



# Effective tactics in deposing defense experts

PREPARE THOROUGHLY SO YOU CAN SHINE THE LIGHT WHERE IT BELONGS, ON THE ISSUES, AND NOT WHERE THEY ARE TRYING TO GUIDE YOU

It is common for plaintiff's attorneys to feel intimidated or put-off by the sometimes-daunting task of going head to head with the defense's experts in a deposition. These defense witnesses are often specialists and authorities in their field or industry. The good ones are also well paid and well trained by defense counsel and the insurance companies who hire them to attack the opinions and credibility of your expert(s), challenge your liability and damages theories, and attack the credibility of your client. If one is not truly prepared, deposing such an expert and producing a poor result could prove to be quite detrimental to your case.

This is why it is essential to put in the work well ahead of time to show the experts that you are not only prepared, but that you are ready, willing, and able to catch them at each opportunity when they are being untruthful, misrepresenting facts/opinions/et cetera, trying to mislead or guide you in a different direction, or when they are leaving out critical information they failed to incorporate or consider in their preparation and analysis, referred to as "negative space."

Having a focus on what the necessary goal of that particular deposition is in relation to the overall case and framing of the case, combined with the courage to continue seeking that information needed regardless of the defense expert's tactics, is essential to obtaining testimony that ultimately increases the value of the case and shows defense counsel you are properly preparing the case for trial, whether you eventually intend to try the case or not.

## **"By Failing to Prepare, You Are Preparing to Fail" – Benjamin Franklin**

There is simply no substitute for thorough preparation; in fact, overpreparation, at times, is not enough. The good defense experts are savvy and often quite cunning. This isn't their first

rodeo, and they didn't get to where they are by being forthright or even truthful. For many, their singular goal is to cast doubt on your case however they can accomplish that goal. That is what they are paid by defense counsel or the insurance companies to do.

Your job is to ensure that no matter where the defense expert tries to pull the wool over your eyes, you are equipped and paying attention.

*"He who lives to forget his past lives to die of his past. Knowing the past, and keeping the past helps us to shape the future and may avoid past disaster repeating."* Anthony Ugwoke

## **Transcripts of previous deposition or trial testimony from that expert**

As an initial step in your preparation, it is essential to obtain all possible deposition or trial transcripts you can get your hands on where this defense expert previously testified under oath. The legwork on obtaining these transcripts is crucial and can often be done at zero cost and with minimal effort. This is why it is essential to be a member of the list-serves of local trial associations such as CAALA, as well as others with broad reach such as my firm's Trial By Human listserve (started by my mentor and partner Nick Rowley), national trial associations such as the American Association for Justice, subject-matter-specific list-serve communities like California Employment Lawyers Association, Trial School, and trial colleges that have their own graduate-based list serves, including The Gerry Spence Method and The Trial Lawyers College.

Often, within a matter of minutes of posting a request for transcripts or information on an expert on any one of these list serves, you will receive a response by multiple lawyers in diverse geographic areas who have transcripts they will send you immediately involving that expert, as well as be willing to discuss

with you their experiences with the expert from previous cases.

There is no better way to start a deposition of a defense expert than to have a large stack of transcripts next to you (whether in person or via Zoom, etc.) to show the expert that you are not only organized and prepared for the deposition, but that you are equipped with the statements and opinions they have made under oath in previous cases.

Defense experts do not want to have their credibility challenged under oath in what will be a new transcript that can be widely shared in a way that hurts their ability to continue earning income from their expert testimony work. This is a direct challenge to their expert witness revenue, and is one of the most effective ways to demonstrate to the expert that they need to be careful with the statements and opinions they make in this case if they want to avoid compromising their revenue stream in the future.

If you are unable to obtain transcripts on the defense expert via list serves, conduct a jury-verdict search ([www.juryverdictalert.com](http://www.juryverdictalert.com)) to identify colleagues who may have been up against this expert in the past. Contact them or connect with your favorite court reporting services that have access to transcripts and/or names of attorneys you can connect with to obtain the transcripts. Whatever you do, get creative and use your networking skills (or use this as an opportunity to develop your networking skills) to obtain at least one previous transcript of the expert so that you can also get a sense of their tone, response style, level of forthrightness, and overall feel to help you prepare the tone and posture of your questions for this witness in your case.

## **CVs, websites, and advertising/marketing materials**

Plan to make collateral attacks on

their background or supposed credentials. It's essential to verify the accuracy of every item listed on the defense expert's Curriculum Vitae or resume. It is astounding how often you will find inaccuracies, blatant untruths, and misrepresentations in a document they freely and willingly produce to you. Some examples are associations, memberships, certificates, board certifications and licenses that they no longer have or maintained but hold themselves out as being current; credentials they never obtained but listed; schools they did not actually graduate from, do not even exist anymore, and in some cases never attended at all; and faculty memberships at colleges and universities that are easily verifiable by calling the institutions and Googling their websites.

Call the schools the defense expert claims to have attended and confirm their attendance and whether they graduated. Do the same for their professional associations, licenses, certificates, accreditations, faculty memberships and so forth; call the state, federal, or other regulatory bodies and agencies. The same should be done of their website, advertising and printed materials.

