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ABA TORT TRIAL & INSURANCE PRACTICE SECTION

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Getting The Most Out Of Expert Discovery

By: Daniel B. Rosenthal, Akerman LLP

Part 1: Exploring Qualifications and Serving Interrogatories

The following article will be featured in an upcoming edition of the TIPS Business Litigation Committee Newsletter.

Too often, attorneys treat experts as the magical portion of the case, a world beyond. Sometimes, they fear the magic. Alternatively, they fear the brainiac: approaching the expert too close may risk drowning in egghead exploits. These lawyers simply wind their expert up and let him speak to the judge or jury. In taking expert depositions, they simply want to get a sense of how the opposing expert presents, and the gist of the opinion and its basis. If they come out with a few good cross-examination points, they are satisfied.

What a mistake. Experts can be the key to a case. And because the expert is typically selected by counsel, not by the client (or the Court), discrediting an opponent's expert can undercut the opposing lawyer's credibility with the court or the jury. An adversary who relies on bunk science, or puts up an unprepared expert, cannot be trusted on other issues in the case. The trier of fact may conclude that his other witnesses cannot be trusted either.

The key function in expert discovery, preparation and cross-examination, at deposition or in trial or arbitration, is twofold: (1) present the most compelling case for your client that is defensible, credible and persuasive; and (2) discredit the other side's approach by attacking only those portions of the opposing expert's work that are not credible or persuasive.

The most important thing to remember in taking expert discovery is that it is not “about” the lawyer. Your job is not to be the expert or to look like one. It is to glean the information and, along with your own team, to assess it. Therefore, never be abashed in asking your own expert or the adverse party – in interrogatories or at deposition – questions outside your realm of comfort.

This article will not address the frequently-discussed *Daubert* case, or its progeny. Instead, it addresses the much more typical scenario, in which the retained experts have an expertise in a given subject matter area; the area of expertise is germane to the issues warranting resolution in the lawsuit; and the opposing expert has reviewed documents, spoken with his client, performed analyses and presented opinions. It provides practice pointers for engaging in expert discovery to provide maximal benefit for your case and client. To allay any confusion, I refer in this article to the opposing expert in the masculine, to my expert in the feminine. Although there are many issues that pertain to expert discovery, Part 1 of this two-part article addresses some common considerations, expert qualifications and expert interrogatories.

1. Qualifications: In most cases, the opposing expert will be qualified to provide an opinion. Nonetheless, his qualifications may reveal information showing either that the expert lacks the particularized information that would be most helpful to the finder of fact or, to the contrary, that the expert has personal background and information that might be very helpful to you in undermining his opinions. For example, it is not enough to inquire at deposition if an opposing party's real estate valuation expert is qualified to offer real estate valuation testimony. Attention also must be given to questions such as these: Does the valuation expert have experience in the real estate in question (such as a hotel); during the relevant time period; and in the relevant city or portion of the city? Has the expert valued mid-range hotels or only luxury properties? Hotels or motels? Properties managed by a nationally-known and recognized hotel management company, or by an independent hotel or chain? What if the opposing expert is not only a consultant but also invests in similar real estate himself from time to time? In that case, in which properties has he invested, and when? Are any of those properties in competition with the property at issue? And what did the opposing expert do when evaluating his own investment in similar properties? These issues can be explored either through expert interrogatories or at deposition. But there is no substitute for independent work as well:

1. Vet opposing experts with your colleagues.

2. Review the opposing expert's resume. It might show that he is not familiar with the precise subject matter at issue. Or perhaps the opposing expert has some experience (such as in investments) that will become favorable to you.

3. Search for the expert on Google.

4. Run searches on the relevant secretary of state websites to identify any companies with which the opposing expert has an affiliation.

5. Run background searches on cases in which the opposing expert has offered expert testimony. If you are practicing in a state jurisdiction where this information is not required to be disclosed by your adversary, expert interrogatories should be served to elicit that information.

6. Determine if the opposing expert has been referred to by name in any reported decisions, and if so, review those opinions and obtain the pleadings in those cases and any motions filed in those cases that pertained to the expert.

