

**PREPARING YOURSELF to DEPOSE THE OTHER SIDE'S EXPERT WITNESS**

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*An expert is someone who knows more and more about less and less, until eventually he knows everything about nothing.*

Anonymous

*Make three guesses consecutively and you will establish a reputation as an expert.*

Laurence J. Peter

*Where facts are few, experts are many.*

Donald Gannon

As the attorney who is preparing to depose an expert witness, you must be certain of the objectives for taking the deposition. The basic purpose for taking the deposition should be twofold: (1) to determine the expert's opinions and conclusions and (2) to undermine and limit the impact of the expert's opinions and conclusions. As one commentator has noted, other goals of the expert witness deposition may include the following:

- To determine whether the expert is qualified to render an opinion;
- To determine whether the expert has knowledge and understanding of the case relevant to the factual evidence;
- To determine whether the expert has made alternative assumptions about the factual evidence which is necessary to support his opinions;
- To determine whether the expert has admits any facts, assumptions or theories of your case;
- To determine whether the expert has a reasonable basis for his opinions;
- To determine whether the expert has relied upon accepted scientific methods and techniques for his opinions;
- To determine whether the expert has reasonably relied upon any hearsay evidence to support his opinions;
- To determine whether the expert has either authored or acknowledged any authoritative texts or articles on the subject of his opinions or conclusions;
- To lock in the expert's testimony and assure that the expert does not later offer any undisclosed opinions; and

- To determine whether, if any of the facts as the expert understands them were changed, the expert would change his opinions.<sup>1</sup>

The goal (or goals) of the deposition, and what you intend to do with the deposition once it is taken, will dictate how you will prepare for the deposition and what areas of inquiry will be covered during the course of the deposition.

### **A. Research the Law**

In order to properly prepare for the deposition of an opposing expert witness, you must know the legal elements of the case—from both the plaintiff’s perspective and the defendant’s perspective. What does the plaintiff have to prove in order to prevail at trial? What does the defendant have to prove in order to prevail on its affirmative defenses? Although you may be able to rely on memory in the simplest of cases, you should not do so in more complicated matters. If you do not know the elements of proof for a legal malpractice case, you will not know the types of questions to ask in order to explore the opposing expert’s opinions concerning the *prima facie* elements of the cause of action.

The first step in preparing to take an opposing expert’s deposition should be to review the relevant case law. Read through the jury instructions for your jurisdiction. The instructions will provide you with the elements of the cause of action and the issues instructions in particular will show you what each party has to prove in order to prevail on their respective claims. Your research into the law should also include knowledge of the evidentiary issues that apply to expert testimony. For example, determine whether your state applies the *Frye* or *Daubert* standards to the admissibility of expert opinions. Find out whether your jurisdiction allows authoritative texts to be admitted as substantive evidence. The answers to these evidentiary questions will dictate some of the areas of inquiry to be covered at the deposition of the opposing expert witness.

### **B. Research the Expert’s Experience in the Specific Field**

Most expert witnesses are savvy at litigation and have extensive deposition experience. They often pride themselves on their ability to frustrate opposing counsel during depositions and cross-examination. The best way to turn the tables on the opposing party’s expert, and to ensure that all relevant evidence is explored during a deposition, is to employ a number of methods to ensure that your knowledge of the opposing party’s expert is as detailed as possible.

#### **1. Ask Other Lawyers About the Expert Witness**

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<sup>1</sup> Daniel P. Dain, “Deposing an Expert Witness”, [http://jamespublishing.com/articles\\_forms/CivilLitigation/deposing\\_expert\\_witness.htm](http://jamespublishing.com/articles_forms/CivilLitigation/deposing_expert_witness.htm), p.1

The first thing you should do when opposing counsel discloses an expert against you is find out from attorneys in your firm if they have had cases involving the expert. Talk to the attorneys that have deposed the expert and get their input on the strengths/weaknesses of the expert. Do a quick search of your firm's computer system. Oftentimes a search of the firm's computer system can yield immediate results, especially in light of the fact that large documents, particularly deposition transcripts, are now being more frequently saved in electronic format on computerized file management systems. If the expert is from a foreign jurisdiction, contact lawyers you know in that jurisdiction and find out what they know about the expert. Have they had cases against the expert before? Have they retained the witness as an expert before? Do they have any depositions/trial transcripts, reports, C.V.'s or prior witness disclosures of the witness that they can send to you?

## **2. Review the Expert's Official Website**

Expert witnesses are creatures of public record. Most experts are actively promoting their practices on the Internet and attempting to build online relationships with the trial bar. You have to make it your job to know that record.

After consulting with other attorneys about the opposing expert, get on the computer and confirm whether the expert maintains an official website. If the expert operates such a site, it can provide a wealth of information for deposition preparation.<sup>2</sup> The expert's website will often contain information regarding the expert's articles, references and prior litigation experience. A careful review of the Web site should take place with an eye towards obtaining information which may be used to either impeach or discredit the expert witness during the deposition or at trial. Make sure that you carefully review the entire website, following all links contained on the site, in order to thoroughly review the information the expert holds out to the public.<sup>3</sup>

Input the expert's name, company name and the names of any past companies the expert has owned or operated into an Internet search engine. That approach should locate the expert's website if one exists. Occasionally, a search using the expert's name and/or the name of his company will yield a reference to a website that once existed but is no longer present on the Internet. In that case, utilize the Internet Archive's Wayback Machine (<http://www.archive.org>) to access the formerly lost site.<sup>4</sup>

## **3. Scrutinize the Expert's Curriculum Vitae**

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<sup>2</sup> James M. Dedman, IV, "Cybersleuthing Plaintiff's Retained Testifying Experts", *Trials and Tribulations* (the newsletter of the DRI Trial Tactics Committee), p. 1 (Winter 2010).

<sup>3</sup> Jannea Rogers and Nicholas F. Morisani, "Challenging Your Opponent's Expert: Due Diligence is Key", *Trials and Tribulations* (the newsletter of the DRI Trial Tactics Committee), p. 19 (Winter 2010).

<sup>4</sup> Dedman, *supra*, at p. 5.

Obtain a copy of the expert's *curriculum vitae* well in advance of any deposition of the expert. Scrutinize the *c.v.* with a fine toothed comb. Typically, in an effort to inflate their credentials, experts list numerous association memberships on their resumes. Contact those organizations and confirm that the expert is still a member of the organization. Find out from the organization what the requirements are for membership. Can anyone who pays a nominal fee be admitted to membership? Must potential members be licensed to practice for a specific period of time before being allowed to join? Is membership limited to a specific number of individuals per year or geographic location? Must an applicant be recommended by her peers in order to gain admittance into the organization? Are their annual continuing education requirements in order to maintain membership in the group?

