Taking the "Expert" Plaintiff Expert Deposition

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Vince Lombardi, the legendary Green Bay Packers coach of the 1960s, famously said that, "[f]ootball is blocking and tackling. You do that better than your opponent, you win."

So, too, is taking expert depositions in modern civil litigation. Indeed, the deposition of an opponent's expert is routinely the most important discovery event in the litigation, and, where allowed, the most critical part of one's pre-trial preparation. Done correctly, and thoroughly, it often means the difference between a plaintiff or defense verdict at trial.

We seek not to provide an instruction manual for our readers. After all, most of you went to law school, passed the bar exam, are practicing litigators, and have your own unique style of taking depositions. Nonetheless, we thought it would be valuable—as Coach Lombardi reminds us—to focus on the basic fundamentals to which due consideration should be given before taking any plaintiff expert deposition.

We will discuss the notion of "expert testimony," including an analysis of when it is required, permissible or prohibited; address whether one should take the expert's deposition, and why; the logistics and goals of the deposition; the fundamentals of preparation and strategic choices that go into the conduct of the proceeding; and certain basic issues which should at least be considered in advance of swearing the witness. Finally, we will discuss appropriate challenges to expert testimony, including an analysis of the "eight gates" through which an opinion must (or should) pass before it is admissible in evidence.

What Is Expert Testimony?

Modern trials in product liability litigation routinely involve testimony offered by retained (and sometimes non-retained) expert witnesses. Expert testimony can be, and often is, more important to the outcome than the testimony of the plaintiff, the defendant company representative, or any other fact witness. Thus, it is important to understand at the outset the scope and import of proper expert testimony.

Broadly stated, "expert testimony" pertains to a *subject* which is *sufficiently beyond common experience*, such that the expression of that testimony, and any attendant opinions, would *assist* the trier of fact in resolving one or more disputed fact issues submitted for the jury's determination. Such testimony and opinions must be based on matters *perceived by* or *personally known* to the expert witness (whether by virtue of their own education and experience, or on matters and materials provided to them in the litigation process). And those matters must be of a type that *reasonably may be relied* upon by an expert *in the field*, *on the specific subject* to which the witness' testimony pertains (unless precluded by law).

Accordingly, expert testimony is typically required when proof of a claim or defense calls for evidence *beyond* the ordinary person's common knowledge. In other words, the testimony of an expert is compelled when the subject of that testimony is not something that the ordinary juror would know, or understand, based on her everyday experience.

Expert testimony may be permissible—even if the lay jurors may have some knowledge concerning the issues—if it would be *helpful* in assisting the jury resolve a disputed issue. Thus, even if ordinary persons may have a general lay understanding of the issue, an expert's opinion may still be useful where it

can help the jury better, or more clearly, understand the facts and circumstances presented in the case.

Expert testimony is, or ought to be, prohibited in specific circumstances. For example, *issues of law* (*e.g.*, the existence of a "duty") is not the proper subject for expert testimony because it invades the province of the court, and does not concern a disputed fact issue. Subjects for which there is *no recognized expertise* should also be off-limits. A recent tactic of the plaintiffs' bar and their experts is to opine on the existence of a "conspiracy" among defendants and others to engage in bad conduct. But there is no generally-accepted or recognized expertise on the "existence of a conspiracy" and such testimony should be excluded.

Ultimately, *matters of common experience, knowledge, or interpretation* should not be the subject of expert testimony. As Bob Dylan said, "you don't need a weatherman to know which way the wind blows." If the subject of the proffered testimony is well within the common lay understanding of the jury, and would not otherwise be helpful in an objective sense in assisting the jurors perform their task, a court is well within its discretion to exclude that testimony.

While the foregoing may seem obvious, it is remarkable how often these most fundamental issues are overlooked. In a day and age when plaintiffs' attorneys routinely call upon their experts to opine on a myriad of subjects, it is important to recognize that not every area or opinion may be the proper subject of expert testimony at trial. Accordingly, a careful analysis of each is necessary to ensure that meritorious motion practice to exclude improper testimony and opinions is not overlooked.

Why Take the Expert's Deposition?