If anything on their CV, website, advertising and/or printed materials is inaccurate or misrepresented, these items must be explored ahead of the deposition to unearth errors in judgment and possible challenges to their credibility that are fervent soil for damaging testimony. An example might look something like: "Sir, you never took a certification/residency in neurology, isn't that true? You're not board certified in neurology? And yet you spent the last hour explaining neurological factors to this jury?"

### **Google, image, video, and publication searches – not always a needle in a haystack**

Never underestimate the power of good old-fashioned Google searching, however with somewhat of a scorched earth intention. Click the links and go down the rabbit holes for each to

determine whether the defense expert speaks at defense-counsel conferences, plays golf with defense counsel in general, has YouTube videos on perspectives involving their subject matter that serve the defense, or are listed on defense-expert exchanges for hiring. Conduct image, video and pdf searches involving their names, companies, and affiliations to find additional information, publications, videos, photographs that may offer information the defense expert will likely not be upfront about.

*"Basic research is what I am doing when I don't know what I am doing."* Wernher von Braun

### **Medical records and technical reports**

You must be more than just familiar with medical records and reports for injury cases, and with scientific/technical reports for products liability, premises liability and other cases involving objective methodologies.

Reading the documents is not enough. In cases involving injury, search the internet for the medical terms, phrases, diagnoses and related conditions and/or consult with a doctor friend or expert to get a real understanding of your client's injuries. A defense medical expert is counting on you not understanding the medicine as well as they do. And while many plaintiff's attorneys argue that you will never know the medicine as well as the medical expert, and that one must never try to go toe to toe with them, you must understand your client's injuries inside and out. Any opportunity the defense medical expert can take to attempt to get unstable opinions and foundations for those opinions they may well try, and you must be prepared to understand logical gaps, impossibilities, for example, in medical correlations, or improper testing techniques, tests conducted and recording of data.

The same is true for cases involving scientific, technical, mechanical or procedural aspects. You must truly understand the science, methodology, technical underpinnings, calculations, and so on. Without this knowledge, there

is no real way to understand whether the expert's opinions and bases for those opinions are sound. If tests or other scientific examinations were conducted, expose how they were planned, actually directed, how the data was recorded, what assumptions, variables, and other factors went into play, and whether any of it was recorded or videotaped.

In all cases, if you are effectively prepared and actively listening, you may be able to effectively discredit the defense expert by illuminating the holes in their preparation, recording of information, logic, opinions, and/or foundations thereon. If the defense expert was not aware of a material fact, for example, either because defense counsel did not provide it to them or because they neglected to reasonably request it or obtain it, you may be able to discredit the opinion(s) altogether.

### **With a critical eye...**

Is this expert testifying about what they were designated for? Did they form opinions in the areas requested by defense counsel? Is it reasonable that the amount of time (exact number of hours you must elicit) they spent reviewing the materials they list out to you on the record that they reviewed in preparation for the deposition matches the numbers of pages for all those documents? If the average minutes per page for their review is a small decimal, for example, it is highly unlikely they actually read and reviewed every page. Did they merely accept summaries of the documents or information given to them by defense counsel? Do they understand which facts are more important than others, or are they focusing on the facts they want in order to arrive at their desired opinion?

Every deposition, deponent, and case is different. Prepare for this deposition as if it is the first one you have ever taken. Treating each deposition as formulaic is a misstep and should always be avoided. Whether you prepare an outline, chapters, or key areas of testimony you intend to elicit, thinking about how to accomplish those goals with this specific

witness in mind is key. What do you know about this person (or what can you learn about them, their personality, and their response style)? What is the best way to approach them? Will they respond better to kindness and befriending, or will a more professional approach allure respect and direct responses?

### Stay focused

Shine the light on the issues where it belongs, not where they are trying to guide you. This is impossible to do however, if you do not have a strong, informed intention for the purpose and goals of what you need to get out of the deposition (meaning the resulting testimony) and then stay laser focused on obtaining that no matter what roadblocks the defense expert puts up. The good ones will try to play games; show them you are a worthy opponent.

*“Real courage is knowing what faces you and knowing how to face it.”* Timothy Dalton

While it can be exhausting and rather depleting of energy to maintain, continue asking the questions you need answered until the defense expert answers them and gives you the truth, or at least direct answers to your questions. Some defense experts are clever in the way they respond to questions, not giving the honest, straightforward response. Giving in and allowing the expert to respond in such a manner only encourages them to continue responding this way. Pursue your questions, rephrasing when necessary or coming at the subject from a different angle, until you get a direct response – not in the way they want to, but in the way you need.

Undermining the credibility of defense experts is seldom accomplished in an hour or two. Demonstrating to the expert that you are willing to question them not just on their biases and other common deposition chapters that are covered in other *Advocate* articles (See, e.g., Arash Homampour’s 2012 *Advocate* article titled The deposition and cross-exam of defense experts: A narrative guide to asking the right

questions at deposition and trial), but also that you are willing to spend the time and money necessary to uncover each inaccuracy, failure of credibility, and logical gap possible. Exhibiting a “no stone unturned” approach reveals to the defense expert that you have the courage and stamina to go the extra mile to obtain the testimony you need and that any efforts at obfuscating your determination will only result in more time and energy expended on their part, which they will often tire of and may come to regret at deposition, if not at trial.