Many associations post their membership requirements and ethical codes on the Internet. Some group's code of ethics include specific guidelines for experts to follow when testifying during litigation. In addition, knowing the standards of the professional organizations can be helpful in establishing the bias of the expert, especially if he is unaware that they exist. Accordingly, each professional organization on the expert's *c.v.* should be Googled to determine whether an ethical code or other set of guidelines for members exist. For example, the American Academy of Forensic Sciences ([www.aafs.com](http://www.aafs.com)) has a written code of ethics included in its bylaws. The code of ethics prohibits members from making material misrepresentations of education or data upon which their professional opinions are based.<sup>5</sup> The American College of Emergency Physicians ([www.acep.com](http://www.acep.com)) has established guidelines for expert witnesses and an "expert witness reaffirmation" statement. The guidelines require that an expert witness be willing to submit his or her deposition testimony to the organization for peer review. False, fraudulent, or misleading testimony can expose the physician to disciplinary action by the college.<sup>6</sup> The American Medical Association ([www.ama-assn.org](http://www.ama-assn.org)) has its own code of ethics. The AMA code of ethics contains a "fundamental ethical requirement that a physician should at all times deal honestly and openly with patients. Patients have a right to know their past and present medical status and to be free of any mistaken beliefs concerning their conditions."<sup>7</sup> The American Academy of Neurology ([www.aan.com](http://www.aan.com)) posts not only a code of professional conduct, but also a list of position statements that include "qualifications and guidelines" for members serving as expert witnesses.<sup>8</sup>

Review the expert's claimed training and licensure. Visit the website of the American Board of Medical Specialties ([www.abms.org](http://www.abms.org)) and determine whether the opposing expert has been board certified in her claimed specialty. Individual websites for medical specialties often

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<sup>5</sup> Betsey Herd and Janabeth Evans, "Preparing for the Defense Medical Expert's Deposition", *Trial*, Vol. 40, No. 5 (May 2004).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

provide information about board certification, as well as practice standards and guidelines. For example, the American Board of Psychiatry and Neurology website ([www.abpn.com](http://www.abpn.com)) walks a subscriber through the process of requesting Board status information and provides the request form online.<sup>9</sup> Two other Internet sources to check regarding Board certification: [www.certifieddoctor.org](http://www.certifieddoctor.org) (a database containing 24 Board of Medical Specialties and the names of those who have obtained Board certification) and [www.certifacts.org](http://www.certifacts.org) (an annual subscription database that contains Board certifications and disciplinary actions).<sup>10</sup> There is one other website that counsel should check when trying to determine whether an expert witness is legitimately qualified to testify: [www.quackwatch.org](http://www.quackwatch.org). This web-based database contains an exhaustive list of “quacks”, FDA warning letters, regulatory actions and “non-recommended” sources of health advice.<sup>11</sup>

Most retained experts have some type of license or certification. Visit the website of the licensing entity to confirm that the expert’s license or certification remains valid. Request written verification of the expert’s license. Contact the medical board for the state or states in which the expert is licensed. The Federation of State Medical Boards lists state boards, with contact information, at [www.fsmb.org](http://www.fsmb.org).<sup>12</sup> If the licensing entity is a governmental unit, a Freedom of Information Act request may prove fruitful.<sup>13</sup>

Experts traditionally list their publications on their *c.v.s.* Do whatever is necessary to obtain copies of their articles, books, book chapters and abstracts. Any written material generated by the expert must be carefully scrutinized for information that may either be contrary to the position taken by the expert in the case at bar or which may in some fashion be used to either impeach or discredit the witness. The PubMed database ([www.ncbi.nlm.gov/PubMed](http://www.ncbi.nlm.gov/PubMed)) contains citations and provides links to full-text journal articles on the websites of participating publishers.<sup>14</sup> The MD Consult database ([www.mdconsult.com](http://www.mdconsult.com)) integrates peer-reviewed resources from more than 75 publishers, medical societies and governmental agencies. This database offers full-text articles from 40 respected medical reference books covering a wide variety of specialties, 50 medical journals and Medline. The service charges an access fee of \$9.95 per day or \$24.95 per month.<sup>15</sup> If the expert’s publications are out of print or not readily available, look for copies on eBay, Half.com or the used section of Amazon.com. It is also possible to look for published writings by running a Google search and preceding the expert’s name with the following operator: “filetype:pdf”.<sup>16</sup> Attorneys Medical Services, Inc.

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Dedman, *supra*, p. 7.

<sup>14</sup> Herd and Evans, *supra*.

<sup>15</sup> *Id.*

<sup>16</sup> Rogers and Morisani, *supra*, p. 19.

([www.attorneysmedicalservices.com](http://www.attorneysmedicalservices.com)) maintains a website where you can locate articles and other information authored by potential experts.<sup>17</sup>

#### **4. Check Whether the Expert has Been Subject to Disciplinary Action**

There are a number of databases available for obtaining this information. Most states maintain websites that compile the results of patient or client allegations of malpractice or databases that track malpractice settlements and judgments entered against doctors in the state. [Www.claims.com](http://Www.claims.com) contains reported insurance claims. A database containing disciplinary action, malpractice suits and the status of licensing of doctors and allied health professionals can be found at [www.docboard.org](http://www.docboard.org). Questionable Doctors ([www.questionabledoctors.org](http://www.questionabledoctors.org)) is a comprehensive, publicly available databank of doctors who have been disciplined by state medical boards and federal agencies in the past 10 years. It contains data on disciplinary actions for medical incompetence, wrongful prescribing of drugs, sexual misconduct, criminal convictions, ethical lapses and other offenses.<sup>18</sup> Finally, AIM/DocFinder ([www.docboard.org/docfinder.html](http://www.docboard.org/docfinder.html)) contains licensing background and disciplinary information for physicians and other health care practitioners.<sup>19</sup>

#### **5. Look for Involvement in Personal Litigation**

Search the local docket where the proposed expert is located. Many of the county clerk offices around the country have their docket available online. A list of electronically accessible clerks' offices can be found at [www.ncsc.dni.us/NCSV/TIS/TIS99/PUBACS99/PublicAccesslinks.htm](http://www.ncsc.dni.us/NCSV/TIS/TIS99/PUBACS99/PublicAccesslinks.htm). Make sure to search both the criminal and civil dockets, using the expert's name as both a plaintiff and a defendant.<sup>20</sup>

#### **6. Locate Past Deposition or Trial Transcripts**

Nothing is more helpful than past deposition transcripts of an expert witness. In federal cases, the experts are required to provide a list of all cases in which they have testified as an expert witness at trial or deposition in the last four years. If the expert provides only the name of the party he testified for, and little else, input the name of the plaintiff or lawsuit into Google or perform a Westlaw Docket Search. Once you obtain more information about the suit, contact the clerk of the court where the case was pending, or perform an online docket search, and find out who defended or prosecuted the case. Contact that counsel and obtain any trial or deposition testimony of the expert. If the expert has a reputation for serving either the plaintiffs or the

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<sup>17</sup> Herd and Evans, *supra*.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

defense bar, it will in all likelihood be worth the effort to contact lawyers who have been on the opposing side of the expert to determine whether they can provide copies of the deposition or trial testimony given by the expert in their case. On more than one occasion an expert has been fatally impeached as a result of conflicting positions he or she has taken in cases involving the same or similar circumstances. You can also perform searches of the DRI Expert Witness Database or perform an IDEX search in an effort to locate past deposition or trial transcripts.