In light of the expense associated with litigation today, and the enduring truth that over 99 percent of cases resolve prior to verdict, litigants and their attorneys often ask whether it is worth the time and trouble to conduct the plaintiff experts' depositions. Some claim the deposition is not worth the expense, given the amount of time, resources, and money necessary to prepare for and conduct the deposition, to say nothing of paying the experts' hourly or daily fee for the privilege of questioning her. Others express concern that, in deposing the opponents' expert, one is "educating" plaintiffs about the weaknesses in their case, and the strengths of the defense case. Still others suggest that the conduct of the deposition can reveal one's own trial strategy. And others question why a deposition is necessary at all when one already "knows" what the plaintiff's expert will say at trial.

All of these concerns may, in a particular case, be valid. It is also true that each is far outweighed by the value of conducting a proper expert deposition.

So why take the deposition? We submit it is necessary for defense counsel to observe the expert in action, and to gauge his reactions to specific and probing questions, particularly on hot button issues that will arise at trial. At the same time, it is important to assess the expert's potential effect on the jury—whether this expert be deemed believable, objective, credible and informed under the circumstances.

Naturally, it is necessary to evaluate the substance of the expert's responses, and to pose follow-up questions which ought not be asked for the first time at trial.

For those concerned about the theater of trial (namely, all trial attorneys), the expert deposition is also an opportunity to rehearse certain aspects of the trial cross-examination, to refine the questions, and to experiment with various ways of questioning the witness to determine what style and approach will work best.

Finally, the deposition is essential to establish defense toe-holds in the evidence and, ultimately, to lock down the expert's testimony to ensure no new or different opinions are expressed at the time of trial (at least not without the expert facing the danger of exclusion or impeachment).

From our perspective, it is important to use the deposition to identify the expert's tendencies, and to plan trial cross-examination based on those tendencies. Thus, one can determine whether the expert is careful, lazy or sloppy in his assessment; whether she is well-prepared on the facts and circumstances of the case, or simply "mailing it in" because the expert has testified so frequently on the subject; whether the expert is a reasonable, and reasoned, individual, or is arrogant, intolerant and overtly biased; and, ultimately,

whether the expert evinces credibility or dishonesty. At bottom, it is simply not useful to make these determination for the first time at trial. From that perspective, the opportunity to depose plaintiff's experts is a gift which ought not be squandered.

The Logistics of the Deposition

Inquiries are often made—by both plaintiff counsel and one's own client—as to more cost-effective means of conducting expert depositions. We submit that, in the case in which one's client is seriously prepared to proceed to trial, and to take verdict, such questions are easily answered in favor of trial counsel conducting the deposition face-to-face.

A favorite tactic of plaintiffs' counsel over the last several years is to propose a so-called "48-hour stipulation" for the conduct of their and defendant's expert depositions. Under this proposal, the depositions would be deferred until no later than 48-hours prior to the expert's testimony at trial. We condemn this practice for all but the most superfluous of experts (assuming that any trial expert can truly be considered superfluous) because it affirmatively hinders the preparation of the defense case and precludes counsel from truly understanding, and preparing for, plaintiffs' case until one is actually engaged in the trial. Thus, we recommend rejecting such proposals and requesting the plaintiff experts' depositions be conducted in the normal course of pre-trial discovery.

Another tactic is to propose that the experts be deposed by telephone (or, rarely, by video conference). We find this uniformly unsatisfactory. For all the reasons discussed above, the proper conduct of an expert deposition requires an in-person proceeding. In our experience, telephonic depositions are often perfunctory. Indeed, it is difficult to retain the necessary focus and drive to conduct a comprehensive deposition while one is seated in an office, speaking into a handset, with no ability to evaluate the witness or see what she might be doing during the examination.

Most jurisdictions require, absent agreement, that the expert travel to the jurisdiction in which the case is venued. Nonetheless, recognizing that many experts are, legitimately, busy professionals for whom such travel could constitute a hardship, we have never rejected (absent good cause) the idea of "going to the expert". It is actually quite productive to take the expert's deposition in his own office, or a local environment in which the expert is comfortable. One can learn a lot about the expert, and develop further issues for cross-examination, simply by observing the surroundings. In a recent case, we saw that plaintiff's expert had our expert's textbooks on his office shelf. This provided fertile grounds for cross-examination since plaintiff's expert was forced to admit these were authoritative and reliable.

An unfortunate circumstance often arises in which critical expert depositions are taken by relatively junior attorneys, or more senior attorneys with little actual knowledge of the case. These are wasted opportunities because they often lead to less-than-comprehensive or incisive examinations. For this reason, we recommend that all critical plaintiff expert depositions be conducted by the trial attorney who will be responsible for that expert in court. After all, if one is going to cross-examine that expert, one should have the opportunity to understand and explore that witness's testimony in advance. It also permits the attorney to establish some level of rapport and respect with the expert, thereby defusing potential hostilities which might spill over unnecessarily into trial.

