

Expert Deposition Tips For Young Lawyers

Law360, New York (November 19, 2013, 12:24 PM ET) -- The prospect of deposing an adverse expert witness can be daunting for a young lawyer. Not only are experts knowledgeable about the subject matter at issue, but also they tend to be experienced witnesses who know how to avoid difficult questions.

So what is a young lawyer to do in this “David and Goliath” scenario? Like the biblical tale, appearances can be deceiving. Although the expert witness might appear to have an intellectual advantage, the young lawyer has the tools to succeed. This is because successfully deposing an expert hinges more on simplicity than complexity. The lawyer’s role is not to outsmart the expert witness but to gather pertinent information for trial, which is a task any attorney can master.

In many ways, deposing an expert witness is no different from deposing a fact witness. The primary difference lies in the witnesses’ respective universe of knowledge. Fact witnesses usually have knowledge about the events at issue, but they may not appreciate the legal significance of what they know.

Expert witnesses, on the other hand, have extensive knowledge about their area of expertise and perhaps even its legal significance, but they are often less familiar with the facts of the case. With the proper preparation, a young lawyer can prevail over the “Goliath” expert witness. The following tips can help simplify the process:

1. Determine the Value of Deposing the Expert

Deposing an expert witness can be expensive for a client. Attorneys’ fees for both preparation time and the deposition itself can be high, and then there is the cost of securing one’s own expert to assist in preparation. You should therefore consider whether that gain from deposing the expert is worth the economic cost.

Things to consider might include: whether the expert’s report is comprehensive enough to contain the universe of statements he might make at trial, whether the expert’s credentials or methodology are shaky, the extent to which you understand the expert’s opinion, whether there are logical holes in the report, and the significance of the expert’s opinion to the key issues in the case. Ultimately, you and your client must decide together whether the potential benefits of deposing the expert justify the economic cost.

2. Research Your Expert

Once you have decided to go forward with the deposition, you need to get further acquainted with the expert's report, credentials and prior publications. If the expert is published, you should study the expert's publications. You should receive a list of publications with the expert's report, but you should also search the Internet to ensure that you know about all relevant material that the expert has publicly produced.

When examining the expert's publications, look for inconsistency. In other words, determine whether the expert's opinion and methodology in this case is consistent with the expert's approach outside of litigation. Inconsistency in an expert's opinion is not only great fodder for cross-examination, but it might also point to a more serious methodological problem that can form the basis for a Daubert challenge.

Your assessment of consistency should not stop at the expert's own work. You should also research whether the expert's opinion is consistent with the opinion of others in his field. An expert who contradicts the majority of his colleagues might be biased or lack credibility. Either way, it is important to investigate the reason for the inconsistency to understand the degree to which it may affect the reliability of the expert's opinion.

In addition to publications, websites can provide valuable insight. Websites can reveal information about the expert's projects and his relationships with clients and colleagues. You might find that the opposing party is listed on a representative client list, or that the expert's company primarily assists certain kinds of clients.

You might find descriptions of the expert's projects that will help you determine whether the expert is adopting a similar approach in the case. Or you might discover that the expert's approach in the case diverges from the approach of his colleagues. Any information that indicates how the expert or his colleagues approach situations outside of litigation is valuable to determining the reliability and credibility of the expert's approach in litigation.

Finally, you will want to determine whether the expert witness has testified before. Legal research might reveal that the expert formerly testified in favor of the opposite position from the one he holds now. You might also find that a court excluded the expert's testimony in another case.

At the very least, a transcript of prior testimony can provide a preview of what the expert witness might say. If deposing this expert is particularly crucial to your case, you should solicit the input of other lawyers who have deposed the expert before.

3. Secure Your Own Expert

If resources permit, you should secure your own expert on the subject matter. Your own expert is a valuable resource for answering substantive questions and understanding the flaws in the adverse expert's opinion. Your expert can also help you understand contextual issues, such as the authorities in the field you should know.

4. Agree on Costs and Secure the Expert's File in Advance

Peripheral distractions could harm your substantive deposition goals if not addressed well in advance. First, agree with opposing counsel on the allocation of costs. Doing so will help you avoid a dispute at the 11th hour when you need to be preparing your deposition outline.

Second, use discovery tools to retrieve the expert's file, including his report and any other relevant supporting documentation, well in advance of the deposition date. This will give you time to digest the expert's opinion and its role in the case while also avoiding unpleasant surprises. You should not look at the expert's file for the first time on the day of the deposition!

5. Understand Your Goal

There are many things you can accomplish through an expert deposition, but you need a plan. The following are a few goals you might set, none of which are mutually exclusive:

a. Set Up a Daubert Challenge

The most aggressive and difficult goal for an expert deposition is to develop grounds for a Daubert challenge. The case law analyzing Daubert challenges might appear complicated, but most successful Daubert challenges boil down to two things — qualifications and methodology.

First, the witness might not be qualified to opine on the particular subject matter at issue. For example, if a damages expert has no experience in the specific industry at issue, he might not have sufficient qualifications to make a reliable forecast of lost profits.

Second, the witness' methodology might not be reliable because of internal flaws or failure to follow professional standards. For example, a damages expert might fail to consult important data or conduct industry-specific calculations. He might have unreasonably relied on litigation-tainted data provided by his client. Or he might have failed to follow generally accepted accounting principles.

These are merely a few possibilities. The critical issue is that you cannot sustain a Daubert challenge by merely disagreeing with the expert's opinion. You must show that the methodology is internally flawed or inconsistent with professional standards.

Once you settle on the form of your Daubert challenge, you should look at relevant case law to determine what support you will need to make your challenge. You should also write an outline of the Daubert argument you want to make. This will help simplify your deposition and enable you to identify the admissions you need to secure in the deposition. Finally, make sure that you preserve a clear record at the deposition so as not to lose important evidentiary support for your challenge.

b. "Boxing In"

Another goal is "boxing in" the expert by forcing him to commit to definite answers or a definitive scope of answers. You may use this technique when you want the expert to commit to his position on an issue, the resources he consulted, the occurrence or nonoccurrence of events, and so on. By using this technique, you force the expert witness to provide a preview of what he will say at trial while also establishing grounds for impeachment.

c. Understanding the Expert's Opinion

If the subject matter is particularly technical or dense, your most important goal might be to clarify what the expert is saying. Sometimes walking through the expert's analysis is a prerequisite to planning cross-examination at trial. In the process, you might also discover how persuasively the expert conveys his

opinion.

d. Understanding the Expert's Assumptions

Every expert makes assumptions in forming his or her opinion, but some assumptions are more reasonable than others. The deposition provides a valuable opportunity to question the expert about the basis for his assumptions. You may ask the expert about the research he has done and the authorities informing his opinion. You may also ask about authorities and documents that the expert did not use and his reason for not using them. The answers to these questions will inform the reliability of the expert's assumptions.

6. Stay in Control of the Witness, and Yourself

Often, experts are experienced witnesses who try to thwart your efforts to pin down their opinions. In light of this fact, you should be prepared to repeat your question or ask the expert witness to rephrase his answer if he gives a vague or circular answer.

Additionally, your demeanor can affect the expert's responsiveness. You should strive to maintain a calm and agreeable demeanor, which will make the expert more inclined to share information. Staying calm and focused will help the witness help you — you need not be an aggressive giant to defeat the expert "Goliath."

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