## **7. Conduct a Thorough Jury Verdict Search**

You should always conduct a thorough survey of verdict reporters both in your state and around the country. The National Association of State Jury Verdict Publishers ([www.juryverdicts.com](http://www.juryverdicts.com)) is an organization of publishers of jury verdict summaries from throughout the United States. The publishers collect detailed case information directly from the attorneys who tried the cases, then write concise summaries, which are used by attorneys and insurers for case evaluation.<sup>21</sup> In addition, a review of your local Jury Verdict Reporter will oftentimes reveal the winning percentage of the expert, as well as the fees the expert charges, the side upon which the expert predominately testifies, and the number of times that the expert has testified at trial in the recent past. All of this information can be used for cross-examination of the witness either at deposition or at trial.

## **8. Obtain Appellate Opinions**

An expert's name should always be entered into Westlaw or Lexis in an effort to locate prior cases in which the expert's testimony has been proffered, questioned or excluded. As different courts refer to experts in different ways, the best way to search for an expert in Westlaw is to utilize a search as follows: Steve! w/3 Kellenberger, "Steve! Kellenberger" or Kellenberger w/3 neuropsych!. Such searches ensure that counsel will uncover any result, regardless of how the court has chosen to name or characterize the expert.<sup>22</sup> Judges sometimes include information about the expert in their written opinions and may even include excerpts of the expert's testimony. This data may reveal instances where the expert has committed to certain opinions and methods or instances where the expert witness has been disqualified.<sup>23</sup>

Once counsel has located a federal or state appellate or trial court opinion referencing the expert, counsel should perform a computerized search to find the original motion concerning the expert. Such motions, especially if they are motions to bar the expert from testifying at trial,

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<sup>21</sup> *Id.*

<sup>22</sup> Dedman, *supra*, p. 7.

<sup>23</sup> Rogers and Morisani, *supra*, p. 19.



typically contain earlier versions of the expert's *c.v.*, as well as relevant excerpts of the expert's report and deposition transcripts.<sup>24</sup>

## **9. Search News and Blogs**

Expert witnesses love to be quoted in the media. If you subscribe to Westlaw, you have access to its "News" database. This is an extraordinary resource and can yield significant results. Another helpful resource, particularly for frequently encountered experts, is the Google News Alert. Counsel would be surprised to learn how often experts author Internet message board posts, letters to the editor and other articles that are available online. Counsel can set Google News Alert to e-mail them an alert whenever there is a news story or blog entry mentioning a particular expert's name. Multiple news alerts can be set to capture articles and news coverage regardless of how the expert's name appears therein. A search can be set to "comprehensive" and be made to search not just news outlets but the entire Internet, which would include blogs, miscellaneous non-news related websites, and official corporate and legal sites which may not be indexed on Google News. In addition, counsel can set the frequency of their searches to daily, weekly, or even "as-it-happens," which means that as soon as Google locates the site on which the searched terms appear, counsel receives an e-mail notification.<sup>25</sup>

## **10. Utilize Local Bar Resources**

Many of the state bar organizations, on both the plaintiff's side and the defense side, provide members with an expert witness database. Such local bar resources, when they do not provide an expert witness database, often provide links to other websites offering expert witness resource tools. In addition, state defense and plaintiff's organizations will also send out an e-mail blast to members of the organization asking for information about a particular expert.<sup>26</sup> Take advantage of these resources.

## **11. Search Expert Witness Databases**

Several of the national bar groups, DRI and ATLA included, maintain expert witness databases. For example, the database maintained by the Defense Research Institute (DRI) contains information on over 65,000 plaintiff and defense experts. Once counsel finds the desired expert in the database, she will have access to a variety of information about the expert. Previous depositions, trial transcripts, *curriculum vitae*, and the expert's contact information are

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<sup>24</sup> Dedman, *supra*, p. 7.

<sup>25</sup> *Id.* at pp. 6-7.

<sup>26</sup> Rogers and Morisani, *supra*, pp. 17-18.

ready for download. In addition to the foregoing, counsel will also find the identities of DRI members who previously inquired about or used the particular expert.<sup>27</sup>

## **12. Use Independent Pay Sources**

Although they will add to the overall litigation costs, independent pay sources are also an option that counsel should consider. IDEX allows defense attorneys to tap into a nationwide network providing a wealth of information pertaining to expert witnesses. Attorneys using the IDEX system have two options: conduct a “do-it-yourself” search through Lexis or have the IDEX staff conduct the search through the Full Service feature. Using the self-search option, those with a Lexis ID can search not only the portion of IDEX content made available to Lexis users, but also additional material from sources such as *Daubert* Tracker and Martindale-Hubbell. When using the Full Service feature, the attorney provides the name of the expert and a few details about the case and submits a request specifying the types of searches desired. If the particular expert is found in the database, the requesting attorney will receive a concise report, usually within two to three business days, from which additional information can be ordered as necessary.<sup>28</sup>

In July of 2009, the TASA Challenge History Report began providing attorneys access to a much more concise database—one that is limited to past challenges to expert witness testimony. The database includes all federal and state evidentiary standards dating from 1993 to the present and the TASA research staff performs the search for attorneys. As one set of commentators has noted, “The database is particularly useful in that it focuses on challenges made in unreported cases which are otherwise difficult to find.”<sup>29</sup> The reports costs a flat fee of \$45.00 per report, including all supporting documents, and the reports are returned within one business day.<sup>30</sup>

### **C. Issue a Request to Produce to the Other Side to Obtain the Expert’s File**

In order to properly prepare for the opposing expert’s deposition, you need to carefully review the expert’s file regarding the case. Issue a request to produce to the other side and ask them to produce the plaintiff’s file. I have attached a sample request to produce to these materials as Appendix A. Make sure the request is issued in enough time that you will have at least 7 days before the deposition to review the file materials. If you cannot obtain the expert’s file materials pursuant to a request to produce, issue a subpoena for the file. Take time to carefully review what is in the file. Does the file appear complete? Is there anything missing?

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<sup>27</sup> *Id.* at p. 18.

<sup>28</sup> *Id.* at pp. 18-19.

<sup>29</sup> *Id.* at p. 19.

<sup>30</sup> *Id.*

Ask yourself why each item in the file is included there. See if you can figure out where each item in the expert's file came from (look for fax transmission numbers, notations, etc.).