The 10 Goals of the Plaintiff Expert Deposition

Since there is a "Top 10" list for virtually everything, we provide here our 10 goals of the plaintiff expert deposition.

1. Learn the Opinions

The most obvious goal of any expert deposition is to identify fully, and understand, each and every opinion that expert intends to express at trial. It is surprising how often certain opinions, or sub-opinions, are either concealed, ignored or not fully pursued. It is, therefore, critically important that each opinion be articulated, expressed as fulsomely as possible by the expert, and any sub- or associated opinions identified and explored.

At the end of the deposition, the classic close-off questions should be posed: "Have you now identified

for us today all of the opinions that you intend to express to the jury at the time of trial? Are there any other opinions, or areas of testimony, that you intend to offer at trial that we have not fully discussed?" At the very least, this will provide defense counsel with strong arguments to exclude any new, different or modified opinions at trial.

2. Understand the Bases for the Opinion

Equally important as identifying each opinion is to understand the grounds for and materials on which that opinion is based. As discussed below, with respect to potential motion in limine challenges to the admissibility of opinion testimony, it is essential to have the expert identify everything on which she relies in arriving at her opinion.

Since an expert's opinion is based on education, experience and matters known to or made available to the expert, each potential category should be identified and explained. This is particularly true where the expert is reluctant to, or unable to, identify authoritative and reliable literature supporting his opinion, thereby suggesting it is the mere "*ipse dixit*" of the expert which is the basis for the opinion (the so-called "authority-based" as opposed to "evidence-based" opinion).

3. Pin Down the Witness

The deposition is the best place to test the credibility and reliability of the plaintiff expert's opinion because it enables defense counsel to ask probing and specific questions which the expert may be unable to, or not want to answer. Since there is no judge to tell you to "move along, counsel," one has the opportunity to ask, and repeat, questions until you get a proper and complete answer.

4. Lay Cross-Examination Groundwork

By getting the expert to commit to the specific opinions in her testimony, and potentially narrowing the scope of that testimony, defense counsel will be better able to prepare for cross-examination at trial. At the same time, the deposition can be used to determine whether plaintiffs' expert may be willing to adopt certain facts favorable to the defense, notably including acknowledgment of and support for certain opinions held by the defense experts.

5. Explore Qualifications

What makes this person an "expert" whose testimony and opinions will be helpful to the jury in resolving a disputed fact issue? Does this expert truly possess the necessary education, experience and objective expertise, in the field and on the subject to which his testimony pertains? The deposition enables defense counsel to evaluate fully those qualifications, or the absence of same. Indeed, just because one has an "M.D." after her name does not entitle that physician to render opinions or any subject in medicine which suits her fancy.

At bottom, it is important to ferret out precisely what the expert has done in the real world on the issues encompassed by his testimony. Anyone can read the literature and spout back what they read (*i.e.*, serve as a conduit for hearsay). By that standard, an attorney would be equally competent in rendering expert testimony at trial. Thus, probing questions should be asked to determine what gives this individual the *gravitas* to render opinions on the subject to which he is testifying.

6. Demonstrate Bias

Bias and prejudice can run equally deep on both sides of the ledger, but it is nonetheless important to fully assess those facts and circumstances which readily demonstrate the bias of a plaintiff expert. For example, does the expert only consult and testify for plaintiffs and their attorneys, or has she ever worked for companies, whether sued in civil litigation or not? What percentage of the expert's income is due to consulting and testifying for plaintiffs in litigation, and how have the expert's fees increased over the course of time? Has the expert ever arrived at an opinion or conclusion exonerating a company, or a product, in a case in which he was consulting or testifying for plaintiffs? Has the expert ignored critical contrary data tending to discount or impugn her opinion? All of the subjects are worthy of careful examination during the deposition.

7. Explore Lack of Support

As essential as identifying all stated bases for the opinion is to identify inconsistencies in the data and a general lack of objective support for the opinion. One can go a long way towards undermining the credibility of an opinion by demonstrating that it is not based on well-established and generally accepted principles, is contradicted or rejected by an impressive and robust literature, or that the expert has simply engaged in sophistry by arriving at an opinion by purportedly "considering and ruling out" other potential explanations or causes.