I have found these questions relevant to my own work. On one case, my expert was a seasoned real estate professional in a large metropolitan area. When I interviewed him, I identified the real estate in question. "Oh, I know that building," he told me. "What do you know about it?" I asked. "My information is quite dated, but I appraised that very building about 25 years ago," he said, whereupon he went into a file room and emerged with the appraisal. The appraisal was irrelevant to the case. But had it been done more recently, or had its conclusions been relevant to the case, it is something I would have wanted to explore in detail. You'd be surprised how frequently your adversary will not have asked his own expert the same questions.

More recently, a well-regarded adverse expert testified concerning a commercial property. There was no debate that he was qualified to give opinions. But we elicited information that he had never done work within 50 miles of the property at issue; and for the immediate past several years, had spent most of his energies as a real estate investor.

The bottom line: Just because the opposing expert is recognized and respected in his field does not mean that you should omit focusing on his qualifications.

2. Expert Interrogatories: One valuable tool in exploring background and qualifications is through interrogatories. Expert interrogatories are helpful as well to obtain specific, pointed information on what the expert has done in the case at hand. The most substantive questions, though, should await the deposition.

A. General Professional Background. At a minimum, interrogatories should explore the expert's prior engagements by the adverse party and by the adverse counsel, any prior disqualifications, and all discoverable retentions relating to the same subject matter, product, property or investment. Discover the expert's work on professional committees, organizations, task forces, and publications. Experts who have been around the block may well have published on professional practices, standards and methodologies that are immediately relevant to your lawsuit. In jurisdictions where the expert does not provide a resume and list of publications and prior testimony, obtain this information through interrogatories prior to the expert deposition.

B. Case-Specific Background And Work. It is best to use expert interrogatories to obtain quantitative information that the opposing expert might not have at his fingertips at deposition. Examples are the hourly rates he and his staff are charging, and how many hours were worked as of the time of the responses to the interrogatories. Ask the opposing expert to state each opinion that has been reached, the basis for each opinion, and the documents, conversations or other information that substantiate each and every opinion. At deposition, the expert might hedge, telling you that he cannot recall each document he reviewed. So give him a month to provide the answer in writing. Similarly, inquire of each and every document that the opposing expert reviewed in reaching his opinions (regardless of whether the expert has relied on the document to substantiate his opinions); all independent information obtained by the expert in the course of his work on the case (such as from industry sources or the expert's own private library); communications the expert has had with anyone whatsoever about the engagement; and any other materials or information upon which the expert is relying in proffering his opinions. By asking for this information in advance, you can better organize the deposition questions, and can better understand how the adverse expert sees the case. As an example, whether the expert ran numerous financial analyses or scientific experiments of his own, or instead relied on literature in the field might reflect on whether he sees the expert analysis as a case of first impression or a standard industry inquiry. Also, his list of materials consulted might conspicuously omit a leading study or article, which is something you will want to address with your own consultant.

Other quantitative information should include a list of who else worked on the engagement, when it commenced, and whether a letter of engagement was signed.

Interrogatories also can focus on any ongoing work that the expert is performing or work that the expert intends to perform but has not yet commenced.

C. Review The Responses. The responses may give you additional ideas about third parties who should be deposed or who need to be subpoenaed; treatises that should be consulted, and questions that should be framed for deposition. It is important to send the responses to your own expert for her review and analysis as well. Something may jump off the page to your expert that is not immediately apparent to you, such as treatises that were not reviewed, experiments that were deficient, or an approach that the opposing expert has taken that is inconsistent with industry practice or which is designed from inception to yield an output that is favorable to your adversary. Arrange a time to speak with your expert once she has had a chance to review the interrogatory responses. Keep in mind that you should use the interrogatory responses to challenge your own expert and reconsider her opinions in the case as well. Step back and evaluate whether the interrogatory responses you have received should cause you to reconsider your position, the strength of your case, or the work of your own expert. Finally, share the interrogatory responses with your own client and with the entire team. Dividing a litigation team or trial team into those handling "factual" matters and those handling "expert" matters is not optimal.