#### **D. Carefully Review the Expert's Report or Witness Disclosure**

It should go without saying that in order to properly prepare to take the deposition of the opposing party's expert, you have to take the time to carefully read and evaluate the expert's report. Start with a careful evaluation of the "facts" cited by the expert in support of her opinions. Has the expert reviewed all of the facts involved in the case? Has he mastered the facts and is he able to sufficiently explain how the facts of the case support his opinions in the case? Contrary to FRE 702's parameters for expert testimony, an expert's testimony does not assist the trier of fact to understand the evidence or to determine a fact in issue, if he merely takes "facts" reported to him by the attorneys in the case and offers commentary based on those "facts." Furthermore, to the extent that the expert is able to reach authoritative sounding conclusions without conducting a single interview, a review of the applicable literature or a single experiment, his opinions are likely unreliable under *Daubert* and merely his own *ipse dixit* (meaning that resolution of the factual issues in question mean what he says they mean because he says so).<sup>31</sup> Try to establish whether the expert's opinions were developed expressly for the purposes of testifying in this case or if the expert's opinions arise out of research he has conducted independent of the litigation.

Are the expert's opinions supported by citations to the factual record: medical records, deposition transcripts, physical therapy records, examination notes? Are there legitimate bases for the expert's opinions and are they articulated in the report?

Question the expert's qualifications. Does the expert report establish the expert's personal expertise in the subject matter involved in the case. I was defending a medical malpractice case some years ago and I realized after reviewing the plaintiff's expert's report that he had not performed surgery for several years prior to the operation in question and had never used the type of medical device that was at issue in the case. The expert's lack of recent surgical experience and his complete lack of familiarity with the medical device in question severely undercut his opinions that my client was negligent in performing the surgery (which he performed several times a week) and in the way he used the device in question.

Evaluate the expert's specialty. Is he a member of the Board of Orthopedic Olympic Reconstruction or Neurologic Best Evaluation? Perhaps the expert states in the report that he is the president of the American Certified Neuro Ortho Evaluators. Careful scrutiny may reveal that not only is the expert the president of the group—he is the only member.

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<sup>31</sup> Eugene Radcliff and Jeffrey B. Crockett, "A Practical Look at *Daubert*, *Voir Dire*, and Report Preparation Issues re Expert Witnesses", *Trial Practice Journal*, Volume 20, No. 1, p. 4 (Winter/Spring 2006).

Did the expert perform any tests to support her conclusions? If so, are the tests legitimate? You've never heard of the Neuro-Skeletal Diagnosticator? Contact a local medical school or teaching hospital, or better yet, your own expert, and ask about the tests or the testing devices. If no one else has ever heard of the test or the device, chances are the results are bogus.

If testing was performed, were proper protocols followed? If testing devices were used, were they properly calibrated prior to the test? Was the testing performed by the expert witness or by someone employed by him? Many tests must be performed by licensed professionals, not untrained or unlicensed assistants. If the testing was performed by someone who was not licensed to perform it, all of the results and the entire report are suspect.

Carefully review the name on the report. If the expert is associated with a facility, is the name deliberately contrived to appear to be associated with a more well-known facility? The Mayo Brothers Clinic? Northwestern Memorial Clinic? Sometimes this is a real clue as to when the entire report should be questioned.

Determine whether the expert reviewed EVERYTHING in the case. In that medical malpractice case mentioned above, I noted when reviewing the expert's report that the expert had reviewed very little prior to drafting his report. He had not reviewed all of the plaintiff's medical records. He had failed to review any of the depositions in the case, including the plaintiff's deposition and the deposition of the plaintiff's main treating physician. He had failed to review the plaintiff's complaint (so he really had no idea what the plaintiff's theory of liability was in the case) and he has not reviewed the plaintiff's (or the defendant's) discovery responses. Although the use of a medical device was at issue in the case, the expert had failed to obtain and review the operating manual for the device (despite the fact that the expert opined that my client had used the device improperly during surgery). All of this was used to maximum effect when the "expert" physician was examined at his discovery and evidence depositions.

Figure out if the expert is offering opinions outside her area of expertise. Is a general surgeon offering opinions about the standard of care applicable to an anesthesiologist? Is a nurse practitioner offering opinions about the actions of a general surgeon? Is a general practitioner offering opinions about epidemiology? Overreaching is a sure way to beat up an expert at deposition and can serve as the basis to have the witness barred from testifying at trial.

Investigate whether the expert is relying on data or documents that are not pertinent to the date on which the event occurred. For example, is the expert basing her opinions on a standard or rule or regulation that was not in effect at the time of the plaintiff's injury? I had a medical malpractice case several years ago where the plaintiff's expert was relying on a certain set of standards in support of his opinion that the defendant doctor had deviated from the standard of care. It turned out that the standards the expert was relying on were not promulgated until eight months after the defendant had stopped treating the plaintiff.

Determine whether the expert's report ignores the opposing side's theory of the case. Whenever I retain an expert witness, and I have that expert prepare a report, I ask the expert to acknowledge the other side's theory of the case AND THEN EXPLAIN why that theory of the case is hogwash. When an expert doesn't acknowledge the other side's theory of the case I think it makes the expert look like an advocate, instead of an unbiased expert whose opinions happen to favor the party who retained her.

Finally, to the extent that you can, try to figure out who actually wrote the expert's report. Some cases contain language that suggests that ghostwriting of an expert's report by counsel is improper. In *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611 (D.N.J. 1989), the attorney wrote the report for the medical expert. The attorney sent an unsigned version of the report to the expert marked "PLEASE HAVE RE-TYPED ON YOUR STATIONARY." The court in *Occulto* said that it was not aware of "another case in which the attorney has ...[prepared] a verbatim self-addressed expert report." *Id.* at 615. In *Jackson National Life Insurance Premium Litigation*, 2000 WL 33654070 (W.D. Mich. 2000), counsel used the same expert witness with the identical report in two different cases. The court found that "the report [did] not contain a statement of [the expert's] opinions in his own words" and that "counsel's participation" so exceeded "legitimate assistance" as to violate Federal Rule of Civil Procedure 26(a)(2). *Id.* Although the attorney drafting the expert's report may not result in the report being stricken, the fact that the proposed expert did nothing more than rubberstamp a report written by counsel can provide you with a great deal of fodder for cross-examination at the expert's deposition.

#### **E. Consult with Your Own Expert About the Opposing Expert's Report**

If you have already retained an expert to help you in prosecuting or defending the case, work closely with that expert in analyzing the opposing expert's report. Ask your expert to help explain the pertinent scientific and technical issues and to help critically analyze the report. Use your expert to finalize the areas of inquiry to be covered at the opposing expert's deposition. Find out from your expert if the theories being asserted by the opposing side's expert have been tested (or are testable), have been peer reviewed, and are generally accepted in the scientific community.