8. Identify Weaknesses in Plaintiff's Case

Since plaintiff's claims may largely rise or fall on the strength of his expert's testimony, it is important to use the deposition as an opportunity to identify and exploit holes and weaknesses in the case. In particular, it is necessary to determine whether the record evidence actually supports the opinion, or the assumptions the expert is making in arriving at that opinion. It is also critical to determine what information is absent from the record evidence which, if known, would either support or refute the opinion.

Since plaintiffs have the burden of proof, these matters should objectively hurt them more than the defense, and should be argued strongly to the court and jury.

9. Evaluate the Witness

The face-to-face deposition is an ideal opportunity to assess the demeanor and appearance of the witness, and determine how she will "play" in front of the jury. Even otherwise legitimate experts are sometimes too smart and glib for their own good, and that arrogance may work against them in trial. By the same token, an expert may be so self-effacing, calm, deliberate, and (heaven forbid) nice that jurors will want to listen to them all day. It is necessary to take these issues into one's calculus in evaluating how the trial will play out over the course of time.

10. Develop Motions to Exclude

Motion in limine practice is one of the more poorly contemplated and executed mechanisms of trial practice. This is unfortunate because, properly handled, concise and laser-like motions to exclude plaintiff expert testimony can be extraordinary effective. Even if the expert's testimony is not excluded or limited at the time the motion (and any associated evidentiary hearing) is conducted, the motion will serve to educate the judge, and thereby heighten her attentiveness to the issues at the time the expert testifies before the jury. As all trial practitioners know, many judges will default to denial of in limine motions, without prejudice, subject to seeing and hearing the actual evidence.

Preparation for the Deposition

Too often, due to the press of time and other work, deposition preparation is cursory. This is to be avoided when preparing to take plaintiff experts' depositions, especially when you are the trial attorney.

First, it is critical that defense counsel understand her case fully. One must know the facts, the law, the percipient witnesses' testimony, and the critical documents produced in discovery. As one legal commentator noted, "…victory is not in the scathing cross, but in the tedious review of documents. This is the numbing, ditch digging work that determines the winner." Thus, it is important to get oneself up to speed on all that has gone before in discovery and the preparation of the defense case to prepare for and conduct the useful deposition of plaintiff's experts.

Secondly, it is critical to identify, and read, authoritative treatises and literature in the field, and on the subjects to which the expert is expected to testify. There is nothing so satisfying as being able to trot out one article, text and learned treatise after another, all standing for a proposition wholly opposed to that advanced by plaintiff's expert. Undoubtedly, the expert will have a "ready" explanation for some (but not all) of these materials, but will still be hard pressed to explain to a jury's satisfaction why their opinion swims against a steady current in the opposite direction.

In those jurisdictions requiring pre-trial expert reports, this is a blessing. Reports enable defense counsel to evaluate, with a critical eye, precisely what

the expert has done, and not done, in arriving at his opinions. Accompanied with a yellow highlighter, defense counsel have the opportunity to identify critical sentences within a report for use in examining the expert, compelling them to explain their words and provide greater detail than might otherwise have been obtained in the report's absence. At the same time, the expert's report may be important for what it does not say or what equally available materials are not cited or meaningfully discussed.

All experienced experts have a paper trail of prior deposition and trial transcripts. Indeed, DRI maintains an impressive database of prior transcripts on notorious and not-so-notorious plaintiff experts which is available to the membership. Efforts should be made to investigate the availability of prior transcripts in comparable cases to determine what the expert has testified to under oath. Many trials involve cross-examination using multiple prior transcripts to prepare for impeachment on multiple subjects, and there is no better way to learn about an expert, and his tendencies, strengths and weaknesses than by reading earlier testimony (particularly where the expert's opinion now differs substantially from what he testified to in the past).

Finally, one of the greatest resources available in preparing to depose plaintiff's expert is one's own expert in the field. We routinely call upon our experts to tell us how they would question their opponent, if sitting across from him in a professional environment—doctor to doctor, scientist to scientist, engineer to engineer.

Learn the language of the field, understand the principles which guide the performance of true experts on a day-to-day basis, and use these in crafting your questions to ensure accuracy and precision. This is particularly crucial because defense experts can serve the dual role of both affirmative testifier and rebuttal witness in critiquing the manner in which plaintiffs' experts approached their task as inconsistent with the accepted principles and practices in that discipline. Accordingly, one's own experts are a fertile source of information in both preparing for deposition and trial cross-examination.

