Winning Your Case at the Deposition:
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DEPOSING EXPERTS

by

VICTOR JOHN YANNACONE, jr.
Yannacone & Yannacone
New York City

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by

Victor John Yannacone, jr.[1]

According to the Federal Rules of Civil Procedure,[2] parties to litigation, through their attorneys are permitted, yea even encouraged, to seek information which is reasonably calculated to lead to discovery of admissible evidence.

According to the conventional wisdom that has evolved along with implementation of Rule 26(b)(1), depositions or, as we used to call them in New York, examinations before trial, are used primarily to discover relevant information, limit the testimony of a witness, establish the strengths and weaknesses of the case, and obtain and preserve testimony for later use at trial.

But should every expert witness be deposed? Not necessarily! Some expert witnesses should always be deposed. Depose some expert witnesses sometimes, and never depose certain experts.

JUST WHO IS AN EXPERT?

Basically an expert is someone who knows a great deal about something of interest to you or your client. On a more practical level, an expert is anyone who knows more about something you should know about than you do.

The precise legal definition of an expert is only of value when opinion testimony is critical to your case. As an advocate, a litigator, and a trial lawyer, I prefer to deliver my personal opinions to the court and the jury without any intercession by an expert. Often, however, that practice is frowned upon by the court and rejected by the jury.

Nevertheless, the strict definition of expert contained in the Federal Rules has to be on your mind at all times during the deposition of an expert witness.

If you do not want the expert witness to testify as an expert, then you must establish that the body of knowledge upon which the expert wishes to base their expert opinion is not so complicated as to be beyond the understanding of the judge or the jury.

On the other hand, if you desperately need the expert witness to give an opinion favorable to the position of your client, then your objective during the deposition is to establish, as convincingly as possible, that the body of knowledge upon which the expert opinion is based is so arcane and specialized that any judge or jurors who do not share the same background and credentials as the expert witness cannot be expected to understand the subject about which the expert is offering an opinion.

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[1] Yannacone & Yannacone, PC, 39 Baker Street, P.O. Drawer 109, Patchogue, NY 11772–0109;
E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

[2] FedRCivP 26(b)(1).

With the *Discovery Channel*, the *Learning Channel*, the Tuesday Science Supplements in most daily newspapers of large circulation, and the constant stream of magazine articles about science, medicine and technology not to mention economics, business practices, and antitrust laws, jurors, and even judges, are considerably more knowledgeable about technical issues today than in the past era when the Federal Rules of Civil procedure were drafted and where laypeople were presumed to know much less than those with more extensive formal education.

Even in 1980, it was quite possible to explain the electron transport system of oxidative phosphorylation in cytochrome P_{450} enzyme reactions to a federal judge without the aid of an expert witness. And today, according to several reports on the judiciary, judges are even more knowledgeable.[3]

The question of expertise is vexing. It must be resolved on a witness by witness basis through investigation and deposition. Nevertheless, the decision of whether a witness is an expert or not must, in the first instance, be made by the attorney presenting the witness as an expert and the attorney challenging the designation of the witness as an expert. That is what the deposition of expert witnesses is all about.

WHY DEPOSE EXPERTS?

There are as many reasons to depose an expert as there are litigators and trial lawyers. First there are the usual reasons, the reasons you find in the textbooks, the treatises, and the Revisers' Notes. Then there are the visceral reasons: discomfort, anxiety, fear of criticism from colleagues, adversaries and clients; and finally there are the unspoken and unarticulated reasons that lie buried in the unconscious self of every barrister.

SOME CAVEATS ABOUT EXPERT WITNESS DEPOSITIONS

- Depositions eventually reveal your theory of the case and give your adversary a reasonably good idea of what you plan to prove, as well as often how you intend to prove it.
- Depositions furnish an opportunity for the witness to rehearse, to learn your style and to shape answers for delivery on trial.
- By electing to depose a particular witness, you often alert opposing counsel to the importance of that witness.

Nevertheless, since the *Daubert/Joiner/Kumho* Rules have become a necessary consideration in any case involving expert witnesses or opinion testimony, depositions

[3] *In re Agent Orange*, MDL 381, Pratt, J., *op. cit.*

have become crucial elements of the evidence required to support or oppose a motion for summary judgment.

DAUBERT DID IT!

In three cases decided in the 1990s,[4] the U.S. Supreme Court greatly expanded the discretion of trial judges to reject expert testimony. This "Expert Trilogy" imposed an obligation on trial judges to screen all expert witness testimony and to refuse to accept, acknowledge or permit a jury to hear testimony from experts who offer opinions that are unreliable or not considered helpful.

The first case in the trilogy, *Daubert* v. *Merrell Dow Pharmaceuticals*,[5] established the gatekeeper obligation and applied it to science-based expert testimony. In the second case, *General Electric Co.* v. *Joiner*,[6] the Court made clear that trial courts, not appellate courts, stand at the gate. Finally, in the third case, *Kumho Tire Co., Ltd.* v. *Carmichael*,[7] the Court expanded the gatekeeper role to include all proposed expert testimony, not just scientific testimony.

The appellate court in *Joiner* adopted this stringent standard of review because it perceived an implicit preference in the *Federal Rules of Evidence* for admitting expert testimony regardless of its scientific merit.[8]

In his partial dissent in *Daubert*, Chief Justice Rehnquist set the stage for the third case in the trilogy when he asked whether the standard offered by the majority would apply to "an expert seeking to testify on the basis of 'technical or other specialized knowledge'—the other types of expert knowledge to which Rule 702 applies—or are the 'general observations' limited only to 'scientific knowledge'?"[9] The question remained unanswered until the Supreme Court decided *Kumho Tire Co., Ltd.* v. *Carmichael*.[10]

In *Kumho Tire*, plaintiffs alleged that a defect in a tire made and distributed by defendants caused the accident and proffered testimony from an expert on tire failure

[4] *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579, (1993), *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997), *Kumho Tire Co., Ltd.* v. *Carmichael*, 19 S. Ct. 1167 (1999).

[5] 509 U.S. 579 (1993).

[6] 522 U.S. 136 (1997).

[7] 119 S. Ct. 1167 (1999).

[8] See *Joiner*, 78 F.3d at 529.

[9] *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579, 600 (1993)(Rehnquist, C.J., dissenting)

[10] 119 S. Ct. 1167 (1999). At the trial level, *Kumho Tire* was *Carmichael* v. *Samyang Tire, Inc.* The name changed at the appellate level due to a merger of Kumho Tire and Samyang Tire.

who examined the tire and opined that a manufacturer's defect caused the blowout.[11] Even though the testimony was not based upon scientific knowledge, the trial court conducted a *Daubert* analysis and held that the testimony of plaintiffs' expert was not admissible.[12]

Applying the *de novo* standard,[13] the Eleventh Circuit reversed the trial court's conclusion of law that *Daubert* applied to the expert testimony at issue,[14] holding that the *Daubert* analysis did not apply to testimony that was not based upon "scientific principles," but only upon "skill- or experience-based observation."[15]

The Supreme Court reversed, holding that the "gatekeeping obligation" assigned to trial courts in *Daubert* applies to all types of expert testimony.[16]

The Gates

Expert testimony is admissible only if it can pass through a number of "gates." Five of these gates are an outgrowth of *Daubert*[17] and are intended to ensure that the expert opinion is reliable because the knowledge of the expert is reliable. Reliability requires an examination of the methods and procedures used by the expert to reach an opinion, the data and assumptions relied upon by the expert as the basis for the opinion, and the reasoning process used by the expert to reach that opinion all in the context of the litigation in which the expert opinion is being offered.

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony and *Kumho*[18] extended application of the checklist to all expert testimony. The specific *Daubert* factors are

- whether the technique or theory relied upon by the expert witness can be or has been tested; whether the hypotheses of the theory upon which the opinion is based can be challenged in some objective sense, or whether it is simply a subjective conclusion that cannot reasonably be tested
- whether the technique or theory has been subject to peer review and publication
- the known or potential rate of error of the technique or theory when applied
- the existence and maintenance of standards and controls; and
- whether the technique or theory has been generally accepted in the scientific community.

[11] 119 S. Ct. 1167, at 1172 (1999).

[12] *Carmichael* v. *Samyang Tire, Inc.*, 923 F. Supp. 1514, 1521-22 (S.D. Ala. 1996), *rev'd*, 131 F.3d 1433 (11th Cir. 1997), *rev'd sub nom.* 119 S. Ct. 1167 (1999).

[13] *Carmichael* v. *Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), *rev'd sub nom.* 119 S. Ct. 1167 (1999).

[14] *Carmichael* v. *Samyang Tire, Inc.*, 131 F.3d 1433, at 1435 (11th Cir. 1997), *rev'd sub nom.* 119 S. Ct. 1167 (1999).

[15] *Carmichael* v. *Samyang Tire, Inc.*, 131 F.3d 1433, at 1435–36 (11th Cir. 1997), *rev'd sub nom.* 119 S. Ct. 1167 (1999).

[16] See, *Kumho Tire*, 119 S. Ct. at 1171, 1174.

[17] 509 U.S. 579 (1993).

[18] 119 S. Ct. 1167 (1999) at 1175.

"KNOWLEDGE" CHARACTERIZES AN EXPERT

The *Daubert/Joiner/Kumho* trilogy clearly indicates that the Supreme Court of the United States gives great deference to the *Federal Rules of Evidence*, particularly Rule 702, in any consideration of expert testimony. The Rule 702 requirement of expert "knowledge" is the basis for the reliability inquiry called for by *Daubert*.[19]

In *Kumho Tire*,[20] as it had in *Daubert*, The Court noted that Rule 702 considered at least three types of expert testimony, "scientific, technical or other specialized knowledge," and that the rule made no "relevant distinction" among them. The critical word in Rule 702 for purposes of the *Daubert* analysis is "knowledge," not the words which modify or characterize "knowledge."[21]

The "testimonial latitude" granted to expert witnesses under the *Federal Rules of Evidence* is not limited to those witnesses who offer testimony based upon scientific principles. The Court said, "it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is no clear line that divides one from the others." The general principles for evaluating expert opinion set forth in *Daubert* apply to all the expert matters described in Rule 702.[22]

The obligation for trial courts after *Kumho Tire* is to determine "whether the testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline'."[23] The discretion of the trial court is, in the words of Mr. Justice Scalia, "the discretion to choose among reasonable means of excluding expertise that is false

[19] *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579, (1993) at 587 where the Court analyzes the *Federal Rules of Evidence*.

[20] 119 S. Ct. 1167, at 1174.

[21] See, *Kumho Tire*, 119 S. Ct. 1167, at 1174.

[22] See, *Kumho Tire*, 119 S. Ct. 1167, at 1175.

[23] *Kumho Tire*, 119 S. Ct. at 1175 (quoting *Daubert* v. *Merrel Dow Pharm.*, 509 U.S. 579, 592 (1993)).

and science that is junky. Though, . . . the Daubert factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion."[24]

Both *Joiner* and *Kumho Tire*, clearly dictate that the deposition of any putative expert witness must inquire, in great and searching detail, about the "methods and procedures" of the relevant scientific, technical or professional disciplines upon which the proffered expert opinion is based.

Each and every relevant method and procedure must be identified and a clear and convincing relationship between the methods and procedures and the expert opinion established based on a well-defined path from the methods and procedures to the expert opinion.[25]

The deposition of an expert witness must leave no question about whether the expert opinion satisfies the *Daubert* requirement of "knowledge" under Rule 702. The opinion must be something more than subjective belief or unsupported speculation. This requires the trial judge to determine "whether the reasoning or methods and procedures underlying the testimony are scientifically valid.[26]

If the issue is causation, the inquiry must address first the question of general causation, "***Can*** the putative cause produce or account for the observed effect?" then move to the question of cause-in-fact, "***Did*** the putative cause contribute to the observed effect? How? By what means? At what time scale?" before even approaching the question of proximate cause.