#### **F. Prepare a Detailed Outline of Questions to be Asked**

The final task to be completed prior to going in and taking the deposition is the preparation of a detailed outline of questions to be asked of the expert witness. This outline should be a guide only—it should not be adhered to unwaveringly. Depositions are fluid experiences; as an examiner, you must listen to the answers that are being given and, when necessary, follow up with additional questions. Although outlines will vary from case to case

and expert to expert, there are certain subjects which should always be included as areas of inquiry on a proposed deposition outline, including the following:

**Daubert or Frye issues.** Has the expert actually applied a recognized scientific method? Has the technique been tested in actual field conditions (and not just in a laboratory)? Has the technique been subject to peer review and publication? What is the known or potential rate of error? Is it zero, or low enough to be close to zero? Do standards exist for the control of the technique's operation? Has the technique been generally accepted within the relevant scientific community?<sup>32</sup> Ask the expert if she believes most of her peers would agree with her opinions/methodologies/theories. Be prepared to inquire whether there is a majority and minority view on this question. If so, to which view does the expert subscribe? Does the expert agree that the other point of view is also considered acceptable or respectable in the field?

**Key assumptions and variables.** What are the foundations of the expert's ultimate conclusion? Are any of those foundational elements based on assumptions or calculations that can be explained? After identifying each of the foundations of the expert's opinion, what would the effect be in one or more of those points were not correct? Can the expert quantify that effect? How far is the expert prepared to go in saying that her opinion survives even if the foundations for that opinion are proved false?<sup>33</sup>

**Scope of analysis.** Your examination should exhaust all the opinions that the expert intends to offer at trial, the grounds for each opinion and the methodology used to arrive at the opinion. Ask the witness for the factual basis for each opinion. Ask if any assumptions were made concerning the facts and, if so, have the expert explain the assumptions in detail. Be prepared to have the expert explain the reasoning process from facts to conclusions. Lock in the expert by asking open questions such as "Did you conclude anything else?" and "Is that all you considered?" Test the completeness and candor of the expert by asking whether, if time permitted, there is any additional analysis or fact review the expert would like to undertake in order to confirm or test her opinions. Press the expert on how much time the expert, as opposed to the expert's staff, has actually devoted to the matter. If the expert testifies that additional time or analysis is not necessary, challenge the expert to explain why further analysis and understanding of the facts would not improve the analysis.<sup>34</sup>

**Background and Qualifications.** Where and when was the expert trained? What degrees or certificates were awarded? Ask about licenses, professional memberships, involvement in industry organizations. Has the expert testified on the same issue in the past? Has the expert published a peer reviewed paper on the topic at issue? Has the expert ever taught

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<sup>32</sup> Jack G. Stern, Kimo S. Peluso & Laura B. Stamm, "Expert Depositions", Taking and Defending Depositions 2010, p. 166 (PLI 2010).

<sup>33</sup> *Id.* at p. 167.

<sup>34</sup> *Id.*

a course or given a speech in that area? Has any of the expert's prior work used a different or inconsistent approach? Consider asking about background not disclosed by Rule 26, such as litigation, criminal convictions, whether the witness has ever been fired, and witness engagements older than four years.<sup>35</sup>

**History as an Expert Witness.** Has the expert been accepted as an expert in any field by a court? If so, when, where, which court(s)? How often does the witness testify? Does he testify more frequently for plaintiffs or for defendants? How much money does the witness earn from testifying as an expert? How much of the expert's time is spent on legal work? Has the expert ever testified for your opponent before or ever been represented by opposing counsel?

**Terms of engagement, drafting of report and preparing to testify.** Unless you are concerned about your own expert's responses to these questions, consider asking about the expert's compensation agreement, how long after being retained did the expert reach her conclusions, how much time was devoted to the assignment, who actually drafted the expert's report and the exhibits to that report, and whether there were any subjects the expert was asked to opine upon but declined.<sup>36</sup> Find out specifically what the expert was asked to do and when. Ask the witness to describe what he thinks was supposed to be done. If the assignment was in writing, make sure you have a copy of the writing. If the witness was asked to answer specific questions, you need to find out what those specific questions were.

**Outside Help.** Did the expert function alone or did she have help? If others were involved in performing experiments or formulating opinions, you need to find out who they were, what their qualifications were and what they did.<sup>37</sup> Did these others work under the supervision of the expert? How were the results of the others' efforts reported to and used by the expert?<sup>38</sup>

**Authorities.** Be prepared to ask if there were any authoritative or persuasive sources used in formulating the expert's opinions? Have the expert identify the exact source—author, title, publication, date of publication.<sup>39</sup>

**Lack of knowledge.** If it often difficult for a testifying expert to master the evidentiary record. Accordingly, even the most accomplished expert can usually be challenged concerning facts the expert either does not know or did not consider. You will also want to test the expert's knowledge of published literature in the relevant field, particularly if the expert has staked out a position without supporting in the literature. You can have the expert acknowledge the respected publications and authorities in her field. After establishing the relevant universe, you can then

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at p. 168.

<sup>37</sup> Clifford L. Somers, "Deposing an Adverse Expert: Hammers and Nails", *For the Defense*, p. 24 (July 1989).

<sup>38</sup> Stern, *supra*, p. 168.

<sup>39</sup> Somers, *supra*, p. 26.

ask if the expert knows of any prior publication that expresses the view that the expert has adopted in your case.<sup>40</sup>

**Contradictions.** It is especially effective to confront the expert with any contradictory statements by fact witnesses who testified on behalf of the party that hired the expert. Before challenging the expert with that testimony, you will want to establish that the expert respects the judgment, experience and knowledge of the other side's fact witnesses. You will also want to expose or ask questions that create inconsistencies with other experts retained by same side. A damages expert, for example, may contradict the other side's arguments on certain liability issues.<sup>41</sup>

I have included an example of an expert witness deposition outline in Appendix B.

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<sup>40</sup> Stern, *supra*, p. 168.

<sup>41</sup> *Id.*



## **APPENDIX A**

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

WILLIAM EICCHOLZ,	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 00 L 009171
	)	
JOHN KRITSAS, M.D.,	)	
REBECCA PRESTON, M.D., and	)	
HINSDALE HOSPITAL,	)	
	)	
Defendants.	)	

**SUPPLEMENTAL REQUEST FOR PRODUCTION OF DOCUMENTS ADDRESSED  
TO THE PLAINTIFF**

NOW COMES the defendant, JOHN J. KRITSAS, M.D., by and through his attorneys, WILLIAMS MONTGOMERY & JOHN LTD., and hereby requests that the plaintiff, WILLIAM EICCHOLZ, produce to the defendant for inspection and copying, at least seven (7) days before the deposition of the plaintiff's expert witness(es), the following materials:

- a. Each and every document, item, photograph, or other tangible object supplied to the Controlled Expert Witnesses or made available to them for their investigation or inspection as expert witnesses in this suit.
- b. All maps, logs, depositions, statements, and any other material supplied to the Controlled Expert Witnesses or made available to them for their investigation as an expert witness in this suite.
- c. All correspondence supplied to the Controlled Expert Witnesses or made available to them, including all correspondence between plaintiff's counsel and plaintiff's Controlled Expert Witnesses.
- d. Each and every book, treatise, periodical, article, standard, regulation, brochure, guide, and/or pamphlet upon which plaintiffs' Controlled Expert Witnesses may rely or cite as authority for any opinions held or expressed by them pertaining to

this lawsuit or which the plaintiffs' Controlled Expert Witnesses consulted in this case.

