Make sure to exhaust the documents the expert brings with him or her during deposition. (See, Section VII. 7., Exhaust But Don't be Tied to Your Outline—LISTEN!, supra). Make sure to identify each document thoroughly on the record and to attach to the deposition as an exhibit. If you are bringing exhibits with you, make certain that you have enough copies of those documents for the expert (court reporter), and other counsel.

6. Depose in Person

In this day and age, depositions often go forward telephonically or by video conference. If possible, take the expert's deposition in person. Experts that have given depositions over and over again get comfortable. Your goal is to challenge the expert, to exhaust all the facts the expert knows, or opinions he or she has. You cannot assess body language over the phone, you cannot review documents over the phone and you lose the advantage of challenging the expert.

7. Exhaust, But Don't Be Tied to Your Outline—LISTEN!

You have researched this witness, and you have prepared your outline, but don't be tied to it. Your job at deposition is to exhaust the witness—don't leave a topic until you have found out every opinion the witness has on that topic. The key to exhausting the witness is listening to the testimony. It is a common mistake to simply read your outline questions without actually listening to the response. This will create a poor record and will not be very helpful when it comes time to prepare a motion to strike, or to figure out the hole in your opponent's case. A savvy expert will try to deflect you from your goal, and run you down paths that have little or no relevance. It is fine to run down rabbit trails as long as you have accomplished your goal of exhausting the witness first.

8. Restate and Summarize

Properly exhausting a topic may require many questions and pages of testimony. If left this way, the testimony may be unmanageable and unusable in court. Therefore, the process of restating and summarizing condenses the testimony and makes it more concise. It also creates nice sound bites for motions, and trial. In addition, easily accessible sound bites makes it possible to easily impeach a witness, if appropriate. Following are examples of lead-ins to restating and summarizing: “Let me understand what you have told me”, “What you are saying...”, “Let me make sure I get it...”, “Are you saying that...?”. After you have restated and summarized the testimony, it is a good idea to ask a follow up question like “Is that everything?” or “Have you given me all of your opinions on x?”

9. Boxing In

The technique of “boxing in” is used in two circumstances and consists of two different techniques: boxing in by bracketing and boxing in by using facts, witnesses and documents. Boxing in by bracketing is used to commit the witness to quantifiable facts, such as time and measurements when he or she is being evasive. This is accomplished by setting upper and lower limits for dates, events, distances, time or anything that can be quantified. Boxing in by using facts allows you to reduce the risk that the witness will change his or her testimony after the deposition by forcing the witness to describe whether additional facts, or documents, might cause the witness to change his or her opinions. This would be used after a witness has been exhausted and effectively says “That's all.” In this case, you would ask the witness whether certain facts, or certain documents, might change their opinions which boxes in the witness's testimony.

10. Effectively Using Treatises and Studies

Under the Rules of Evidence, treatises and scientific studies can be used during the examination of an expert. When the treatise or study comes to a conclusion that contradicts a portion of the expert's opinion,
your goal is to make sure that the jury knows about it. To do this, you first need to identify a key persuasive point that can be established by the treatise or study. Then, if possible, get the witness to acknowledge that the treatise or study is authoritative or reliable. Next, identify uncontroverted case facts that directly relate to the key point selected, and get the witness to admit them. Lastly, cite the treatise/study and ask if the witness agrees with the key persuasive point. Exhaust this point.

11. Dealing with a Difficult Witness

Experts are the “hired guns.” There is no question that the better they do for their clients, the more likely they will be retained in future cases. They have a vested interest in making sure you do not score points for your client. If you know in advance that a witness is going to be difficult, you must assess what you can reasonably achieve in taking that witness’s deposition and determine what types of questions will accomplish your goals. If one of your goals is to find out what the witness knows, open-ended questions, exhaustion, and restating and summarizing can be effective techniques. But if your goal is to get the witness to admit facts or points that are favorable to your case, open-ended questions may not work. To control the witness, each question must focus on one, and only one, fact. The advantage to this is that if the witness gives you a nonresponsive answer or “runs” from the question, the question can easily be repeated again and again. Every time the witness runs or avoids the question, he or she appears less and less credible. If you press hard enough, the witness may eventually admit the fact embedded in the question.

The following techniques can be used to control a difficult witness:

(i) repeat the question—when the witness is nonresponsive, repeat it again and again;
(ii) throw out the trash—when the witness is nonresponsive, say “Thank you but I did not ask you x, I asked you y”;
(iii) state the opposite—when the witness is nonresponsive, state the opposite of a truthful answer—“Are you saying there were not x?”;
(iv) state the obvious—“That’s a yes or no question.” If the witness is repeatedly nonresponsive, include the correct answer in the question “Then that is a yes…”

12. Act like a Pro

It is likely that this is not the first deposition for the expert witness you are deposing. It is likely that he or she has been deposed more times than you have taken an expert deposition. They know the ropes, they can be argumentative, condescending and overall difficult. However, it is important that you do all your homework in advance, listen, and exhaust. Reasonable minds do disagree—your experts will refute the opinions of the expert you are deposing. Your job is to come out of the deposition with as many nuggets to use in motion practice, or at trial. Keeping a level head will help you focus on your goal!

VIII. Conclusion

We hope you find some meaningful pearls in this paper so that you can take an expert deposition like an expert. There is much to be gained by thorough investigation and organization before taking an expert deposition. Following some of the techniques set out in this paper will help you focus on what you need for your case and take an exceptional expert deposition.