Courts generally insist that an expert may not give opinion testimony to a jury regarding causation without demonstrating that the opinion was reached by some process of differential diagnosis, differential analysis or some other form of expert discrimination among alternatives which reliably eliminates other possible causes or at least establishes their probability ranking as possible causes.[27]

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[24] 119 S. Ct. 1167, at 1179 (Scalia J., concurring)

[25] See *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579, 590 (1993). In *Kumho Tire* (119 S. Ct. at 1178), The plaintiffs' expert's opinion was inconsistent with the methodology he purported to follow. In *Joiner* (522 U.S. 136, at 146), the expert purported to rely upon animal studies to support his conclusion. The court however, concluded that "there [was] simply too great an analytical gap between the data and the opinion proffered" for the opinion to be properly considered grounded in the methods and procedures of science, citing *Turpin* v. *Merrell Dow Pharm., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992).

[26] *Daubert*, 509 U.S. 579, at 592–93, 113 S.Ct. 2786.

[27] See, for example, *Rutigliano* v. *Valley Bus. Forms*, 929 F. Supp. 779, 786 (D.N.J. 1996), *aff'd*, *Valley Bus. Forms* v. *Graphic Fine Color, Inc.*, 118 F.3d 1577 (3rd Cir. 1997).

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

Failure by an expert to meaningfully rule out or consider any multiple, well-recognized, potential causes for an observed effect is contrary to accepted methodology in any recognized science, profession, or trade which might form the basis for an admissible expert opinion.[28] In *Daubert*, the proffered expert offered no tested or testable theory to explain how, from the limited information available to him, he was able to eliminate other potential causes of birth defects.[29]

WHAT KIND OF KNOWLEDGE? *RELIABLE* KNOWLEDGE.

The "reliability" of a scientific fact derived from a scientific principle generally depends on a number of factors common to the philosophy underlying the "scientific method" since the time of Francis Bacon.[30]

- the reliability of the underlying scientific principle
- the reliability of the technique or process that applies the principle
- the nature and condition of any instrumentation used in the process
- adherence to proper procedures
- the qualifications of the person who performs the test; and
- the qualifications of the person who interprets the results.

THE *DAUBERT* DILEMMA

The *Daubert/Joiner/Kumho* rules seem to use at least two meanings of the word, "reliable," at the same time.

In certain contexts, "reliable" seems to mean that the explanative theory actually produces a correct, accurate, truthful, or valid conclusion.[31] In other contexts, "reliable" means meriting confidence worthy of dependence or reliance, possessing sufficient assurance of correctness to warrant acceptance by the trier of fact—the dictionary definition.[32]

In the *Daubert* discussion of "gatekeeping," the Court seems interested in whether the proffered explanative theory actually produces a correct, accurate, truthful, or valid conclusion. The Supreme Court even expresses its confidence that federal judges

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[28] *Bennett* v. *PRC Pub. Sector Inc.*, 931 F. Supp. 484, 499 (S.D. Tex. 1996)

[29] *Daubert* v. *Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)

[30] See, Sessions, W.A., *Francis Bacon Revisited*, (New York: Twayne Publishers, 1996), *op. cit.*

[31] See *Kumho Tire Co., Ltd.* v. *Carmichael*, 119 S.Ct. 1167 (1999); *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[32] That dictionary definition was also the underlying approach of the now, at least nominally, rejected *Frye* test. Webster's Third New International Dictionary 1917 (1981).

can make a "preliminary assessment of whether the reasoning and methodology underlying the testimony is scientifically valid."[33] That is, "the principal support[s] what it purports to show."[34]

The Supreme Court established as a rule of law that "evidentiary reliability will be based upon scientific validity,"[35] and reaffirmed the basic premise of Rule 702 which requires that an "expert's opinion will have a reliable basis in the knowledge and experience of his discipline,"[36] which is a reference to general acceptance and sufficient assurances, the dictionary meaning of "reliable."

THE "EXPLANATORY THEORY" AND KNOWLEDGE

Under Rule 104(a), whenever an expert proposes to testify about scientific knowledge in order to assist the trier of fact to understand or determine a fact in issue, there must be a preliminary determination that the reasoning, methods and procedures of the expert can be properly applied to the facts at issue in the litigation.[37]

While declining to set out a definitive checklist or test, the Supreme Court in *Daubert* did identify factors that will assist the trier of fact to determine whether a theory, technique, reasoning, methodology, &c., collectively referred to as an "explanative theory," represents scientific knowledge. The Supreme Court suggested that a key question is whether the theory or technique can be, and has been, tested, recognizing that, "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."[38]

The Supreme Court then suggested that another important consideration is **Peer Review**, but expressly noted that, "**Publication**. . . does not necessarily correlate with reliability, and in some instances well-grounded but innovative theories will not have been published. Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected. The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though

[33] *Daubert*, 509 U.S. 590, at 592–93.

[34] *Daubert*, 509 U.S. 579, at 590, n. 9.

[35] *Daubert*, 509 U.S. 579, at 590, n. 9.

[36] *Daubert*, 509 U.S. 579, at 592.

[37] *Daubert*, 509 U.S. 579, at 592–93.

[38] *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579 (1993) at 593.

not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.[39]

The third factor suggested is the known or potential **rate of error**, while the fourth factor is the existence and maintenance of **standards** controlling the technique's operation.[40]

The fifth and final factor, "General Acceptance," had to be more subtly developed by the Supreme Court since it was expressly overruling the *Frye* decision.

FRYE REVISITED

Although a reliability assessment does not require, as it once did under *Frye*, explicit identification of a relevant scientific community and an express determination of the particular degree of acceptance of the expert opinon within that community, nevertheless, it does permit, and even encourages, such consideration. A technique that has been able to attract only minimal support within the scientific, technical or professional community of which the expert witness is a part may properly be viewed with skepticism. What general acceptance can provide for evidence and opinion testimony is **"Sufficient Assurances of Correctness."**

Ordinarily, sufficient assurances of correctness can be established by showing the explanative theory, as applied, has gained widespread acceptance in the particular field to which it belongs. For certain methods and procedures, widespread acceptance is a sufficient alternative test.[41] Of course, reliance on "widespread acceptance" is subject to the limitation that the entire field to which the explanative theory belongs may lack reliability. "[T]he presence of *Daubert's* general acceptance factor [does

[39] *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579 (1993) at 593–94 (internal citations omitted).

[40] *Daubert*, 509 U.S. 579, at 594.

[41] A classic example would be well-established procedures in analytical chemistry. "All the chemical testing took place at a FDA laboratory, where analysts performed four procedures—fourier transform infrared spectrometry, gas chromatography/mass spectrometry, high performance liquid chromatography and electrospray liquid chromatography tandem mass spectrometry. Each of these procedures reveals a substance's 'spectrum' or 'fragmentation pattern'—a sort of chemical fingerprint. Analysts then identify a substance by comparing its spectrum with spectra from known standard samples or from a computer library. These procedures, and the tools used to perform them, are widely used and generally accepted in the fields of analytical and forensic chemistry." *United States* v. *Vitek Supply Corp.*, 144 F.3d 476, 485 (7th Cir. 1998)

And another from economics, "Plaintiffs have amply demonstrated the soundness of the Cournot model as a fundamental, time-tested economic tool that has been widely accepted for years by reputable economists. Indeed, the Cournot model provides the theoretical underpinnings for the Department of Justice's Horizontal Merger Guidelines and the widely used Herfindahl-Hirschman Index (the 'HHI')." *Concord Boat Corp.* v. *Brunswick Corp.* 21 F.Supp.2d 923, 934 (E.D. Ark. 1998). .

not] help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."[42]

In the alternative, the explanative theory can be shown to possess sufficient assurances of correctness by proof that the explanative theory, as actually applied, possesses particularized **earmarks of trustworthiness**.

Generally speaking, particularized earmarks of trustworthiness can be established if the explanative theory is shown to have been derived and employed in a manner consistent with processes customarily employed by experts in the particular field and

- meets the same standards for intellectual rigor demanded in the expert's regular business and professional work
- conforms to applicable professional standards employed outside the courtroom, and
- is soundly grounded in the principles and methodology of the particular field.[43]

The Supreme Court was interested in the general question of whether development of the explanative theory exhibits the *aura* of proper scientific methodology and that the expert, whether basing testimony upon professional studies or personal experience employs in the courtroom the same level of intellectual rigor that characterizes the practice of the expert in the relevant field.[44]

Focusing on whether the explanative theory possesses the aura of proper scientific methodology rather than requiring the trial judge to decide whether the explanative theory in fact is true and correct comports with the Supreme Court's observation in *Daubert* that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[45]

Daubert does not require that a party who proffers expert testimony to carry the burden of proving to the judge that the expert *opinion* is correct. As long as the expert's testimony rests upon "good grounds, based on what is known,"[46] it should be tested by the adversary process—vigorous cross-examination and competing expert

[42] *Kumho Tire Co., Ltd.* v. *Carmichael*, 119 S.Ct. 1167, 1175 (1999)

[43] *Kumho*, 119 S.Ct. 1167 at 1176.

[44] *Kumho Tire Co., Ltd.* v. *Carmichael*, (1999) 119 S.Ct. 1167, at 1176.

[45] *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993).

[46] *Daubert*, 509 U.S. 579, at 590, 113 S.Ct. 2786.

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

testimony—rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.[47]

Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories is "correct." *Daubert* and its progeny only require the party offering the evidence show that the expert opinion has been arrived at in a scientifically sound and methodologically reliable fashion.[48]

Case law interpreting Daubert has established that, when evaluating the admissibility of expert testimony, a trial judge must first consider whether the testimony is consistent with the scientific method and not mere subjective belief or unsupported speculation; then determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue.[49] An expert opinion should at least have a reliable basis in the knowledge and experience of the particular discipline involved.[50]

The true spirit of the Supreme Court opinion in *Daubert* is found in the general instruction that the inquiry envisioned by Rule 702 is a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.[51] However, in *Joiner*, the Supreme Court was forced to acknowledge that "conclusions and methodology are not entirely distinct from one another."[52]

PROBATIVE VALUE OF EXPERT TESTIMONY

Once the first requirement in Rule 702 has been addressed and it has been established that the expert has "knowledge" and the expert opinion is based upon "reliable" knowledge, there remains the question of whether the expert testimony will assist the trier of fact. The real test, and the foundation for the deposition strategy, is not whether the expert *opinion* is important to the determination of the case, but

[47] *Daubert*, 509 U.S. 579, at 596, 113 S.Ct. 2786.

[48] See, *Kannankeril* v. *Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir.1997); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir.1994)."); *Moore* v. *Ashland Chemical Inc.*, 151 F.3d 269, 276 (5th Cir.1998).

[49] See, *Deimer* v. *Cincinnati Sub-Zero Products, Inc.*, 58 F.3d 341, 344 (7th Cir.1995); *Porter*, 9 F.3d at 614.

[50] 509 U.S. at 592, 113 S.Ct. at 2796.

[51] 509 U.S. at 594–5 95, 113 S.Ct. at 2797.

[52] 552 U.S. 136, 146 (1997)

whether the expert testimony in support of that opinion will assist the judge and jury in resolving issues.[53]

Even if expert testimony is sufficiently reliable and helpful to satisfy Rule 702, it may still be excluded under Rule 403, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. . . . Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."[54]

Expert testimony under Rule 702 is also subject to other rules.

Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data which might otherwise be excluded as "hearsay," are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Rule 706 allows the court, at its discretion, to obtain the assistance of an expert of its own choosing. This practice is becoming more prevalent as cases become more complex and dockets more congested. The time to address it is during the deposition of expert witnesses before the Court feels a need designate a "706 Expert."

Never fail to have any expert witness identify other acknowledged "experts" in the field and to the extent possible discuss their contribution to the body of arcane knowledge the witness shares. Try to identify the relationships, business and professional, and even personal or collegial, between the expert testifying and the other "acknowledged" experts in the field.