- e. All materials reviewed by plaintiffs' Controlled Expert Witnesses in connection with this case regardless of whether they decided to rely upon it as a basis for any opinion.
- f. Transcripts of fact witness depositions taken in this case.
- g. Witness statements obtained in the case.
- h. All papers, diagrams, drawings, illustrations, tangible objects, slides, photographs, or other documents which contain information relevant to any issue involved in this lawsuit and which may be used by plaintiffs' Controlled Expert Witnesses as an exhibit in the trial of this case.
- i. All reports, tests, test results, raw data, graphs, models, or tangible things prepared by, used by or reviewed by plaintiffs' Controlled Expert Witnesses which form the basis, in whole or in part, of their opinions or testimony.
- j. All work papers, notes and documents in plaintiffs' Controlled Expert Witnesses' file dealing with this lawsuit and any preliminary report(s).
- k. All agreements or contracts between plaintiffs' Controlled Expert Witnesses and plaintiff or any attorney for plaintiff regarding his fee as an expert witness in this lawsuit.
- l. All of the Controlled Expert Witnesses time sheets, billing statements, or invoices reflecting charges for their services rendered in this lawsuit.
- m. All the Controlled Expert Witnesses' curriculum vitae and/or resumes.
- n. List of all lawsuits in which the Controlled Expert Witnesses have testified as either an expert or fact witness.
- o. List of all lawsuits in which the Controlled Expert Witnesses have given deposition testimony as an expert or factual witness.
- p. Each experts' license.
- q. Applications for continuing education credits for seminars and courses attended.
- r. All of the experts' published abstracts, articles, book chapters and books.
- s. All materials presented at professional meetings covering the issues in the case.

Respectfully submitted,

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Bradley C. Nahrstadt  
Counsel for the Defendant

Bradley C. Nahrstadt  
Williams Montgomery & John Ltd.  
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(312) 443-3200

## **APPENDIX B**

## DEPOSITION OUTLINE

### I. CONTENTS OF EXPERT'S FILE

*Mark the File as an Exhibit*

*Ask the Expert to Identify all Contents of the File*

*Ask the Expert to Identify all Time Sheets/Time Records/Billing Records in the File*

- Are there any other documents or materials that you have reviewed in forming your opinions that are not included in this file?
- Are there any other documents or materials that you have reviewed in preparation for your deposition that are not included in this file?
- Have any materials been removed from your file based on the grounds of privilege?

#### **Records**

- From what source were the records in the file derived?
- Are they copies and, if so, from what source were they copied?
- Are you expecting to examine more records and if so, what records, when and from where?
- Were there any records that you wanted to review but could not get or were not provided?

#### **Literature, Tables, Standards**

- From what source were these materials received?
- Who obtained them?
- Were copies retained by the witness?
- Is this material authoritative, useful, persuasive, generally relied on in the industry?
- Are you aware of any literature that is relevant but still in preparation or in the process of being published? Get details.

#### **Specific Product at Issue (if a products liability case)**

- Did you examine the product that allegedly injured the plaintiff?
- How was it obtained? Trace the chain of custody.
- How was it identified?
- Did you take any photographs of the inspection? Are they part of this file?
- If you examined a similar product, but not the one involved in the case, what differences were there?
- Where and how was the similar product obtained?
- Did you perform any testing?

- Are the results of the testing contained in the file?
- Did the testing result in the destruction or alteration of the product at issue?
- Did you record the results of the destruction or alteration?

### **Oral Information**

- Did you obtain any information about the case orally?
- From whom did you obtain the information and when was it obtained?
- What information was obtained?
- What part did this information play in formulating your opinions?
- What notes or records were made of this information? Are they part of the file?
- If not, what happened to the notes or records?

### **Other Materials**

- What other materials or information were gathered or used?
- When and where and from who were they obtained?
- Where are these materials now?
- Is anything else expected and if so, what, when and from whom?

### **Written Reports**

- Have you prepared any written reports other than the one dated \_\_\_\_\_?
- Have you been asked or are you planning to prepare any supplemental reports?
- Of the materials contained in your file, were any of them obtained by you for the first time after you issued your written report in this case?
- Has any other information or testimony that has been developed in this case after your report was issued been shared with you? When and by whom?
- What other information or testimony was shared with you?
- Have any newly received materials or recently developed information in any way affected or altered the opinions set forth in your written report?

## **II. EXPERT QUALIFICATIONS AND EXPERIENCE**

*Questions should focus on the expert's education, training, experience, skill and knowledge.*

### **Personal Information**

- Name
- Home address
- Business Address
- Current Employers
  - Identity of employer

- Nature of employer's business
- Employer's affiliation with any party
- How long employed there
- Job titles and duties
- Expert's reporting relationships (up and down)
- Usual hourly rate billed by employer for expert's services
- Usual hourly rate paid by employer to expert
- Document retention policies of employer
- Member of any professional organizations?

### **Education**

- For each college or graduate school attended:
  - Name of School
  - Years attended
  - Major or Concentration
  - Degree
  - Subject of thesis or dissertation
  - Any courses in subject of litigation
  - Honors, prizes, fellowships, etc.
  - Teaching work while attending school
- Professional seminars, continuing education, etc. re: subject matter of suit
- Have you ever taken any courses or received any education regarding the product at issue in the case?
- Is your expertise taught anywhere or is it part of any recognized curriculum?
- Do you believe that the facts of this case are beyond the ken of the average juror such that a person with specialized knowledge, skill or education must explain them?

### **Professional Organizations and Societies**

- Earned membership?
- Voluntary membership?
- How selected for membership in each organization?
- Criteria for membership?
- Certification?
- Standards or government committee membership?
- Relationship to plaintiff, defendant and/or industry?

### **Licenses and Certifications**

- Issuing authority
- Any tests or training?
- Dates issued?



- Period of renewal?
- Requirements for renewal?
- Any disciplinary actions, suspensions, revocations, etc?

### **Employment History**

- For each position:
  - Identity of employer
  - Nature of employer's business
  - Employer's affiliations with parties
  - How hired
  - How long employed there
  - Job titles and duties
  - Expert's reporting relationships (up and down)
  - Nature of compensation (salary, hourly, etc.)
  - Why did the expert leave?
- Have you ever designed or manufactured the product at issue in this case or worked for a company that did so?
- Have you ever worked with the product at issue in the case in any capacity outside of litigation?