For example, do they cite that they do 60% of their expert work for the defense to you, yet in previous transcripts they have said 70%? Has the percentage actually changed or are they trying to “estimate” a different number to you to see if they can get away with the misrepresentation? What’s the reason for the discrepancy now? Going through each item even in a simple bias inquiry of how many depositions have they conducted for plaintiff versus defense cases, how many for each side at trial, what percentage of those defense cases comes from the insurance companies, what is their total revenue for expert work and what percentage of the total revenue is that from their entire practice/professional work? What percentage of that comes from defense cases? Ask them who is their best customer (e.g., specific insurance companies, specific defense law firms, etc.)? Do they testify at trial more for the defense, and why? Do they play golf with defense counsel? Or socialize and/or otherwise network with defense counsel in other ways (e.g., baseball games, dinners, conferences, etc.)?

See if you can get the defense expert to agree with any of your expert’s opinions. Explore whether he or she has read your expert’s reports, and what are their criticisms of those reports. If their ultimate opinions depart from your expert’s, find out where those departures are, what information, documents, facts, assumptions and testimony they are based on. Is there anything missing in what the

defense expert should have considered there?

### Negative space

Sometimes the best areas to explore are the areas of “negative space” where the expert either did not conduct the tests they reasonably should have, did not conduct the analysis or review of certain case documents they logically should have, or some similar failure on their part to obtain and properly analyze the information and documents needed to conduct a complete and thorough analysis to inform their testimony and/or opinions. When the expert fails to reasonably inform themselves of information and acquire the relevant case documents to do so, it undercuts their credibility and reveals an important range of inquiry that can demonstrate the defense expert was not interested in adequately and reasonably preparing themselves in order to give credible testimony.

You must inquire of them whether they have all the relevant information needed to form their opinions. If defense counsel did not ensure they do, ask if the defense expert requested such documents and information. Why were those not provided to her/him? Get a detailed list of every document they received and reviewed, including notes, films, tests, and PowerPoints, and mark them all as an exhibit to the deposition.

Therefore, when preparing in advance of the deposition, you must ensure that you have provided all the documents, information, other expert opinions, et cetera, to the defense that the defense expert would need to reasonably review and rely on, whether directly relevant or relevant to rule out something. Otherwise, the defense expert can also later assert they did not have all the information, documents, and opinions they needed to rely upon and may attempt to change their opinions or add to them later, requiring additional deposition testimony you may or may not be entitled to based on how well you ensured the expert had what they

needed and how thorough your questioning was.

Another fertile area to explore for “negative space” credibility attacks are omissions of facts and information in their expert report that are clearly relevant and important to include if they were being fair and truly attempting to accurately portray all items of information involved. Such an inquiry might go something like this: “You get paid \$700/hour, correct? You’ve put a lot of work into this case already, haven’t you? You’ve been paid over \$21,000 in this case so far, true?” (If you don’t know the answer, pick a big number so they say “only \$21,000” and then say “So you’ve been paid \$21,000 on top of your regular salary just for this opinion already, right?”) “You went through X number of pages and read them carefully, right? 20,000 pages in 30 hours? Then that just means you weren’t being careful, isn’t that true? Did you leave the rest out because you didn’t think this case was important? You would agree that if there’s relevant information that it’s critical that you accurately represent and be able to explain that information to the jury as an expert, wouldn’t you? You understand as an expert you’ve got to start at a neutral

position, don’t you agree? Your job as an expert is to inform the decision of the fact finder, isn’t that true? Not to make up their mind for them?”

### **Full disclosure**

Remember that the defense expert is not subject to the attorney-client privilege and cannot hide behind it. Ask them how many times they have consulted with defense counsel and other defense experts about the case. Ask whether the expert assisted the defense attorney in preparing for other depositions in the case. If so, how? Ask to see any text messages exchanged with defense counsel or even other experts about the case.

In cases of Zoom and other remote depositions, ask at the beginning of the deposition who else is listening in on the deposition. Ask them to make sure their phone is visible on the screen to you so that you can ensure they are not texting with defense counsel or others in another location, being coached, et cetera. If they take notes, ask them to read them into the transcript and attach them as an exhibit.

### **Closing it out**

Ensure you have received all of the experts’ opinions in a detailed fashion

with the factual and other basis for each, any assumptions they relied upon to form their opinions, and any literature whatsoever that they relied upon. Have they done all the work they expect to do on this case? Or is there anything at all left they intend to review, or additional work defense counsel asked them to conduct which they have not yet done for some reason? What about the expert themselves, do they believe there is anything additional they want to do or any additional work they believe should be done? If there is anything left, whatsoever, get defense counsel’s agreement on the record (or at least state your intention to pursue) that they will need to provide their expert for additional deposition after such work has been completed, especially if it changes any of their opinions or causes them to formulate any new ones.

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