It can be critically important, particularly in toxic substance, intellectual property, and economic interest cases, to identify the universe of potential "706 Experts," and their relationships with the experts chosen by the parties to the litgation, long before the time arrives for the judge to select one from that universe.

RULE 104(a) CONSIDERATIONS

The burden of proof for preliminary determination of whether expert opinions are admissible is the same as the burden for all other preliminary determinations and is

[53] For an example of expert testimony that satisfies the first requirement of Rule 702, but is inadmissible because it will not help the jury, see *Daubert*, 509 U.S. 579, at 591.

[54] *Daubert*, 509 U.S. 579, at 595.

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631-758-9468

established by Rule 104(a). "In reaching a determination pursuant to Rule 104(a) on a question of admissibility, the court generally applies the standard for the burden of persuasion applicable in civil cases, more probably true than not true.[55] However, the *Daubert/Joiner/Kumho* Rules have significantly complicated Rule 104(a) determinations and consequently made Rule 10(a) hearings and the depositions upon which many of them are based much more important.

During a Rule 104(a) hearing,[56] it is important to distinguish between support for the reliability of the opinion and support for the reasonableness of reliance by the expert on what might be otherwise inadmissible hearsay evidence. Methodological and foundational reliability may be proven without reference to whether the expert knows or is aware of material in the record. Expert opinions may be based upon inadmissible data or facts "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," but the court must determine the reasonableness of the expert's reliance in the context of the litigation about which the expert witness intends to testify.[57]

Although *Dauber* clearly established that admissibility "should be established by a preponderance of proof,"[58] *Daubert* did not identify the party with the burden of proof. Subsequently, lower courts have interpreted the opinion as placing the burden on the proponent to show that the evidence is admissible by a preponderance of the evidence.[59]

ADMISSIBILITY AND SUFFICIENCY

The several Courts who heard the *Daubert* case struggled with the distinction between the admissibility and the sufficiency of expert evidence. The district court focused on the insufficiency of the evidence.[60] The Ninth Circuit in its first opinion stressed the inadmissibility of the evidence.[61] The Supreme Court noted that the

[55] See, *e.g.*, *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987) "[P]rior decisions regarding admissibility determinations... hinge on preliminary factual questions. We have traditionally required that these matters be established by a preponderance of proof."

[56] See Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167, 1176 (1999)

[57] See, *e.g.*, *United States* v. *Skodnek*, 896 F. Supp. 60, 65 (D. Mass. 1995)

[58] Daubert, 509 U.S. at 592 n.10.

[59] See *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 & n.11 (3d Cir. 1994); see also *Lust* v. *Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

[60] See, *Daubert* v. *Merrell Dow Pharm., Inc.*, 727 F. Supp. 570, 572, 575 (S.D. Cal. 1989).

[61] See, *Daubert* v. *Merrell Dow Pharm., Inc.*, 951 F.2d 1128, 1130-31 (9th Cir. 1991).

evidence might be admissible under the *Daubert* factors but still be insufficient, thus permitting a summary judgment or directed verdict.[62]

"Admissibility" and "sufficiency" of scientific evidence necessitate different inquiries and involve different stakes. Admissibility entails a limited threshold inquiry over whether a certain piece of evidence ought to be admitted at trial, while a sufficiency inquiry, which asks whether the collective weight of a litigant's evidence is adequate to present a jury question, lies further down the road toward a verdict or decision on a motion for summary judgment.[63]

Some authorities have interpreted Daubert as establishing two independent tests of expert opinion, one for admissibility and another for sufficiency. Under this view, a court may sidestep an admissibility analysis when it is prepared to terminate the case on sufficiency grounds. *Daubert* does not directly address the issue, although it does indicate that summary judgment may be granted or a directed verdict entered when the evidence is insufficient to reach the fact finder, even though the evidence is admissible.[64]

The dispute over whether *Daubert* applies to sufficiency review is more apparent than real. A judge who does not want to intrude on sufficiency questions has enough discretion under *Daubert* to exclude suspect expert testimony on admissibility grounds.

One important difference, however, is the standard of review used by an appellate court. A court that strikes expert evidence as inadmissible will have its judgment reviewed under the favorable "abuse of discretion" standard,[65] On the other hand, a summary judgment or directed verdict based on insufficient evidence is reviewed *de novo*, notwithstanding a discretionary review of any Daubert analysis.[66]

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[62] See, *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993).

[63] *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1132 (2d Cir. 1995).

[64] *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993).

[65] See, *e.g.*, *Ancho* v. *Pentek Corp.*, 157 F.3d 512, 518 affirming that a court has wide discretion when evaluating the admissibility of expert testimony, and that its decision will not be overturned unless the court abused its discretion and rendered a decision that was clearly erroneous. See, generally, *Parts & Motors, Inc.* v. *Sterling Elec.*, 866 F.2d 228, 233 (7th Cir. 1988) where the Court explained that the abuse of discretion standard requires showing not just that the trial court's decision was "probably wrong, it must. . . strike us as wrong with the force of a five-week old dead, unrefrigerated fish."

[66] See, *e.g.*, *General Elec. Co.* v. *Joiner*, 552 U.S. 136, 146-47 (1997) which held that a trial court has discretion to exclude scientific evidence that is insufficient to support a finding of causation; *Allison* v. *McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999) affirmed that a grant of summary judgment is reviewed *de novo*, and that a court has discretion to exclude evidence that is insufficient to support a finding of causation.

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

To be admissible, expert testimony need not directly address or prove an ultimate dispositive issue; it need only provide evidence for a proposition that is part of the proof of the ultimate issue.[67] An expert's "data and testimony need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury."[68]

If an expert opinion is based upon a foundation of data from other experts, each item of data may be admissible as one "brick in the wall" establishing the reliability of the a party's theory of the case. However, if all of the admissible pieces of evidence do not establish a reliable and substantial foundation for the expert opinion, the opinion is inadmissible.

In complex cases where a great deal of seemingly unrelated data is required to establish the foundation for an expert opinion, the evidence establishing the individual elements of the case can initially be admitted through a finding of conditional relevancy under Rule 104(b).

Data may be admissible as part of the proof of an element of a claim, but it may still be legally insufficient evidence to support a judgment or verdict. A common example is where the only evidence to support a finding of causation in a toxic tort case is one or a small series of anecdotal case studies. While admissible, those limited studies, standing alone, are usually insufficient to establish causation.[69] However, temporal proximity between an injury and a chemical exposure can be used as "confirmatory data."

DEPOSITION STRATEGIES

Long before depositions of expert witnesses begin, you must determine whether there is a need to establish consistency and common agreement among experts or establish that disagreement and controversy characterize the particular field of expert knowledge that is the subject matter of the litigation. This determination will be the cornerstone of your deposition strategy.

Always depose the most knowledgeable expert about the subject matter of the litigation who was now employed by or was employed by a the opposing party. Try to depose this witness first.

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[67] See, e.g., *City of Tuscaloosa* v. *Harcros Chem., Inc.*, 158 F.3d 548, 564-65 (11th Cir. 1998), declaring that the expert testimony need only assist the finder of fact in deciding the issues.

[68] See, e.g., *City of Tuscaloosa* v. *Harcros Chem., Inc.*, 158 F.3d 548, at 565 (11th Cir. 1998)

[69] See, *Casey* v. *Ohio Med. Prods.*, 877 F. Supp. 1380, 1385 (N.D. Cal. 1995)

The more complex the litigation, the more important this rule. Treat your opponents in-house expert well, and you may be rewarded handsomely.

Treat the in-house expert with the respect they are entitled to by virtue of their achievements.

Respect, however, does not mean obeisance and obsequious pandering or foppish fawning. Respect must be genuine and based upon your careful study of the background and publications of the witness.

THE MILITARY METAPHOR

Law school professors are fond of referring to questions as "bullets."

To use another analogy drawn from the world of strife and violence, consider an expert witness as a target and adopt the strategy, tactics, philosophy and methods of those engaged in combat since the dawn of human civilization.

- Acquire the target
- Identify the target
- Classify the target
- Locate the target
- Fire for effect or hold your fire.

Acquiring the target, the expert witness, begins before the complaint is filed if you represent a plaintiff or as soon as you are served with a complaint when you represent a defendant.

In order to comply with the spirit as well as meet the due diligence requirements of Rule 11, before you ever file a complaint, you should have made an exhaustive search for expert witnesses who have knowledge concerning the subject matter of the litigation. This is particularly true in cases involving intellectual property, toxic substances, hazardous waste, and medical malpractice arising from failure to diagnose, improper diagnosis, and adverse reactions to medication or iatrogenic disease.

It is no less important for counsel representing a defendant to immediately acquire all possible targets—the expert witnesses—that might be called by the plaintiff or should be called by the defendant. Only by acquiring all the targets within range that pose a threat can security and peace of mind be attained whether we are talking about combat or litigation.

After all possible targets that pose a threat have been acquired, they must be identified.

Identifying the target may be harder than you think. This is particularly true of those witnesses that a been named by your adversary as experts but who you might have failed to identify during the initial target acquisition phase of the litigation.

- Who is this witness?
- Why has this witness been named as an expert by your adversary?
- What can this witness contribute to your adversary's case?
- What damage can this witness do to your case?
- Can this new witness help your case?
- What makes this witness an expert?
- How was the determination that this witness is an expert?

WHERE TO DEPOSE AN EXPERT WITNESS

Although depositions are generally conducted at the office of the attorney who requests the deposition and under certain circumstances, telephone and videoconference depositions may be conducted,[70] whenever possible take the deposition of an adverse expert witness in their own office or laboratory.

Seeing where, and often how, an expert works can be of great value in understanding their point of view and discovering unconscious bias in their opinions. It also means that documents may be more readily available for spontaneous production than in other venues. The same strategic considerations should encourage you to hold depositions at the office of one of the parties.

VIDEOTAPING DEPOSITIONS

The first use of videotape evidence is said to have been employed in litigation as early as 1956.[71]

Uses of videotape now include "day in the life" films;[72] surveillance of alleged injured parties;[73] automatic hidden-camera security;[74] roadway surveillance;[75]

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[70] See FedRCivP 30 (e).

[71] Comment, "Videotape: A New Horizon in Evidence," 4 *John Marshall Journal of Practice & Procedure* 339 (1971).

[72] See generally, "Using or Challenging a 'Day-in-the-Life' Documentary in a Personal Injury Lawsuit," 40 Am Jur Trials 24.

[73] Joseph Kelner and Robert Kelner, Trial Practice: "Demonstrative Evidence— Exhibiting Injuries," *New York Law Journal* 7/25/95 p.3 ("The advent of videotapes has vastly increased defendants' surveillance of injured plaintiffs. Plaintiffs must assume in every case that surveillance is occurring and should routinely obtain discovery of such material.).

[74] See, e.g., *People* v. *Patterson*, 242 AD2d 740 (2d Dept. 1997).

[75] For an example of roadway surveillance see generally [http://photocop.com/red-light.htm].

deposition testimony;[76] accident re-enactments; memorialization of events such as execution of wills[77] and confessions.[78]

While the Federal Rules[79] provide that depositions may be taken on both audio or videotape absent a court order to the contrary, "courts must be vigilant to ensure that their processes are not used improperly for purpose unrelated to their role."[80]

The "Artist Formerly Known as Prince," an entertainer, sought to prevent the operators of a fan magazine and Web site dedicated to him, from videotaping his deposition during a lawsuit in which he claimed that they were making unauthorized use of his name, likeness, photographs and other intellectual property. The entertainer contended that the defendant's efforts at videotaping his deposition were intended to generate more content for the offending Web site and publicity for themselves and served no legitimate litigation purpose.[81]

Although the Court found "a substantial factual basis for plaintiffs' concerns," particularly in light of the fact that defendants' counsel refused to stipulate that the defendants would refrain from disseminating or making any non-litigation use of the videotape, and despite a determination that the defendants' motive for videotaping the deposition was at least in part "to generate notoriety for themselves and their business ventures," the Court permitted the videotaping to proceed, albeit with significant limitations on the uses to which the videotape could be put.[82]

The Court distinguished *Westmoreland* v. *CBS*,[83] by noting that here it is "the plaintiff who invoked the judicial process to begin with, not a non-party witness dragged unwillingly into a dispute between others," and that there was at least some

[76] Fed. R. Civ. P. 32; but see also, Local Rules and individual Judge's Rules); CPLR 3113(b); 22 NYCRR §202.15.