### **Publication History**

- Does expert's report/*curriculum vitae* list all publications in the last 10 years?
- Which publications are germane to the expert's work on this case?
- Any previous publications (more than 10 years old) germane to expert's work on this case?
- For each publication identified as pertinent:
  - Did any publisher or journal reject the publication?
  - Was the publication peer reviewed?
    - By whom?
    - Any comments during the peer review process?
    - Any revisions resulting from the peer review process?
- Drafts retained?
- Anything in the article that the expert would now want to change or revise?
  - If yes, has the expert done that?
  - If not, why not?
- Identification, qualifications, roles of co-authors and others who assisted.
- What generated expert's interest in the area?
- How would expert summarize the publication's thesis or content?
- Further research:
  - Did publication identify need for any?
  - Why or why not?
  - Was there, in any case, a need for any further research?
  - Why or why not?

- Has any needed further research been done?
- If yes, identify; if not, why not?
- Does the expert know how frequently the publication is cited?
- Has anyone requested the right to reprint it?
- Is the expert familiar with any literature that expresses contrary views or that reaches contrary findings?
  - Citations
  - How and why does the expert differ from the literature that expresses contrary views ?

### **Specific Qualifications Regarding the Product in Question**

- When was the first time you ever inspected/dismantled the product in question?
- At whose request did you do this?
- How many times have you inspected/dismantled the product?
- Have you ever written an article or other published work regarding the product at issue?
- Have you ever read any articles in scientific or professional publications regarding the product at issue?
- Have you ever read an article that supports the theories you have asserted in this lawsuit?
- Have you ever done any experiments or testing related to the theories you have asserted in this lawsuit? If so, describe the circumstances and outcomes in detail.
- Have you shared the results of your experiments or testing with any professional or scientific organization for the purpose of peer review? For any other purpose?
- Are you aware of any other peer reviewed study that supports the assertions you are making in this lawsuit?

### **III. CAREER AS AN EXPERT WITNESS**

- Does expert's report identify all cases where expert has testified at trial or by deposition in the last four years?
- Any other cases in the last four years where expert prepared a report but did not end up testifying?
- Any previous cases similar to this one?
- For each case:
  - Subject matter of the case
  - Subject matter of the testimony
  - For whom did the expert testify?
  - What law firm retained the expert?
  - Did the expert prepare a report?
  - Who assisted in the preparation of the report?
  - Was the expert deposed?
  - Did the expert testify at trial?

- Were there any motions to exclude the expert's testimony? Result?
- How was the expert compensated?
- Have you ever acted as an expert witness in a case involving \_\_\_\_\_?
- Have you ever been qualified in court to testify as an expert in a case involving \_\_\_\_\_?
- Have you ever failed to qualify or been disqualified by a judge in any case? Obtain details.
- Have you ever given a deposition in a case involving \_\_\_\_\_?
- Do you have in your possession any deposition or trial testimony transcripts?
- Have you reviewed any of those transcripts recently? Have you reviewed them in preparation for this deposition?
- Do you consider yourself an expert in the field of \_\_\_\_\_?
- Why?
- Have you ever acted as an expert witness in the field of \_\_\_\_\_ in litigation?
- Have you ever testified in a deposition or at trial as a \_\_\_\_\_ expert? Obtain details.
- Do you work predominantly for one side or the other?
- How much time do you spend serving as an expert witness?
- Frequency that you have worked with this attorney/law firm?
- Do you advertise your services as an expert witness? Where? How much does that cost?
- Do you belong to any expert witness databases or services? Which ones? How long? How much does that cost?

#### **IV. INITIAL RETENTION IN THE CASE**

- On what date were you first contacted about this case?
- Who contacted you?
- How was the contact initiated?
- Had you previously known or worked with the person/firm who contacted you?
- How did this person/firm know about or come to contact you?
- Was anyone else present during this initial contact?
- Were you retained to render an opinion on this first occasion?
- What were you initially told about the facts of the case?
- What reliance did you place on those facts?
- What facts did you think were particularly important during this initial consultation?
- How long did the initial consultation last?
- What documents were you shown?
- What photographs were you shown?
- Did you render any preliminary opinions during this initial consultation?
- What were they?
- What arrangements did you come to regarding your fees?
  - How much charge per hour?

- Set charges for depositions/ trial testimony/file review?
- How much have you been paid so far?
- How much have you billed so far?
- What percentage of your income comes from legal work?
- What was your understanding of your assignment?
- Did you do all you were asked to do in this case?
- Did you do anything beyond what you were asked to do?
- Did you request any additional materials from the attorney? What?
- Did you receive them? When?
- What was important about the information you requested?

## **V. WHO GATHERED INFORMATION FOR THE EXPERT?**

- Did you personally do all the work that led to your opinions?
- Give the full names, addresses, titles and qualifications of others involved in gathering and evaluating data.
- What did each of these people do?
- Were you actively involved in their work or did you supervise?
- Were you present at all times when they performed their work?
- Give the names, addresses, titles and qualifications of any independent consult whose input was received by you.
- What did they provide to you or produce for your review?
- How was it used?
- Explore qualifications and hearsay problems.

## **VI. WHAT WAS DONE?**

- Did you interview the plaintiff?
- Did you interview any other witnesses?
- Do you have your notes of those interviews?
- Did you review any investigative or accident reports regarding the matter in question?
- Did you interview any of the investigating officials?
- What information did you obtain from the individuals you interviewed?
- Did you inspect the scene of the accident before formulating your opinions?
- Did you inspect the scene of the accident after you formulated your opinions?
- Did you inspect the product in question?
  - When?
  - How long?
  - What was done during the inspection?
  - Did you take the product apart during the inspection?
  - Were any component parts removed?
  - Did anyone else take the product apart or remove component parts?
  - When? Who did that?
  - Who has the parts now?

- How much time did you spend on the inspection?
  - Did you take any notes of the inspection?
  - Did you take any photographs?
  - Where are they?
  - Were they produced as part of the file?
  - Who was present during the inspection?
  - Did you follow a particular methodology for inspecting/dismantling the product at issue?
    - Explain the methodology. How did you arrive at that methodology?
    - Did you begin the inspection with a cause in mind or suspected cause in mind?
      - Did anyone express a suspicion in advance of the inspection as to the cause of the accident?
      - Did you go into the inspection with your own opinion as to the cause of the accident in mind?
        - What was that opinion?
- When did you review the material supplied to you?
  - What did you learn of any significance?
  - How much time did you spend on the initial review?
  - Did you feel that you were unqualified to give opinions after you reviewed the material?
  - After having studied the materials, did you recognize any inherent conflicts between the position you knew the lawyer wanted you to take and the positions you have taken in other cases?
  - Have you ever testified against the hiring attorney's client or any industry groups of which the client is a member?
  - Did you go to any outside sources for information? Why?
  - What were these sources?
  - Did you determine that you needed experiments, onsite visits, advance laboratory studies, photographic studies, further testimony from key witnesses, etc. and if so, why?
  - What experiments/inspections/studies did you conduct?
  - How much time was spent on these experiments/inspections/studies and what was the involvement of the attorney in approving the experiments/inspections/studies or dealing with their results?
  - Did you discard any such experiments/inspections/studies as unnecessary, too costly, or unlikely to give the "right" answer?
  - Did you need any additional information before providing your opinions?
  - What did you expect or hope this additional information would show?
  - Are you aware of any conflicts or controversy within the profession or within the professional literature over your theory/approach/conclusions?
  - At what point did you decide you had enough information to finalize your opinions?
  - How did you proceed to finalize your opinions?