Part 2 of this article will address the opposing expert's report and deposition, the most critical aspects of expert discovery.

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Getting The Most Out Of Expert Discovery

By: Daniel B. Rosenthal, Akerman LLP

Part 2: The Expert Report And The Expert Deposition

In Part 1 of this article, we explored the opposing expert's qualifications and serving expert interrogatories. Part 2 addresses the two most critical aspects of expert discovery: the opposing expert's report and the opposing expert's deposition.

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3. The Expert Report:

The expert report migrates the practitioner past issues of background, qualifications and general case-specific work and into the guts of expert discovery.

Depending upon the jurisdiction and venue of your dispute, expert reports may or may not be required. Where you have been presented with an opposing expert report, review it thoroughly. This includes reviewing the schedules with mind-numbing figures and terms. The key to the battle of the experts resides here, because while your opposing counsel may have had a hand in crafting the report, the schedules typically are unadulterated, and sometimes, unreviewed. Do not attempt to replicate the expert's analysis. Instead, understand what was done, what each chart or line or analysis represents – and what it does not. Ask yourself whether the expert performed the correct analysis under the relevant operative documents; whether the environmental conditions in the opposing expert's work modeling – took all of the various parameters and considerations into account. As an example, if the issue is performance of a certain material upon exposure to particular environmental conditions, see whether the testing was done under the relevant conditions. If a financial model must account for the time value of money, see whether the opposing expert used an inflation index, the consumer price index, or some other index, and ask yourself whether his choice of index was purposeful, evasive or proper. If the issue is a membership interest in a limited liability company, see whether the expert's analysis determined this value or mistakenly determined the value of the factory that the LLC owned.

Next, share the report with your own expert and ask for her brain dump as to each and every particular of the report. If your expert is doing her job, she will notice more than you. If she does not catch what you have caught, you should ask yourself whether you have indeed selected the right expert.

Frequently, clients are hesitant to shoulder the cost of having both the lawyer and the expert pore over the adverse report. It is absolutely critical for both to review it in detail, which leads to optimal results.

If you notice what appear to be arithmetic or other perfunctory errors in the adverse expert's report, bring those up at deposition. The trier of fact will not appreciate playing "gotcha" at trial. Also, if what you perceive to be an error is in fact not so, it may be you who will be enlightened at deposition, not the opposing party. There is an exception to this advice, where the opposing expert's error actually changes his entire analysis and/or conclusion. In that case, you may not want to alert your adversary of the error until trial. In a recent case, the opposing expert mistakenly performed a financial analysis under an inapplicable provision in a deal document. We reran his analysis ourselves using the correct provision, and the analysis

The devil is in the details. The details frequently are in the schedules.

4. The Expert Deposition:

Once you have dissected many aspects of the opposing expert's work through an examination and analysis of the expert report, the next step is the expert deposition. Frequently, counsel approaches the opposing expert deposition the way someone would approach an encounter with a wizard: "Thanks for the audience, but I find you odd and incomprehensible. Let me ask what I think I need to ask and get back to my office where I can speak with real humans." And so follows a stream of questions about prior engagements with the adverse counsel or before the same judge; the fine points of the expert's engagement and pay; queries as to who drafted the report, on what computer and with whose assistance; and similar questions on topics of ready facility for the lawyer. And then only perfunctory queries as to each opinion that has been reached and the basis for each. "Oh strange wizard, I don't need to know each minute detail of how you made your brew, but if you give me the basic ingredients, I'll be on my way and not seem like a bumbling idiot to you." In other words, the lawyer allows the expert to manage the process and does his client little good.

This, of course, is a huge mistake. The expert deposition is your chance to meet a real live wizard (or determine that the guy is no wizard at all); morph from lawyer to student, and receive a "brain dump." Unlike trial, there is no bad question at deposition, except one that might reveal your knowledge that the opposing expert has committed a significant error or failed to consider something that your own expert is refining. Do not be concerned that the deposition will take more than a few hours (it likely will). Do not be concerned that you will look uninformed to the opposing expert or his counsel (you will). You obviously are expected to know practically no water chemistry as compared with the PhD in water chemistry; practically no polymer science as compared with the polymer scientist; practically nothing about actuarial science as compared with the actuary; practically nothing about tensile strength compared with the mechanical engineer. Not only that, but you will find that asking straightforward, fair and simple questions occasionally has side benefits. Experts generally want to tell you how smart they are and everything they have done. They like to teach. Give them the opportunity to do so. The more they say, the more you discover. Which, of course, is the point of the whole exercise. The best way to do that is to come at the deposition as part lawyer, part student.