[77] See, e.g., *In re Estate of Burack*, 201 AD2d 561 (2d Dept. 1994) (video offered to show testamentary capacity and not offered to probate the document as a will).

[78] For a good introduction to the subjects of editing, duplication, and alteration of videotapes, see generally
"Videotape Evidence," 44 Am Jur Trials 171.

[79] Fed. R. Civ. P. 30(b) (2)

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[81] *Paisley Park Enterprises Inc.* v. *Uptown Productions,* No. 99 Civ. 1439, 1999 WL 450868 (June 29, 1999) (Kaplan, USDJ).

[82] *Paisley Park Enterprises Inc.* v. *Uptown Productions,* No. 99 Civ. 1439, 1999 WL 450868 (June 29, 1999) (Kaplan, USDJ).

[83] 584 F. Supp. 1206 (D.D.C. 1984), *aff'd in part and rev'd in part*, 776 F2d 1168 (D.C.Cir. 1985),

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

"bona fide litigation purpose to the video recording" sought by defendants.[84] Nevertheless, the Court held, a party seeking access to the judicial system should not have to pay too high a price "in the form of the surrender of personal privacy," accordingly, videotaping could go forward but no copies of the tape could be made and a mutually agreed-upon custodian was to retain the sole copy of the tape absent further order of the court.[85]

Because of the potential mischief inherent in the use of videotape which can be easily edited, and the danger that deceptive tapes, inadequately authenticated could contaminate the trial process,[86] admission of videotape evidence is a matter within the sound discretion of the trial courts and depends on the facts and circumstances of each case. The ultimate object of the authentication requirement is to ensure the accuracy of the videotape sought to be admitted. Therefore, the trial judge must be satisfied that there is enough evidence so that a reasonable jury could find that the videotape is accurate.[87]

WHO SHOULD DEPOSE AN EXPERT WITNESS?

Unless you consider the deposition of an expert witness nothing more than a training exercise for associates and junior partners and you can confidently treat the litigation as a "throwaway" lawsuit, only the barrister who will be examining the witness during the trial should conduct the deposition. If you are the litigation partner responsible for the case, one of your chores as a rainmaker is to convince the client of the value of having top flight trial counsel conduct depositions of expert witnesses.

Regardless of the high flown rhetoric of those scholars responsible for the *Federal Rules of Civil Procedure* and the *Federal Rules of Evidence*, and all their State progeny, the deposition of expert witness is not an fair, balanced, dispassionate, academic quest for truth and justice. Depositions of expert witnesses are not training exercises for associates and junior partners you would not trust to conduct the trial in the court room.

Remember, there are some witnesses you must never depose. Those are the witnesses about whom you know a great deal already whether from prior trials,

[84] *Paisley Park Enterprises Inc.* v. *Uptown Productions,* No. 99 Civ. 1439, 1999 WL 450868 (June 29, 1999) (Kaplan, USDJ).

[85] *Paisley Park Enterprises Inc.* v. *Uptown Productions,* No. 99 Civ. 1439, 1999 WL 450868 (June 29, 1999) (Kaplan, USDJ).

[86] *DiMichel* v. *South Buffalo Ry. Co.*, (80 NY2d 184, 190 (1992), *cert. denied sub nom. Poole* v. *Consolidated Rail Corp.*(__ US __ , 114 S. Ct. 68, 126 L.Ed2d 37 (1993).

[87] Fed R. Evid. 901(a); and see, e.g., *United States* v. *Scully*, 546 F2d 255 (9th Cir. 1976).

depositions, or more esoteric intelligence sources and who you must never allow to discover your rhythm and moves.

THE EXPERT WITNESS REPORT: BLUEPRINT FOR THE DEPOSITION

Rule 26(a)(2) provides:

(A) In addition to the disclosures required by paragraph (1) [requiring voluntary disclosure at the outset of the case], a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; and any exhibits to be used as summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Rule 26(a)(2)(B) only specifies the minimum information that must be provided. Additional information may be requested through deposition, document request or interrogatory, as long is it is "relevant to the subject matter involved in the pending action."

Under the *Daubert/Joiner/Kumho* interpretation of the rule, the report must contain a complete statement of expert's opinion and basis and reasons therefore. The report must provide more than the conclusion(s) reached. It must explain the methodology by which the expert reached his or her conclusions.

Until the 1993 Amendments to the Federal Rules, expert discovery was haphazard. Typically, a party would have to serve an interrogatory to elicit the identity and opinions of the experts and then seek leave of the court to take a deposition to flesh out those opinions. "The information disclosed under the former rule in answering interrogatories about the 'substance' of expert testimony was frequently so sketchy

and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness."[88]

Rule 26(a)(2)(B) was added to ensure that a detailed report would be provided by the expert as a meaningful roadmap, while 26(b)(4)(A) provided for expert depositions without petition to the court.

To ensure that the expert disclosures were complete and sufficient, the amendments added a self-executing sanction for failure to comply. Under Rule 37(c)(1), a party who "without substantial justification fails to submit an expert report shall not, unless such failure is harmless, be permitted" to use that evidence at trial. There is no requirement that the opposing party file a motion to obtain this relief, so there is no safe harbor for noncompliance.

- At the deposition, test the report. Paragraph by Paragraph. Sentence by Sentence. Keyword by Keyword. Footnote by Footnote. General Reference by General Reference.

BEWARE OF RULE 26(A)(2)(B)

Rule 26 provides that you are entitled to a detailed report with "a complete statement of all opinions to be expressed and the basis and reasons therefore," an identification of all of the data considered, the exhibits to be used, the qualifications of the witness and a list of the witness's publications and previous testimony. But, if you do not get that report, can you confidently assume that you will not need to deal with any expert testimony. No!

The drafters of the 1993 amendments could have, but did not, apply the report rule to all experts. All experts who might give testimony under Rule 702 must be disclosed, but not all disclosed experts must provide reports. The report requirement is limited to witnesses who are "retained or specially employed to provide expert testimony" or to employees of a party "whose duties. . .regularly involve giving expert testimony." By the plain language of the rule, the report requirement only applies to specially retained experts. It does not apply to employees who do not regularly give expert testimony.

A careless litigator will serve interrogatories requesting the identity of all fact witnesses and depose each of them, relying on Rule 26 for the production of expert reports, then, in the pretrial order, careless counsel will provide for the depositions of experts after exchange of expert reports; only to be surprised—after the discovery cutoff— to receive notice pursuant to Rule 26(a)(2)(C) that opposing counsel

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[88] F. R. Civ. P. 26, Advisory Committee Notes.

proposes to offer expert testimony under Rule 702 from witnesses who are exempt from the Rule 26(a)(2)(B) report requirement!

The courts, however, do offer some protection to the careless litigator. Despite the seemingly clear language of the rule, court's are reluctant to hold that an expert witness need not submit a Rule 26 report merely because he or she is an employee of a party.[89] The reason may lie in an important caveat to Rule 26, which notes that the reporting requirements and exceptions apply "except as otherwise stipulated or directed by the court." Courts would rather see full, complete discovery before trial because it makes the trial more efficient.

DESIGNATING TESTIFYING EXPERTS

While consulting experts are not supposed to be discoverable, we must produce in discovery anything relied upon by testifying experts. Before the passage of the 1993 amendments to the *Federal Rules of Civil Procedure*, the sole discovery tool automatically available to obtain the identity of the expert and an overview of his or her opinions, and the bases for those opinions was an interrogatory. Further discovery, such as document production and depositions, was not available except by court order.

Even when documents were produced and depositions taken, counsel could generally draw a line between the universe of information supplied to the expert and the materials actually relied upon to inform the opinion. Counsel used that line to shield from discovery work product and other possibly privileged materials that the expert could, in good faith, claim that he or she did not rely upon.

The 1993 amendments erased that line. Significantly, the amended rule requires the production of all materials "considered" by the expert. Anything said to or given to the expert, therefore, is discoverable, whether or not the material played a role in the final opinion. When you convert a consulting expert into a testifying expert, you have probably waived work-product privilege for any materials shared with that expert while they were a consultant.[90]

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[89] in *Minnesota Mining & Mfg. Co.* v. *Signtech USA, Ltd.*, 177 F.R.D. 459 (D. Minn. 1998), 3M argued that its employee experts would "testify based on their experience and knowledge gained through their regular employment at 3M" and that no reports were necessary. Rule 26 says that no report is needed unless the witness is specially retained, and these witnesses, long-standing employees, had not been "retained" to give testimony. Their duties did not regularly include giving expert testimony and they had never testified before. But the court found otherwise reasoning that since these employees do not regularly give expert testimony, they must be deemed to have been specially retained. *Day* v. *Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996), came to the same result.

[90] *BCF Oil Refining Inc.* v. *Consolidated Edison Co.*, 171 F.R.D. 57 (S.D.N.Y. 1997), offers a scholarly review of the 1993 amendments and their impact on expert discovery.

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

A designated trial expert often performs two roles in litigation—testifying expert and technical litigation consultant.[91] However, any ambiguity as between the two roles must be resolved in favor of full discovery. Even opinion work product can not be shielded from discovery. The drafters of the 1993 amendments, who were presumed to understood the issues related to opinion work product, "decided that disclosure of material generated or consulted by the expert is more important."[92]

DESIGNATING A CONSULTANT AND A TESTIFYING WITNESS

Counsel whose clients have pockets deep enough and who feel comfortable living compartmentalized lives often try to mitigate the effect of this problem of insulating the testifying expert from the consultant by hiring two experts—one with whom they can speak freely and one with whom they share only those thoughts that have been carefully distilled through the consultant.

A variation on the theme, commonly employed in complex cases utilizing large consulting firms that employ armies of professionals, is to have one individual act as the consultant and to designate another as the testifying witness. The "talking head" witness receives only refined and sanitized information, while his or her equity partner is the expert with whom the attorneys spend most of their pretrial time and share their innermost secrets and concerns. However, designating the "talking head" partner as an individual witness, not their firm may not be sufficient protection as more and more courts determine that the firm is actually giving expert testimony and, as a result, that information possessed by any employee of the firm may be discoverable.[93]

The message is clear. Do not disclose to any expert anything you would be embarrassed to share someday with your adversary.

It would seem logical and efficient to designate as a testifying expert a person who has not only real expertise, but also a background in the subject matter of the litigation or some established relationship with the client. For example, designating a patent attorney to testify on issues such as validity, enforceability and infringement who was involved in the prosecution of the patent, since that attorney is already the most knowledgeable person on the subject. However, that expert designation will almost

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[91] *BCF Oil Refining Inc.* v. *Consolidated Edison Co.*, 171 F.R.D. 57 (S.D.N.Y. 1997).

[92] *BCF Oil Refining Inc.* v. *Consolidated Edison Co.*, 171 F.R.D. 57 (S.D.N.Y. 1997).

[93] See, *e.g.*, *Bank Brussels Lambert* v. *Chase Manhattan Bank*, 175 F.R.D. 34 (S.D.N.Y. 1997); *Master Palletizer Systems Inc.* v. *T.S. Ragsdale Co.*, 937 F.2d 616 (10th Cir. 1991).

certainly waive any privilege for any matters having anything to do with the patent in suit.[94] But that is not the only danger.