Grounds to Exclude Opinion Testimony

Regardless of the name put on it (*e.g.*, *Daubert*, *Havner*, *Sargon*, *Frye* or Federal Rule of Evidence/state evidence code challenge), all courts provide for pre-trial and other hearings outside the jury's presence to consider the foundation for and admissibility of expert opinion testimony. In his outstanding note on the subject, Texas Appellate Court Justice Harvey Brown (then sitting as a trial court judge) wrote about the so-called "Eight Gates of Expert Testimony" through which each opinion must (or should) pass before being admitted. *See* 36 Hous. L. Rev. 743.

1. Relevance

It is hornbook law that only relevant evidence is admissible. Evidence is relevant only if it is probative of some disputed fact issue which must be decided by the jury. This then, triggers the issue of whether expert opinion testimony is required, helpful or prohibited under the circumstances, and whether each particular opinion is actually and ultimately helpful to the jury in resolving the issues they are called upon to decide. It is surprising how often this most basic criterion is assumed or ignored. It cannot be, and every opinion sought to be offered by plaintiff's experts should be viewed through the lens of relevancy.

2. Qualifications

Discussed at length above, it is enough to say here that the expert should be tested on his true education, experience and accomplishments in the field, on the subject to which his testimony pertains. Once again, this should not be taken for granted merely because the expert has an impressive-looking and lengthy curriculum vitae and bibliography. If the expert has really not done anything of significance in the area on which he now seeks to testify, his "real" qualifications to render opinions on the subject should be challenged.

3. Assist the Trier of Fact

The admissibility of opinion in testimony depends on whether it is proper, helpful and reliable. Only then can opine truly "assist" the trier of fact in resolving disputed fact issues. Each of these criteria must, in

turn, be assessed—does the opinion embrace the subject which is a proper area for expert testimony; will it assist the jury; and is it itself reliable, or based on reliable materials of the type that an expert in the field typically relies on with respect to the issues.

4. Methodologic Soundness

It is extraordinary how often plaintiffs' experts simply abandon the principles of science, medicine, engineering or other disciplines in the context of litigation. In other words, they do things, or fail to do things, that they would never do, or fail to do, in the day-to-day practice of their discipline. The notion that an opinion is proper if it is couched in terms of "more likely than not" is used as an excuse for abandoning vigorous analysis. This is no small matter, and the defense experts may be one's best resource in attacking the methodologic flaws, errors and oversights committed by plaintiffs' experts.

5. Proper Extrapolation

At bottom, the question is whether the claimed basis for an opinion actually supports that opinion. Plaintiffs' expert may testify that "studies A, B and C support my opinion," but careful analysis of those studies may reveal that they say something quite different, notably including the authors' own conclusions which wholly contradict plaintiffs' expert testimony. This is why it is so important to evaluate every cited basis for an opinion to determine whether it actually lends support to the opinion.

6. Reliable Data and
7. Data of the Type

It used to be said, somewhat in jest, that "an expert can rely on anything, including the Holy Bible and Betty Crocker Cookbook, in support of an opinion," and the crucible of cross-examination can be used to test that foundation. No more. It is now well-established that an expert opinion must be predicated on a reliable foundation and proper assumptions—*i.e.*, materials which a reasonably objective expert in the field would consider and rely upon in arriving at an opinion upon the subject. Thus, inquiry should be made into, and challenges brought, where the expert is relying on weak or discredited data where stronger and authoritative literature and other materials are available.

8. The Catch-All

As with all evidence, one must give careful consideration to a challenge based on the expert opinion being unduly prejudicial, misleading, time-consuming, or cumulative. Indeed, even if the expert's opinion can pass through the first seven gates, grounds to exclude may still lie on this basis. But it is necessary to treat such arguments seriously, and not simply as a throw-away.

Strong arguments may exist to exclude an otherwise relevant and admissible opinion based on the fact that another expert is already testifying on the point; that the opinion, as expressed, would be misleading and confusing to the jury; that the expression of the opinion and its bases would take too much time in light of its importance to the case; or that the opinion would, indeed, be *unduly* prejudicial to the defense because of the manner in which it is expressed, or the subject to which it relates.

Conclusion

We hope that our thoughts have given you some ammunition in your planning for future plaintiff expert depositions. We consider these depositions to be the main event in our litigation and pre-trial practice, and hope you will consider them in a similar light. The time, money and resources which must be expended in modern litigation not only compel careful preparation and conduct of plaintiff expert depositions, they demand it.

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