Your time at deposition will be well spent for the client. If done correctly, it also can provide a nearly verbatim cross-examination for trial.

One good approach to expert depositions is to elicit from the opposing expert the entirety of his knowledge about the case. Do not try to coax him into providing sound bites. Interject with follow-up questions, exploring each line. Make sure that there is no stone left unturned. This approach requires asking the expert not only what he did, but why he did it, whether he considered any other alternatives, what those were, and why he did not consider various other steps that you think may have been relevant or important. It is not merely enough to understand what discount rate a valuation expert used, but why other rates were not used; or whether the same expert used different discount rates in connection with other valuations of similar assets or businesses during the same relevant time period.

The careful practitioner should pay attention to detail. As an example, the same publications may provide for national, regional and local economic data, and the opposing expert may have selected his data set improperly. Your opposing expert may have selected the consumer price index in lieu of the rate of inflation for purely mercenary reasons. Soil quality may have been reported on at a particular soil depth for reasons that only the opposing expert has chosen, perhaps unreasonably. The same is true for various other types of analyses.

Always ask, "please tell me what you did next." Once the opposing expert tells you, explore each thing he did not do. "So, what I understand from your testimony is that in providing your opinions about the policy exclusions, you reviewed the policy itself and the case law around interpretation and application of the pollution exclusion, right?" "Yes." "Did you also consult with any insurance brokers? Did you review any insurance industry materials? Did you speak with any business-people who own businesses similar to the one at issue in this case? Did you see any correspondence between your client and the broker about the scope of coverage? Did you do anything other than review the policy and what you determined to be applicable legal precedent?" If your own expert in fact took these other steps, her work and testimony may resonate more with the trier of fact than the testimony of your adversary's expert.

Where possible, ask your own expert to consult with you in preparation for the opposing expert deposition. Doing so benefits your case in multiple ways. One is that it can reduce your preparation time and the resulting cost to your client. It will not increase your expert costs significantly, because your expert, if properly prepared, will have to consider these same questions herself in confronting the opinions of her opposite number. A second benefit is that you will glean a different approach to the same material (that of the professional) than you otherwise would have (that of attorney). Arguments or points which would seem secondary to you may be a big deal to your expert.

Speaking with your own expert can also save your client money. In a case involving water chemistry, I shared my expert deposition outline with our consulting experts. "Why are you asking the other guy whether he did any work to determine the water quality near the mobile home parks?," they asked. "Because a bunch of their clients are claiming damage to mobile homes, and the water quality near the mobile home parks is therefore relevant," I responded. "Statistically, it isn't," replied my statistician. "Mobile homes are mobile. Unless people deliberately relocate from one mobile home park to another based on local water chemistry, the water chemistry at the places they have lived for the past three months is practically irrelevant. Drop the questions." So I did.

Sometimes, your expert will have you ask for information he needs, without having to wait for interrogatory responses, such as: "Ask what this particular code means on the general ledger," or "ask whether they know the specific make and model of the repair in the failed tire, because we have no information on that."

If your own expert can attend the opposing expert's deposition, consider asking her to do so. She can advise you on follow-on questions. And her mere presence can also keep the adverse expert from trying to bamboozle you with expert-speak.

Do not end the deposition before asking whether you have covered every opinion that the expert has, the support for each opinion offered, and everything that the opposing expert has done to arrive at his opinions. Finally, ask whether the opposing expert has completed his work, or has any plans to do any further work in the case or to revise his opinions.

Conclusion

There is no magic. Don't fear your own lack of knowledge or information. Become the student, learn the details, and use them to benefit your case.

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