The designation of an expert as a testifying expert may result not only in the waiver of privilege relating to the specific expert engagement, but also in the waiver of privilege for other engagements of that expert in the past.[95]

YOUR EXPERT MAY BECOME THE EXPERT OF YOUR ADVERSARY

Once an expert witness is identified for testimony, you can choose not to call the witness at trial, but you cannot prevent your opponent from taking their deposition. "Once an expert is designated, the expert is recognized as presenting part of the common body of discoverable, and generally admissible, information and testimony available to all parties."[96]

Any attempt by the original designating party to question the credentials or qualifications of a switched-loyalties expert[97] might open the door to rebuttal to show that the party was initially pleased with those credentials or qualifications.[98]

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[94] See, *e.g.*, *Multiform Dessicants Inc.* v. *Stanhope Products Co. Inc.*, 930 F. Supp. 45 (W.D.N.Y. 1996); *Vaughan Furniture Co., Inc.* v. *Featureline Manufacturing Inc.*, 156 F.R.D. 123 (M.D.N.C. 1994).

[95] In *The Herrick Co. Inc.* v. *Vetta Sports Inc.*, 1998 WL 637468 (S.D.N.Y.1998), one of the defendants, a major law firm, designated a well-known law professor, Charles W. Wolfram, as an expert trial witness on the subject of legal ethics. The law firm had enjoyed a relationship with Mr. Wolfram for many years on a variety of other matters. Mr. Wolfram had been retained more than half a dozen times to render advice related to ethical matters for other clients of the firm and nearly a dozen other times to render advice directly to the firm on legal ethics issues. The court had no difficulty finding that these prior engagements of Mr. Wolfram ordinarily would be shielded by the work-product and attorney-client privileges, but by designating Mr. Wolfram an expert trial witness, the law firm had opened the door on other engagements regarding legal ethics because those other engagements would be relevant to the effective cross-examination of Mr. Wolfram. His designation of as a testifying expert erased the privilege on all the other engagements—a classic demonstration of the *Law of Unintended Consequences*.

[96] *House* v. *Combined Insurance Co. of America*, 168 F.R.D. 236 (N.D. Iowa 1996).

[97] In *Agron* v. *Trustees of Columbia University*, 176 F.R.D. 445 (S.D.N.Y. 1997), the plaintiff retained a psychiatrist to offer expert testimony that she suffered from a mental disability. Her expert, Deutsch, diagnosed her as suffering from chronic paranoid schizophrenia. After designating the doctor as an expert witness, the plaintiff found an expert more to her liking who opined that she did not suffer from schizophrenia, but rather from post-traumatic stress disorder. She withdrew her designation of her first expert as an expert witness and Columbia promptly put him on its list of potential witnesses. Over her objection, the court allowed Columbia to convert Dr. Deutsch into their expert witness. The court did, however, grant one substantial concession to the plaintiff, it precluded Columbia from eliciting that the expert had originally been retained by the plaintiff.

[98] In *Peterson* v. *Willie*, 81 F.3d 1033 (11th Cir. 1996), the trial court permitted the defendant to call a trial expert who was originally designated and later withdrawn by the plaintiff. The trial court also

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

NON-TESTIFYING EXPERTS WHO CONTRIBUTE TO THE EXPERT OPINION

While the identity of a non-testifying expert generally need not be disclosed, no deposition of a "testifying" expert is complete without a diligent search for these "hidden" experts.

At the very least you should obtain the name and some description of the work performed by every individual with whom the expert witness being deposed has had contact whose work is associated in any way with the subject matter of the litigation. That includes colleagues who may have discussed the case informally with the witness at professional society meetings or socially.

It is particularly important to obtain information from the witness about the firms and companies which perform routine work such as clinical laboratory analyses, instrument calibration and repair and the like.

When laboratory work is involved try to obtain information about the make and model of the laboratory equipment used. Try to elicit an opinion from the expert as to why a particular brand of gas chromatograph, MRI, oscilloscope, or other instrument was chosen over a competitor.

Testifying and consulting or non-testifying experts often share support staff. Establish the fact and then attack the "firewall" or "Chinese Wall" between the experts. Often the testifying expert witness will provide the evidence necessary to obtain a deposition of the non-testifying expert.

HYBRID WITNESSES NEED NOT FILE REPORTS

Witnesses who express opinions related to their actual observation of factual matters related to a case are not pure experts, but they are not simply fact witnesses, either. Rather, they are hybrid witnesses who offer the trier of fact a mixture of factual observation and opinion derived from that observation. The courts have generally held that such hybrid witnesses are not subject to the report requirement of Rule 26(a)(2)(B).[99]

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permitted the defendant to elicit the fact that the expert had originally been retained by the plaintiff. The Court of Appeals affirmed the trial court's discretion to allow the testimony but held that it was error to advise the jury that the plaintiff had originally retained the expert. It was error, but not reversible error. Judgment for the defendant stood, error and all. The court not only found the error harmless, but it also set out a framework for future decisions that would permit the jury, without error, to hear about similar retentions.

[99] One obvious example of a hybrid witness for whom a report is not needed is a treating physician, but the rule applies to all areas of expertise. See *Riddick* v. *Washington Hospital Center*, 183 F.R.D. 327 (D.D.C. 1998); *Sprague* v. *Liberty Mutual Insurance Co.*, 177 F.R.D. 78 (D.N.H. 1998). A treating physician may have expert opinions relating to cause and effect, but since he or she formed those opinions in the context of a factual observation of the plaintiff, the doctor is excepted from the report

- Cover the opinions of hybrid witnesses through interrogatories and deposition, unless you want to hear those opinions for the first time at trial.

There is very little case law interpreting the report requirement of Rule 26. The few reported cases suggest that "[I]t is a mistake to focus solely on the status of the expert, instead of the nature of the testimony which will be offered at trial."[100] The status of the expert as an employee does not obviate the need for a report,[101] at least under some circumstances. However, merely because the proffered expert is not an employee, it does not necessarily mean that a report is required.[102]

The real issue in determining whether a Rule 26 report is required is the substance of the testimony. If the witness comes to the engagement with no prior knowledge of the events related to the lawsuit, the witness is a pure expert and probably should prepare a report. If the witness was involved in the factual events of the litigation and as a result formed opinions, then the witness is a hybrid expert who may be subject to deposition but need not produce a Rule 26 report.

DOCUMENTS ASSOCIATED WITH EXPERT OPINION

Under the *Daubert/Joiner/Kumho* interpretation of the Rules, all the documents prepared by the expert in connection with the preparation of their expert report and testimony must be disclosed even if the expert ultimately does not base their opinion on such documents. That means all the drafts of the report and any notes the expert might have made including notes concerning discussions with counsel.[103]

Even some attorney work product may have to be produced, including memoranda to file, handwritten notes, and similar material which may have been presented to the expert and might be construed as "data or other information considered."[104]

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requirement.

100 *Sullivan* v. *Glock*, 175 F.R.D. 497, 500 (D. Md. 1997).

101 *Minnesota Mining & Mfg. Co.* v. *Signtech USA, Ltd.*, 177 F.R.D. 459 (D. Minn. 1998); *Day* v. *Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996),

102 *Riddick* v. *Washington Hospital Center*, 183 F.R.D. 327 (D.D.C. 1998); *Sprague* v. *Liberty Mutual Insurance Co.*, 177 F.R.D. 78 (D.N.H. 1998).

103 See, *e.g.*, *B.C.F. Oil Refining, Inc.* v. *Consolidated Edison Co. of New York, Inc.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997).

104 See, *Musselman* v. *Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997) where the attorney communicated work product to an expert and it was discoverable if considered by the expert retained to render opinion at trial; *B.C.F. Oil Refining*, 171 F.R.D. 15, at 62 held that all materials, not just factual information, furnished to an expert must be disclosed in the expert's report; *Karn* v. *Rand*, 168 F.R.D. 633, 637–39 (N.D. Ind. 1996) held that when an attorney furnishes work product—either

Oral communications between counsel and an expert may be discovered during a deposition,[105] and the subsequent deposition of the attorney may be taken to learn of communications with the expert that were considered by the expert in forming his or her opinion, although it appears, at least at the present time, that the attorney's memoranda of his or her conversations with the expert are not yet discoverable if they were not actually shown to the expert[106]

EVALUATING WITNESS PREPARATION

You must determine the extent of the preparation an expert witness has made for the deposition during the first few questions. Perhaps the most straightforward and least complicated way to test the extent of witnesses preparation at the opening of the deposition is with a few simple questions concerning familiarity with the subject matter of litigation and identification of the documents used to refresh recollection.

"REFRESHING RECOLLECTION" AND "REVIEWING DOCUMENTS"

The difference between reviewing documents and refreshing recollection with documents is a distinction that Lewis Carroll would have enjoyed and it is the kind of empty legal formalism that led the diverse wits and pens of Shakespeare, swift, Dickens, and Gilbert to taunt the law and mock the lawyer.[107]

Touching on the interplay between Evidence Rule 612[108] and the attorney-client privilege, disclosure of a handwritten note to an EEOC lawyer was ordered.[109]

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factual or containing attorney's impressions—to an expert retained to provide opinion testimony at trial, the opposing party is entitled to discover that communication if it was considered by the expert in developing their opinion.

105 *William Penn Life* v. *Brown Transfer*, 141 F.R.D. 142, 143 (W.D. Mo. 1990); *Intermedics, Inc.* v. *Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D. Cal. 1991).

106 *B.C.F. Oil Refining*, 171 F.R.D. 57, at 67

107 Yannacone, Victor John, jr., "Property and Stewardship—Private Property+Public Interest Equals Social Property," 23 S.D. Law Rev. 71, at 123, n. 78

108 Fed. R. Evid. 612

109 *Equal Employment Opportunity Commission* v. *Johnson & Higgins Inc.*, No. 93 Civ. 5481, 1998 WL 812051 (Nov. 6, 1998). (Peck, MJ). When the attorney for the witness cautioned him several times to restrict his answer only to those documents that refreshed his recollection, rather than to all documents he had reviewed, the witness asked him, "Isn't that what you review everything for?" He stated that he understood the question, as well as his attorney's instruction to limit his response, but noted that "[i]t is very difficult to differentiate between what I looked upon for review only and what I looked upon to make sure I was going to be giving the entire response that was being asked."

The balancing standard requires the court to weigh the competing interests—the need for full disclosure on the one hand[110] and the need to safeguard the integrity of the adversary system through the protections afforded by privilege on the other.[111]

The court must weigh "the recognized interest in protecting from disclosure the thought processes and legal theories developed by counsel . . . against the need of the adverse party for the factual information contained in the requested material."[112] This balancing test should take into account the extent of the protected material that would be disclosed.[113]

WORK-PRODUCT PROTECTION

Generally, documents generated or obtained because of the prospect of litigation are entitled to work-product protection, even if they are not prepared exclusively or even primarily to assist in litigation.[114] However, "[a]pplication of the work-product doctrine to documents prepared by insurance companies has been particularly troublesome because it is the routine business of insurance companies to investigate and evaluate claims and to defend their insureds against third-party claims."[115]

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110 *Equal Employment Opportunity Commission* v. *Johnson & Higgins Inc.*, No. 93 Civ. 5481, 1998 WL 812051 (Nov. 6, 1998) (Peck, MJ). Under Rule 612(2), documents used to refresh recollection before testifying must be produced to the adverse party "if the court in its discretion determines it is necessary in the interests of justice."

111 *Bank Hapoalim, B.M.* v. *American Home Assurance Co,*, 92 Civ. 3561, 1994 WL 119575 (SDNY April 6, 1994) (Wood, J.) and *Lawson* v. *United States*, 97 Civ. 9239, 1998 WL 312239 (June 12, 1998) (Peck, MJ)

112 *In re John Doe Corp.*, 675 F2d 482, (2d Cir. 1982) and *SEC* v. *Thrasher*, 1995 WL 46681 (SDNY, Feb. 7, 1995) (Dolinger, M.J.)