- Are there any calculations, photographs, experiments, etc. which you conducted but which do not form the bases for your opinions? What are they?
- Are there general subject areas which at the beginning of the assignment you thought you would be investigating but which are not part of your final opinions?
- Did you make any preliminary findings, conclusions or opinions that you have discarded? What are they?
- Did you communicate those preliminary findings, conclusions or opinions to the attorney who hired you?
- Are your final opinions based solely on the facts you have been supplied or that you have discovered, or are they also based on assumptions that you have not tested? If so, why do you accept these assumptions?
- Where are these assumptions recognized as reliable or accepted?
- Are you finished with your investigation?
- Are you prepared to express your professional opinions in this case?
- If not, what else must be accomplished and why?
- If the opinions to be expressed at the deposition are preliminary, when will you finalize your opinions?
- Will you be issuing a supplemental report?
- Is there any other work you anticipate doing in the future? *If the expert says that he will be reading the opposing expert's report, establish that this expert's additional opinions will be limited to a critique of the opposing expert's opinions and that there will be no new original opinions disclosed.*

## **VII. PREPARATION OF THE EXPERT'S REPORT**

- What was your process for preparing your report?
- Did your process for preparing your report in this case differ from your process in preparing any expert witness reports you have prepared in other cases? How so?
- Who did the actual writing of the report?
- Did anyone else help in preparing the report?
- Did counsel who retained you help draft the report or completely draft the report?
- How much time did you spend drafting the report?
- How many drafts were there of the report?
- Is your final report shorter or longer than the previous draft reports? By how much?
- Did you receive any written comments from anyone about your report (drafts or final)?
- From whom? What were the comments?
- Did you save any of the drafts or written comments?
- What changes did you make to your report based on the comments you received?
- Did you reach any conclusions that did not make it into your final report? What are they?
- Were you asked for your opinion on any topics that are not addressed in the final report?

- Can you point to any language in your final report that are not your words or were written by someone else?

## VIII. THE OPINIONS

### Lay Them Out

- What are the opinions you have formed in this case?
- Read the list back—have I listed all your opinions in this case?

### For Each Opinion

- What is the basis for each opinion (facts; knowledge, experience, training or education of the expert; scientific methods or techniques; scientific texts or standards)?
- Who assisted you in developing this opinion?
- Did counsel help formulate this opinion?
- What facts/data underlie the opinion?
- Tell me about all of the assumptions that underlie each opinion.
- Does your report list all the data considered? If not, why not?
- Where did you obtain the data you relied on in formulating the opinion?
- Explain to me the reasoning process for each opinion—how did you go from the facts to your conclusions?
- Explain to me the causal or other relationship between the opinion and the case.
- What about your knowledge, education, training, or experience supports this particular opinion?
- Did you review and/or rely on any literature to formulate this opinion?
- For each publication the expert relies on:
  - Who published it?
  - Can expert summarize pertinent information, theory or methodology from the publication?
  - Is the expert familiar with the author's reputation, experience, etc.?
  - Was the publication peer reviewed?
- Can the expert state every methodology relied upon in formulating the opinion?
- For each such theory or method:
  - Is the expert an expert in the particular theory or methodology?
  - Can the expert identify any literature supporting it?
  - Can the expert summarize the theory or method?
  - Has the method or theory been tested?
  - Can the method to theory be falsified?
  - Have they ever been subject to the peer review process by colleagues in the same field?
  - Have the expert's methods or techniques been published in a peer reviewed journal or text/
  - Does the method or theory have a known error rate?

- Are the expert's methods or techniques generally accepted in the relevant field?
- Do standards exist for the techniques or methods used?
- Are you aware of any dissenting views? If so, where can they be found?
- How would you respond to the dissenting views?
- What is the context in which your theory or method is usually applied (litigation, research, etc.)?
- Are there certain kinds of questions that this theory or technique cannot answer (e.g., causation, fault, etc.)?
- Have you ever done work in this area outside the litigation context?
- Would any theories or methods that you did not use be potentially pertinent?
  - Why did you not employ these theories or methods?
- Does your report recite every step taken by you to reach your opinions?
- Is every step recited with enough specificity that another expert in the same field could duplicate the results?
- Does your report contain a complete statement of all of the bases for your opinions?
- Were there any false trails or abandoned approaches?

### **Close the Door**

- Have all your opinions and the bases for those opinions now been explored?
- If not, what else is there?
- Do you feel that you have been given a fair chance to state these other opinions and the bases for those opinions?
- Is there anything else you would like to add so as not to be misunderstood?
- What is the expert NOT opining on (liability, causation, etc.)?

## **IX. DEPOSITION PREPARATION**

- What did you do to prepare for your deposition?
- How did your preparation differ from times you have been deposed in the past?
- Who did you talk to?
- What did you read/review?
- Were you prepared by counsel for your deposition?
- How many sessions were there?
- How long did they last?
- Who else was present?
- What was discussed?
- Were you shown any documents? Which ones?
- Did you ask any questions during the preparation session?
- What questions did you ask?
- Did you discuss what questions you could expect during the deposition?
- Did you discuss how you would answer any particular questions?
- Did you discuss how to answer questions about:



- Your qualifications?
- Your prior experience as an expert?
- The process of preparing your report?
- What documents you reviewed or which individuals you talked to?
- What facts you were relying on and what facts you thought were not pertinent to your report?
- About your methodology?
- About your conclusions?

## **X. COMMUNICATIONS WITH COUNSEL**

- Statement of expert's assignment.
- Any restrictions on assignment?
- Any communications re: *Daubert* or *Frye*?
- Provided with counsel's theory of the case?
- Involvement of attorney in formulating opinions/drafting report.
- Involvement of attorney in preparing for deposition.

## **XI. AGREEMENT WITH YOUR EXPERT**

- Would you agree that my expert is qualified to offer the opinions that he or she has offered?
- Would you agree that my expert is well qualified in the field?
- Would you agree that certain treatises relied upon by my expert are authoritative?
- Would you agree that the methodologies followed by my expert are valid?
- Would you agree that the methodology followed by my expert has been tested?
- Would you agree that the methodology followed by my expert has been peer reviewed?
- Would you agree that the methodology followed by my expert has been published in a peer reviewed journal?
- Would you agree that the rate of error in the methodology followed by my expert is within acceptable norms?
- Would you agree that the methodology followed by my expert is generally accepted in the field?