113 *National Union Fire Insurance Co. of Pittsburgh,* No. 97 Civ. 1438, 1998 WL 823611 (Nov. 25, 1998). (Martin, J)

114 *United States* v. *Adlman*, 134 F3d 1194 (1998 CA 2)

115 *Mount Vernon Fire Ins. Co.* v. *Try 3 Building Services Inc.*, No. 96 Civ. 5590, 1998 WL 729735 (Oct. 16, 1998) (Pitman, MJ). Citing *Amoco Oil Co.* v. *Hartford Accident & Indem. Co.*, 93 Civ. 7295, 1995 WL 555696 (SDNY Sept. 18, 1995) (Sotomayor, J.) and *SEC* v. *Thrasher*, 92 Civ. 6987, 1995 WL 46681 (SDNY Feb. 7, 1995) (Keenan, J.), among other cases. The difficulty in determining when an insurance company's activities cross the line from "ordinary course of business" to "anticipation of litigation," has led some judges in the Southern District of New York to apply a presumption that investigative reports prepared prior to coverage decisions are not entitled to work-product protection. But see other cases, such as *American Ins. Co* v. *Elgot Sales Corp.*, 97 Civ. 1327, 1998 WL 647206 (SDNY Sept. 21, 1998) (Carter, J.) and *Weiss* v. *Muccillo*, 95 Civ. 5686, 1997 WL 706444 (SDNY, Nov. 13, 1997) (Leisure, J.), inwhich the court conducts a "more flexible case-by-case approach."

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

The protection offered by Rule 26(b)(3) to work-product material is a qualified one, which gives way if the party seeking discovery has a substantial need for the evidence and cannot obtain it from other sources without undue hardship.

PRIVILEGE

There is a pressing need for attorneys to weigh carefully what documents should be shown to a witness preparing for deposition or other testimony, as well as the importance of specifically preparing witnesses for questions asking them to identify those documents that refreshed their recollection. Such preparation is critical when the witness has reviewed documents that would otherwise be subject to privilege or work-product protection.

One of the particular concerns associated with assertion of the attorney-client privilege involves communications made to an in-house lawyer who also holds an executive position in the company.[116] Because the "burden of sustaining the privilege is on the proponent,"[117] an in-house attorney who also holds an executive position, must make a clear showing that they "gave advice in their legal capacity, not in their capacity as business advisor."[118]

WAIVER OF PRIVILEGE

Privilege can be waived by permitting a witness to provide even limited information without a specific agreement that the testimony will not waive the privilege. In the Second Circuit,[119]inadvertent production of a privileged document will not, in and of itself, waive the privilege. In determining whether privilege has been waived, court generally apply a four-part test.

- the reasonableness of precautions undertaken to prevent inadvertent disclosure,
- the time taken to rectify the error,
- the scope of discovery, and
- the extent of the disclosure.

In the end, however, the Court considers all the facts and circumstances and weighs them all against that ill-defined but oft-cited standard—fairness.

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116 *Ames* v. *Black Entertainment Television*, No. 98 Civ. 0226, 1998 WL 812051 (Nov. 18, 1998).

117 *Bowne of New York City Inc.* v. *AmBase Corp.*, 150 FRD 465 (SDNY 1993) (Dolinger, M.J.),

118 *Ames* v. *Black Entertainment Television*, No. 98 Civ. 0226, 1998 WL 812051 (Nov. 18, 1998).

119 *Lois Sportswear, U.S.A.* v. *Levi Strauss & Co.*, 104 F.R.D. 103 (SDNY 1985) (Sweet J.)

Where the producing party is "so careless as to suggest that it was not concerned with the protection of the asserted privilege," waiver will be found.[120] Recently,[121] the SEC exhibited such carelessness surrounding its production of a privileged document—a 100-page draft of an "action memo" reviewing and weighing the SEC's evidence and discussing the strengths and weaknesses of its case—that it effectively surrendered its claim that the document was privileged. The SEC lead attorney had authorized a paralegal to provide a copy of the document to the defendants without making any effort to first ascertain its contents.[122]

Although finding that the SEC had been inexcusably careless, the Court took pains to avoid endorsing the conduct of the defendants' attorneys[123] and declined to express an opinion "as to whether those defense counsel who reviewed the document acted appropriately, particularly prior to the point at which SEC counsel approved copying the document for defense counsel."[124]

CONFIDENTIAL DATA

Keep in mind that depositions of expert witnesses and demands for document production, especially in litigation over intellectual property rights, trade secrets, and unfair competition, are often little more than thinly disguised attempts at industrial espionage, and many third-party subpoenas are nothing more than an effort "to romp

120 See *Aramony* v. *United Way of America*, 969 F. Supp. 226, 235 (SDNY 1997) (Scheindlin, J.)

121 *Securities and Exchange Comm'n* v. *Cassano*, No. 99 Civ. 3822, 1999 WL 771398 (SDNY Sept. 28, 1999).

122 *Securities and Exchange Comm'n* v. *Cassano*, No. 99 Civ. 3822, 1999 WL 771398 (SDNY Sept. 28, 1999). In finding that the SEC had exercised inadequate care with respect to the document in question, the Court focused less on the fact that the document was initially included in the materials produced for inspection, and more on the SEC attorney's response to the defense attorney's request for its immediate copying and production, concluding that "[t]he circumstances of the request clearly should have suggested to the SEC attorney that defense counsel had found what they regarded as gold at the end of the proverbial rainbow. Any attorney faced with such a request in comparable circumstances should have reviewed the document immediately, if only to find out what the other side thought so compelling."

123 *American Express* v. *Accu-Weather Inc.*, No. 91 Civ. 6485, 1996 WL 346388 (SDNY 1996) (Sweet, J.) and *Am. Bar. Ass'n Standing Comm. On Ethics and Prof. Resp.*, Formal Op. 92-368 (1992),

124 *American Express* v. *Accu-Weather Inc.*, No. 91 Civ. 6485, 1996 WL 346388 (SDNY 1996) (Sweet, J.) and *Am. Bar. Ass'n Standing Comm. On Ethics and Prof. Resp.*, Formal Op. 92-368 (1992),

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

through the files" of competitors.[125] When presented with a subpoena seeking broad discovery of materials such as sales, marketing and technical information, an immediate motion to quash pursuant to Rules 26(c) and 45(c) (3) is appropriate.

Under Rule 45(c) (3) (B), a party seeking confidential commercial information from a non-party bears the burden of showing a substantial need for the information that cannot otherwise be met without undue hardship.[126] Merely "intoning that discovery of the type sought is relevant to a [particular] theory is insufficient." and consent to a protective order does not substitute for the requisite threshold showing of relevance.[127]

THIRD-PARTY DISCOVERY INVOLVING THE UNITED STATES

Parties in private litigation occasionally seek to obtain documents or even testimony from federal agencies. Most agencies have regulations that govern how requests for such information should be made and how they should be considered by the agency. These regulations are known as "*Touhy* regulations," after the case of *United States ex rel. Touhy* v. *Ragen*,[128] in which the Supreme Court confirmed the authority of an FBI agent to refuse compliance with a subpoena where the party issuing the subpoena had failed to comply with the applicable Department of Justice rules.

Sovereign Immunity

The waiver embodied in *Administrative Procedure Act* (APA) §702 for actions "stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority" apparently does not extend to actions to enforce subpoenas in cases where the United States is not a party.

To some courts, it seems that the broad waiver of sovereign immunity which is at the heart of APA §702 refers only to lawsuits in which the United States is named directly as a party defendant, and not to ancillary motions against the United States as a non-party. This leaves a party with no means to challenge an agency decision to withhold documents under its *Touhy Regulations* than the cumbersome route of instituting an independent action against the agency under the *Administrative*

125 *Fort James Corp.* v. *Sweetheart Cup Co.*, No. 97 Civ. 1221, 1998 WL 709813 (Oct. 8, 1998, Buchwald, USMJ).

126 See, *Katz* v. *Batavia Marine and Sporting Supplies Inc.*, 984 F2d 422 (Fed. Cir. 1993) and *Micro Motion Inc.* v. *Kane Steel Co.*, 894 F2d 1318 (Fed. Cir. 1990)

127 *Fort James Corp.* v. *Sweetheart Cup Co.*, No. 97 Civ. 1221, 1998 WL 709813 (Oct. 8, 1998, Buchwald, USMJ).

128 340 U.S. 462 (1951).

Procedure Act.[129] However, as in the *Agent Orange* litigation,[130] in the interests of judicial economy, and on proper notice to the agency, such a third-party motion can be treated by the Court as a declaratory judgment "action" under APA §702 and resolved by the trial court to whom it is addressed.

RULE 30(B)(6) DEPOSITIONS

Under this Rule,[131] a party may notice[132] another party or government agency to designate a person to be deposed who has knowledge of matters about which information is sought by an adverse party. This gives a party the opportunity to obtain information from the knowledgeable representative of an adverse party without having to identify a specific person. The disadvantage is that Rule 30(b)(6) allows the adverse party to determine who to produce for the deposition.

Great discretion is afforded the designating corporation under 30(b)(6).[133] The party serving a Rule 30(b)(6) notice cannot complain that another of deponent corporation's employees was more knowledgeable about the matters to be covered at the deposition because "Rule 30(b)(6) does not require a party to produce someone who is the 'most knowledgeable' but only someone whose testimony is binding on the party."[134]

Witnesses produced by your adversary under Rule 30(b)(6) can be particularly troublesome. Most often they are not the best qualified witnesses to answer the questions you have in mind, but those best prepared to frustrate your inquiry.

Examining a Rule 30(b)(6) witness involves building a record to support a motion to compel production of a more knowledgeable witness.

One of the most important issues you must address when deposing a Rule 30(b)(6) witness is when does that witness become an expert witness. The answer is obvious. When the witness knows more about the company or agency than you do.[135]

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129 *Grand Street Artists* v. *General Electric Co.*, No. M8-85, 1998 WL 760228 (Oct. 30, 1998, Rakoff, USDJ).

130 MDL 381, Pre-trial Orders, George Pratt, USDJ, *op. cit.*

131 FedRCivP 30(b)(6)

132 As with other deposition notices, a party may include a request for documents as part of a 30(b)(6) notice. In that case, the notice must be served at least 30 days before the date of deposition. See FedRCivP 30 (b) (5).

133 *Cruz* v. *Coach Stores Inc.*, No. 96 Civ. 8099, 1998 WL 812045 (Nov. 18, 1998).

134 See, *e.g.*, *SEC* v. *Morelli*, 143 FRD 42 (SDNY 1992) (Leisure, J.); *Bank of New York* v. *Meridien BIAO Bank Tanzania Ltd.*, 171 FRD 135 (SDNY 1997) (Francis, M.J.).

135 See Appendix A, the deposition of a Kraft paper mill manager taken as part of an early (pre-NEPA, pre-EPA) air pollution case and Appendix B, the testimony of the Director of Pesticide

The most important series of questions and those with which you should open the deposition of any Rule 30(b)(6) witness establish the family tree of the witness within their organization. From their testimony you should be able to construct the organizational family tree down to the roots and up to the topmost branches; as the tree is seen from the perspective of the witness.

A "corporate deponent has an affirmative duty, when responding to a 30(b) (6) notice, "to make available 'such number of persons as will' be able 'to give complete, knowledgeable and binding answers' on its behalf."[136]

A corporation has significant latitude in selecting the witnesses to produce in response to a Rule 30(b) (6) notice. The deposing party may not insist on the "most knowledgeable" witness, but only on an adequately prepared witness whose testimony is binding on the corporation.[137] However, a corporation's discretion in selecting 30(b)(6) witnesses is not unfettered, and such witnesses must be knowledgeable and prepared to testify on the subjects identified in the Rule 30(b) (6) notice.[138] Where a party produces an inadequate witness in response to a 30(b) (6) notice, and fails to respond to its adversary's requests for a witness with knowledge, it may not only be bound by the testimony of that witness, but also find itself precluded from presenting other, more knowledgeable witnesses at trial on its own behalf.[139]

HIGH RANKING EXECUTIVES

The broad scope of discovery authorized by the *Federal Rules of Civil Procedure* entitles a party to depose practically any witness with relevant knowledge and that depositions, even of busy and important people, will be barred only where it is clear that the witness lacks personal familiarity with the facts of the case.

Registration for the United States Department of Agriculture before EPA assumed control of pesticide registration.

136 *Securities & Exchange Comm'n* v. *Morelli*, 143 F.R.D. 42 (SDNY 1992) (Leisure, J.)

137 *Cruz* v. *Coach Stores Inc.*, 96 Civ. 8099, 1998 WL 812045 (Nov. 18, 1998, SDNY) (Rakoff, USDJ)

138 *Reilly* v. *NatWest Markets Group, Inc.*, Nos. 98-7968(L), 98-9222(XAP), 1999 WL 397747 (June 17, 1999 CA 2).

139 *Reilly* v. *NatWest Markets Group, Inc.*, Nos. 98-7968(L), 98-9222(XAP), 1999 WL 397747 (June 17, 1999 CA 2). A party produced a single witness in response to the Rule 30(b)(6) notice, and declined to produce additional witnesses even after the plaintiff complained that the designated witness lacked sufficient knowledge to give complete answers to his inquiries. When, at trial, defendant attempted to call two additional witnesses, plaintiff sought and obtained an order precluding their testimony because the defendant had not produced them in response to the Rule 30(b)(6) notice.

A single allegation in a 94-paragraph complaint was sufficient to entitle plaintiff to depose the Board Chairman of the Company although the witness disclaimed any recollection or any specific knowledge of the plaintiff's claims.[140]

The Court compelled the deposition of Bear Stern's chairman, over objections that his attendance would be unduly burdensome and that he lacked personal knowledge of the facts underlying plaintiff's claim.[141]

On reconsideration,[142] the Court upheld that order and further refused to limit the testimony to written interrogatory responses, specific subjects, or to one hour, as urged by the defendants.

DID THE EXPERT WRITE THE REPORT?

Rule 26 quite reasonably requires that the expert report be written and signed by the expert,[143] however, Counsel may assist in preparing report. The subject of the inquiry during the deposition of the expert on their report is just how much assistance did counsel provide.

- Search for clues as to how comfortable the expert is with the actual language, the words used, in the report.
- Are the words used in the report, words that come naturally to the witness?
- Is the writing style of the report consistent with the style the witness uses in his or her professional or business publications?
- Do not begin these inquires until you are satisfied that you have a feel for the cadence and rhythm of the expert's speech patterns and recognize their written style through familiarity with all their published papers.

Since the expert does not personally have to type the report or draw the charts and graphs, find out who did and what their relationship is to the expert and the expert's client and to counsel for the client.

- Make the witness account for every draft of their report.
- Where are the early drafts now?
- Who participated in their preparation?
- If they were destroyed, who actually destroyed them?

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140 *Naftchi* v. *New York Univ. Medical Ctr.*, 172 F.R.D. 130 (SDNY 1997) Kaplan, USDJ)

141 *Lloyd* v. *Bear Sterns*, No. 99 Civ. 3323, 1999 WL 813420 (SDNY Oct. 12, 1999).

142 No. 99 Civ. 3323, 1999 WL 825769 (SDNY Oct. 15, 1999).

143 But see, *Gallardo* v. *Reineccius*, 1998 U.S. Dist. LEXIS 18484 (E.D. Cal. Nov. 18, 1998) in which the Court denied a (motion to exclude expert testimony although the expert report was typed by counsel and contains counsel's edits, including legalese.

- Were the drafts submitted to counsel or the client for review?
- Did the client or counsel make comments?
- Were those comments considered?
- Did those comments or the substance of those comments affect subsequent drafts? To what extent? How can they be identified? . . .

PREPARATION FOR EXPERT WITNESS DEPOSITIONS

- Should you write out specific questions?
- Should you make a checklist of areas to cover?
- Should you write out the answers and ask questions using the answers?[144]

Regardless of the method, you must know where you want to go with the information.

- What are the elements of your *prima facie* case?
- What does the judge have to know in order to deny a motion to dismiss your case?
- What do the judge and/or jurors need to know to decide in your favor on trial?
- Why is the information that you are trying to elicit from the witness during a deposition going to be important to a judge or jury?

THE BARRISTER AS BIOGRAPHER

As soon as an expert witness has been named, you must start to prepare a detailed biography of the expert as both a human being and an expert witness. This detailed biography must be much more than the *curriculum vitae* that may be provided by the witness or your adversary.

- family, friends, social and political organizations,
- pre professional education, even as far back as grammar school,
- a residence history that reaches back to early childhood,
- an employment history that includes summer employment during school years,
- a community history that includes a search in the local newspaper morgues,

Personal information is as important in preparing for the deposition of an expert witness, or any important witness for that matter, as information about professional qualifications.

The Rule provides for production of all the publications authored by the witness in the preceding ten years as well as a list of cases in which the expert has testified

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144 Herbert J. Stern, 1 *Trying Cases to Win* 485 (1991).

during trial or by deposition, in the preceding four years. More information can be sought if relevant under Rule 26(b)(1).[145]

If possible obtain the transcripts of all testimony the expert witness has ever given and store it in a full text Boolean searchable database.

The professional investigation begins with **publications**. You must obtain copies of every publication which contains the name of the witness as an author, a reference, or a participant in the work that is the subject matter of the publication.

It is equally important to obtain copies of all references to the witness that may have appeared in the general media as well as the professional literature. Remember that most electronic media data banks such as *NEXIS WESTLAW* and *Reuters* do not carry materials subject to full text search much before 1980. A great many successful experts made their mark in the 1960s and 1970s.

It is not enough to obtain all the publications of the witness, you have to read them, and, to have any real success with the witness on the deposition and later during the trial, you must understand them.

Proper preparation mandates that the attorney responsible for the deposition of an expert witness read and generally understand every article ever written and published by the witness. If you can't, you must associate with counsel who can. In the alternative, you can always increase the limits on your professional liability policy.

If the witness is a scientific or technical expert, and particularly if the witness holds an academic position, you must search out all the other scientists and technical experts named in or associated with the expert witness in any professional activity. From this research you'll be able to construct a Web with the witness at the center and a well defined universe in which the expert lives and works as an expert. You will be able to see where the expert fits in their profession. From the web you can quickly determine whether the expert is part of the mainstream or works in some eddy or backwater of the field. You should also be able to immediately determine areas of common interest between your experts and the expert you are about to depose.

Armed with an intimate knowledge of the expert witness, you can refer to the biography during the deposition and fill in areas where information is lacking. These sallies, when based on a detailed knowledge of surrounding facts, will often lead to surprising rapport between you and the expert witness being deposed.

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145 See *Ladd Furniture, Inc.*, 1998 U.S. Dist. LEXIS at *35–36 which ordered disclosure of information about cases in which the expert served as an expert witness in the past 6 years.

Victor John Yannacone, jr. E-MAIL v.yannacone@abanet.org VOICEMAIL 631–758–9468

DEPOSITION GOALS

Consider the purpose of each deposition. The general rule that when you have all of the facts already, you should use the depositions to obtain admissions and establish positions for cross-examination at trial; but when you do not know what information your opponent has, you use depositions to find out applies to expert witnesses as well.

The general rules with respect to the use of documents in depositions also apply with perhaps even greater force and effect to depositions of expert witnesses.

If your goal is to obtain admission of a specific fact, show the witness the documents which support your position.

When gathering facts and eliciting specific information, periodically invite the expert witness to talk, by asking if he or she has any more to add in response to a specific question. Once you start asking these kinds of questions, continue encouraging even the most taciturn witness to offer more and more until the only answer left is, "No!"

If you are seeking information, don't stop until you have drained the witness of all the information they might have on the topic.

Impeachment of an expert witness by means of prior or subsequent or even contemporaneous inconsistent statements, must be based on very specific statements made which can later be shown to be inconsistent. Even in a civil action, the methods and strategies are not much different from those of a prosecuting attorney laying a perjury trap for a witness before a Grand Jury.

THE MANNER OF ASKING QUESTIONS

With experts the faster the pace of the deposition and the more questions you ask, especially innocuous fact questions, the easier it is to slip in an important substantive question.

Always make an adverse expert witness your own fact witness whenever possible. This can be of particular value in establishing the basis for professional credentials and the existence of industry custom and usage as well as generally accepted standards.

Never forget that an adverse expert witness may be a truly well-known and established expert in the field. During the days of litigation over the peaceful use of atomic energy, particularly generating electric power from nuclear reactors, it should have been obvious to the attorneys representing the opponents of nuclear power that everyone who knew a substantial amount about nuclear energy was either an employee of the Atomic Energy Commission, a consultant to the Atomic Energy Commission, or wished they were one or the other.

Whenever possible, try to make an adverse expert witness establish facts that your experts may need to rely upon. The more agreement you can establish between the opinions of an adverse, hostile, or even neutral and disinterested expert witness and the opinions of your expert witness the more weight the jury will give to the opinion of your expert witness.

Whenever possible, allow an expert witness to wax pedantic during a deposition. Cultivate the attitude of a raptly attentive graduate student during the deposition of an expert witness, particularly one who has an academic background.

Treat expert witnesses during their depositions with respect and deference unless you have a valid strategic—not merely tactical—reason for belligerence or antagonism.

Try not to make personal enemies of expert witnesses, even if they are little more than hired guns or highly credentialed streetwalkers.

During the deposition search for the philosophical, even the theological, basis for the expert's opinions. This is the most effective way to uncover latent or hidden bias in even the most fair-minded expert.

Always place the expert witness in the context of his or her own personal time and establish on the record the professional paradigms or "box" within which the expert thinks.

Remember the parallels of history and science.[146] and build a similar set of parallels within which to locate the expert you are deposing in terms of culture and professional world view..

Know, or if you do not know, discover, the main events which occurred throughout the expert's formative years. Try to let the expert tell you what events, books, scientific discoveries, and personal epiphanies influenced them. Explore the character forming choices each expert has faced.

Try this, "Doctor, your education and background clearly show that you might have been successful as a (nuclear physicist or electronics engineer, or . . .). What made you choose to practice medicine?" the answer to that question may be very revealing about the basic character of the witness.

Pitfalls and Pratfall.

Be particularly wary when an *expert* witness repeats a portion of a question.

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146 See, Grun, Bernard, *The Timetables of History, A Horizontal Linkage of People and Events,* based on Werner Stein's *Kulturfahrplan* (New York: Touchstone, Simon & Shuster, 1979) and Hellermans, Alexander and Bryan Bunch, *The Timetables of Science, A Chronology of the Most Important People and Events in the History of Science* (New York: Simon & Shuster, 1988).

Sarcasm, irony, and other literary and rhetorical devices which depend upon inflection or tone of voice are lost in the printed transcript and are even often missed in videodepositions.

Multiple negatives in questions produce ambiguous answers. Clarify them immediately even if it means interrupting your adversary.

LACK OF KNOWLEDGE

Many expert witnesses are well-prepared personally and some have been well prepared by the attorney for whom they are appearing. Occasionally, however, some expert witnesses are not prepared.

On occasion, it is important to depose an expert witness in order to establish their lack of knowledge or limit the scope of their knowledge about the subject matter of the litigation or some aspect of it.

When you are trying to establish lack of knowledge from a witness, lay the broadest foundation possible to help the witness recall the information before even asking the ultimate question. Use all the documents available to refresh the recollection of the witness. You do not want the recollection of the witness to be suddenly refreshed months or years later during the trial.

TRAVELING THE INFORMATION BYWAYS

Successful depositions of expert witnesses rarely proceed in a straight line. The advice to "bob and weave" is just as important for trial lawyers conducting depositions as it is for boxers trying to avoid brain damage. The few exceptions prove that rule [147] Sort and restructure the information you gather from the witness during the deposition later at your computer.

The key to any successful deposition, and the successful examination and cross examination of any witness during a trial, is your ability to see the outline of your inquiry floating over the head of the witness at all times. It also helps to be able to read the transcript as it passes through your brain behind your eyeballs as well.

Success in the examination of any witness whether at a deposition or during trial requires that you never lose sight of your outline and you never lose your place.

During the deposition, and to a lesser extent during trial, your job is to keep the witness from reconstructing your outline for as long as possible. You have the road map for the inquiry and you are supposed to know where you are going. Your

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147 See Appendix A, the deposition of a paper mill manager which did, by necessity, proceed in a straight line appears as an appendix.

success, however, may depend on concealing your destination from the witness for as long as possible.

Deposing an expert witness is like playing *n*–dimensional chess simultaneously with many masters. You must keep track of every line of questioning you have as well as all those opened by the answers of the witness.

Modern studies on military and police interrogation methods have confirmed the empirical observations of trial lawyers in the Common Law tradition for generations. Witnesses tend to bond with their interrogators no matter how unpleasant the experience may be. Take advantage of that fact when questioning a witness and prevent it from happening when your adversary is working a witness.

DEPOSITIONS; GENERAL CONSIDERATIONS

- Know the local court rules concerning depositions. Follow them.
- Know the local rules for depositions established by both the Judge and the Magistrate Judge in your case. Obey them.
- Know the idiosyncracies of the Judge, the Magistrate Judge and their Law Clerks concerning depositions and motions relying upon or involving depositions. Respect them.

Although depositions are part of an adversary proceeding, they are generally conducted in a cooperative spirit, or at least they are supposed to be.

A deposition is not a trial. Save your outstanding cross examination skills for the Courtroom.

Depositions are the time to find out not just what the witness knows but also to form a judgment on whether a jury will relate to and believe that witness on trial.

Stipulations

Beware of agreeing to the "usual stipulations" which usually include waiver of:

- Signing. A witness has the right to read, correct and sign the transcript. If the witness is not required to sign the deposition, they may wait until trial to claim that the reporter erred.
- Certification. Never waive certification by the reporter that the witness was duly sworn and the deposition transcript prepared by the reporter is a true and complete record.
- Sealing. In the case of expert witness depositions, sealing the transcript pending further direction from the Court is often necessary. This is particularly true where intellectual property considerations, confidential business information, or sensitive medical records are involved.

- Filing. Check local rules about filing depositions with the court. Some Courts insist upon filing before trial; some judges insist on filing only at the time of trial.
- Waiver of notice. Usually innocuous, but be wary.
- Waiving the oath. Why? At the very least an affirmation of truth is called for. Occasionally, perjury is committed during depositions. Without an oath or affirmation it cannot be prosecuted other than through Rule 11 Sanctions.
- Special effects. Insist on some stipulation as to the effect of certain specific acts such as failure to sign the transcript and failure to answer a question.
- Carry a set of your own favorite stipulations to every deposition.

Objections

Except as to the form of the question, objections are supposed to be reserved until trial.[148] This is a rule honored more in the breach than by observance. Agreeing to this rule by stipulation raises the spectre of sanctions more ominously than refusing the stipulation might.

Avoid unnecessary objections, but when you do object, always state the grounds. It is not just common courtesy and "civil" practice manners, but good strategy to cure the objection at the time the question is asked, rather than face the Judge or Magistrate with the controversy at a later date.[149]

If a substantive objection has real merit, it is usually better to dispose of it during the deposition rather than on a motion or during the trial.

Instructions not to answer

As the economic stakes rise in commercial, intellectual property, employment, and personal injury litigation continue to rise, more and more counsel are forced to instruct a witness not to answer a question. The fate of these instructions upon the witness, the associates and employer of the witness, and counsel directing the witness not to answer depend entirely on the record made at the time the instruction is given. Be sure to make an adequate record of the basis for the instruction before facing the court.

If opposing counsel instructs a witness not to answer a question, listen to your adversary make their record, then, without argument, and certainly without rancor, ask a series of follow-up questions designed to fully determine the understanding of the witness, their knowledge about and interest in, the specific matter which has become the subject of the direction not to answer. You must build no less a record on the issue than your adversary.

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148 See FedRCivP 32(d)(3)(A)–(B).

149 See FedRCivP 32(d)(3).

Later on in the deposition return to the same area of inquiry and continue to ask questions all around the same point which led to the instruction not to answer even if the questions lead to further instructions not to answer.

The Witness Who Talks Too Much

When a witness answers with too much information, particularly when that information is damaging or of little value to your client, never forget to note for the record a motion to strike the answer as unresponsive. In the event that the witness is later unavailable for trial and an attempt is made to deliver the testimony by reading the deposition, the offending testimony may be kept out.

Exhibits

Exhibits must be numbered and marked by the reporter. It should not be necessary to point out that copies should be made before the deposition for the witness and all counsel. A more interesting problem occurs with the numbering of exhibits. Many depositions generate sets of exhibit numbers for each party or for each witness (D–1, D–2, D–3. . ., P–1, P–2, . . ., Jones–1, Jones–2, . . ., Employer–1, Employer–2, &c). At the time of preparing a pre-trial order or on motions or during trial, such designations lead to endless confusion.

Sequential numbering of all exhibits (1, 2, 3, . . .), regardless of when and by whom they are offered avoids endless duplication of the same exhibit, saves trees, reduces frustration and generally makes for a cleaner record. If the attorneys insist on identifying the party offering the exhibit, use a single prefix letter, but keep the sequential numbering of all exhibits and insist there be no duplications.

The party offering an exhibit should make sure that it is fully identified at the time it is marked by the reporter so that it appears in the reporters index of the transcript with sufficient identification to be easily recalled, cited, and referred to. This has become increasingly important with computer assisted and real time transcription.

Let the witness authenticate a document offered as an exhibit after counsel has described it for the record prior to marking by the reporter. If, after asking the witness to identify the exhibit and what it purports to be, the answer of the witness and the description of the exhibit provided for the reporter by counsel are inconsistent, insist that the description of the exhibit be modified to reflect the understanding of the witness. If a witnesses refuses or rejects the identification of an exhibit made by a previous witness or counsel, either reconcile the description or include both descriptions in the index.

Bring a portable scanner to every deposition. Routinely scan every original document presented or used at a deposition.

Work Sheets

If a witness needs time to make a complicated calculation, establish, on the record, the exact procedure and method of calculation so you can do the math yourself later. This is also a fine way to test the understanding of the expert witness and their ability to explain a complicated process to a layperson.

Use a portable plain paper electronic whiteboard as well and make sure that the reporter marks every piece of paper written upon or read by the witness regardless of the purpose.

The Stenographic Record

Make sure that the reporter notes on the record the appearances of *everyone* present during the deposition on the record. Don't forget to have the reporter note the time that the deposition starts and the time it closes. Counsel should instruct the reporter to indicate on the record, "Let the record show, . . ." whenever a witness takes time to review a document, goes off the record to consult with counsel, or when there are breaks.

Correcting Deposition Transcripts

A witness has the right to make corrections, even substantive ones, to the transcript.[150] If the witness makes a fundamental change, they must give the reason. Never be afraid to reopen the deposition of witness who makes a substantive change in any important deposition answer.

Breaks

It may seem trivial, but be sure to take a lunch break and other adequate breaks during a deposition. Be sure to agree on the times for scheduled breaks at the outset of the deposition, before testimony begins, and except for emergencies and spontaneous, mutually agreeable breaks, insist on adhering to the established break schedule. Allow for scheduled breaks at least every 45 minutes. In certain cases short breaks every 30 minutes are not unreasonable.

Set the time and duration of each formal break with an eye toward the facilities available. Identify bathrooms and smoking areas before the deposition begins. Make sure that the witness and all the parties present at the deposition know where the facilities are and how to get to them.

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[150] See FedRCivP 30 (e).

Check with your witness before their deposition on his or her personal needs for breaks and make sure that the formal break schedule accommodates those needs.

Make sure that there are no interruptions between breaks. Have office workers hold calls until the next break. Provide the office staff member responsible for conveying messages to the deposition room with the formal break schedule. Insist that all cell phones and beepers be turned off at the start of the deposition and kept off at all times in the deposition room.

LISTENING

Listening is not easy, but you must learn to listen if you are to be successful in deposing expert witnesses.

Listen with your ears and your eyes.

Listen by being aware. Focus on all that is around you. Collect information.

At depositions, listen not only to the spoken answers, but watch the deponents. What is their body language? Are they bold or afraid, sure of themselves or meek? Always, you concentrate. How do they speak?

Listen particularly to the answers to your questions. Do not become mesmerized by the sound of your own questions. Stay awake.

Listen for inconsistencies. Listen for impeachable material and for weaknesses in the observations and perceptions of the witness..

Listen in the elevator and the parking lot. During breaks, listen in the restroom.

Process what you hear. Adjust your questions to address what you have heard.

Try to hear the testimony of the expert witness with the ears of the judge and the jury. Hear the expert with the ears of a judge or juror that is listening for the first time.

Even though you have thoroughly prepared your own expert witness for deposition, listen carefully to their answers. When the words get too big, when the jargon is arcane, when the concepts get too involved, follow up with questions that will elicit explanations.

Keep the following points in mind throughout the deposition of any expert witness.

- Has the expert testified as anticipated?
- Did the expert use the appropriate words in answering the question? This is particularly important when those words mean a great deal to appellate courts. "Probability" and "possibility" are classic examples.
- Were the *Daubert/Joiner/Kumho* factors covered?
- Did the answers to the questions posed really qualify the expert to express an opinion?
- Will the judge in the first instance, and the jurors eventually, understand the testimony?

- Will the judge and appellate courts that may have to read the transcript or quotations from it be interested in what the witness has to say?
- Be ready to bring an expert back to the point of their testimony whenever they stray.

Notes

Leave your pen in your pocket. Take no notes until there is a break in the flow of question and answer. If you take notes, you will not hear the all of the question and the answer. Your adversary's questions, are often as important as the answers. Allow no interruptions during an expert witness deposition. Concentrate, focus, give your total attention to every question and answer.

Don't confer with associated counsel or your client until you have fully understood the answer and considered it in the context of the question.

Non-verbal clues

Be aware of your body language and non-verbal cues. Be acutely aware of your non-verbal communication when you are deposing an expert witness, particularly when they are trained observers. Be aware of the pattern and rhythm of your questioning.

Your body language and facial expressions are just as important to the witness as his or her body language and facial expressions are to you.

What do your body language and facial expressions convey to the witness?

During a deposition, listen to the words, but also observe the voice, eyes, and body language of both the witness and their attorney.

Watch *everyone* in the room during a deposition

- How seriously does your adversary treat your case?
- What is the real claim or defense your adversary is trying to develop with or from the witness?

You discover this information by studying the questions asked as well as the answers and by the way the lawyer asks questions during a deposition.

Listen with your eyes, too. Don't just watch the witness. Watch your adversary and their entourage, particularly the Associates and paralegal.

Where there are multiple attorneys representing the witness, watch the younger and more inexperienced attorneys carefully, they often react more significantly to questions and answers than more experienced trial counsel might. Seriously consider whether you should have inexperienced associates and paralegal with you during a deposition.

- What seems important to your adversary?

- When does your adversary take notes?
- When do the associates and paralegal of your adversary take notes?
- What impression is the witness giving?
- How will a judge or jurors react to your witness?

Listen to the entire answer! Do not worry about the next question until you have received a complete and understandable answer to the question you just asked.

Although you have prepared for the deposition, always be ready to modify your plans, add new areas of injury and eliminate others.

Looping, the practice of restating or recapitulating and including the answer just given in the next question is no less important in the deposition of expert witnesses than in the testimony of less educated and less articulate witnesses. The most common example is,

Q: What direction were you driving?

A: West.

Q: As you were driving west, did you see the red car?

A: Yes.

Q: In what direction was the red car going?

Although you do not have to loop every question, if you cannot open your question with a loop you did not listen carefully enough to the last answer or that answer was unresponsive or confusing. Think about it and ask a better question or insist on a more responsive answer.

One of the primary reasons for looping is the need to use transcripts of depositions on motions prior to the trial. A question and answer or a short group of questions and answers should stand alone as a point in your case or argument. If they do not you have not been conducting a proper deposition.

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