EXPERT WITNESSES

by George M. Walker

Expert witnesses often play over-sized roles in the development of and in the trial of a lawsuit. Every trial lawyer needs to be familiar with a variety of issues that may arise in any case for which his or her client, or the opposition, or both, intends to present expert testimony in support of a position expected to be taken at trial.

I. How to deal with the opposition's expert.

If the opposing party has an expert witness, you can be sure that the expert's purpose is to provide the jury or the judge with some information damning to your case that comes with a tincture of super-reliability provided by the expert's background and qualifications. Once you know or believe that your opposition has an expert, there are a number of things you need to do in an effort to get that damning information away from your trier of fact.

A. Getting the name.

Lawyers are very protective of their experts, and generally refuse to identify them unless and until they are compelled to do so by the court. An all-to-frequent ruse is to assert work product protection under F.R.C.P. Rule 26(b)(4)(D), or A.R.C.P. Rule 26(b)(5)(B), claiming that while an expert has been retained, the attorney has not yet determined whether the expert's opinions will be presented at trial. While persistence in demanding that opposing counsel disclose the identity and opinions of his expert is one approach, the best approach is to

enlist the court's assistance by obtaining a scheduling order imposing a deadline for disclosure of the opposing party's expert and his opinions; the scheduling order should recite that no expert not identified by the deadline will be allowed to testify, and that no opinion not disclosed by the deadline will be allowed into evidence.

B. Getting the opinion.

Just getting disclosure of the expert's name is of little benefit -- you also need to know what opinions the expert is expected to offer and the bases for those opinions. This information should also be covered in the scheduling order. F.R.C.P. Rule 26(a)(2)(B) requires a witness who is "one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony" to provide an expert report. The details required in the report are listed in F.R.C.P. Rule 26(a)(2)(B)(i)-(vi). Even if the witness is not one from whom a report is required, if the witness is expected to present evidence under Rule 702, 703, or 705 of the *Federal Rules of Evidence,* the party presenting that evidence must disclose the subject matter of the witness' testimony and a summary of the facts and opinions to which the witness is expected to testify. F.R.C.P. Rule 26(a)(2)(C).

An expert report is not a requirement under the *Alabama Rules of Civil Procedure.* Instead, those rules simply permit a party to "through interrogatories require any other party to identify each person whom the other party expects to call as

an expert witness at trial, to state the subject matter on which the expert is expected to testify and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." A.R.C.P. Rule 26(b)(5)(A)(i). Sub-section (ii) of the rule allows the court to order further discovery by other means. As stated above, it is far preferable to have the expert disclosure requirements set forth clearly in a scheduling order, rather than relying upon opposing counsel to respond fully and fairly to discovery requests.

C. Researching the expert.

Once you have the expert's name and opinions, it is time for you to do some substantial research. Each case is different, and each will be guided to some extent by the expert's qualifications, the nature of the opinion testimony, and the importance of that testimony to the issues presented in the case. The goal is to discover as much as you can about the expert's background, qualifications, bases for his opinion, and opinion shortcomings. There are a variety of research tools available. Here are some of them:

1. *Internet.* Google the expert, and use any other search engines at your disposal to learn all that you can about the expert and his background. If he has articles in his field that are published on the internet, read them and assess whether his writings are consistent with his opinions in your case. Often, they will not be consistent.

2. *Social Media.* Find out if your expert has been blogging, tweeting, or otherwise making himself or his opinions known in social media. Many experts

market themselves on Facebook and LinkedIn, and you may find useful information on those or similar sites.

3. *ADLA.* The Alabama Defense Lawyers Association will send a blast e-mail to all of its members inquiring about your opposing expert, for a cost, I believe, of $150. There is nothing more valuable than getting yourself in touch with another lawyer who has faced the same expert and who will quite likely have a deposition transcript and possibly an expert report to share with you.

4. *DRI.* The Defense Research Institute has an expert witness database from which you can seek transcripts of prior depositions of your opposing expert, as well as expert reports. Again, those documents can lead you to other lawyers who have run into the expert previously, likely providing you with valuable insight and background information and testimony.

D. Researching the field.

It is not enough to learn about the expert, his opinions, and the bases for his opinions; you are going to have to become something of an expert yourself in his field. This requires additional internet research, review of articles, papers, and books in the expert's field, and often some quality time with your own expert. *The Reference Manual on Scientific Evidence* is a wonderful resource, as it contains reference guides on statistics, multiple regression, survey research, estimation of economic losses, epidemiology, toxicology, medical testimony, DNA, and engineering practice and methods. It is worth a look for anyone getting ready to do battle with an expert witness. The primary goal of field research is to determine

whether the expert's opinions are mainstream, outliers, or demonstrably false. As you will see below, simply proving that the expert's opinion is outside the mainstream is not enough, by itself, to justify its exclusion. But it is an important fact to know, because it may point to methodology problems in the expert's process. Flawed methodology is the gold standard for expert opinion exclusion. Review everything that you can get your hands on bearing upon the expert's field, and upon how experts in that field reach and support opinions.

E. Expert discovery.

Most of your investigation about your opposing expert should be conducted unilaterally by researching the expert and researching the field. But you should also take advantage of every opportunity provided by the rules to obtain expert-related information.

1. *Interrogatories.* Under Alabama law, absent a court order, you may only discover information about your opposing expert through interrogatories inquiring into the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each opinion. That should be enough to inquire into by interrogatory. The federal rules do not contain this limitation on the scope of expert discovery.

2. *Requests for Production.* The Alabama rules do not specifically allow a party to seek documents related to an expert's opinions or related to the bases for those opinions, although the trial court is authorized by A.R.C.P. Rule 26(b)(5)(A)(ii) to include this requirement. The best way to obtain documents from

an expert is through a Rule 45 subpoena *duces tecum* accompanying his deposition notice. It is important to request that the expert produce everything that he reviewed or relied upon in reaching his opinions.

3. *Depositions.* The Alabama rules likewise do not specifically permit a party to depose an opponent's expert, but this is routinely done, and I have never seen a court refuse to permit an expert deposition. F.R.C.P. Rule 26(b)(4)(A) specifically permits a party to depose any expert whose opinion may be presented at trial. The expert deposition is a critical stage of a case. If it is your intent or expectation that you will be able to get the expert's opinion excluded from evidence, virtually every bit of the groundwork for that exclusion will occur during the deposition. The expert's deposition should be the culmination of a massive amount of preparation on your part.

First, prepare a comprehensive request for production to the expert and serve it in a subpoena *duces tecum* or in a note to counsel. You will want the expert's entire file in your case; any expert reports or depositions he has given in other cases; any resources or references he consulted in reaching his opinions; any documents related to the methodology he utilized to reach his opinions; any articles he has authored that relate to the subject matter of his opinions; and any demonstrative evidence that he has prepared or has relied upon in the case. In federal court, Rule 26(b)(4) protects from disclosure drafts of the expert's report and some of the communications between the expert and opposing counsel; there

is no such specific prohibition in the state rules, but remember that Rule 26 only addresses expert discovery by interrogatories in the absence of a court order.

Second, prepare a comprehensive deposition outline. In preparing the outline, you must have already carefully reviewed all of the expert research and field research, and any prior reports or depositions of the expert. You must have already determined whether the expert's opinions have reliability or fit deficiencies, and you must be prepared to expose those deficiencies at the deposition.

Third, make sure that the expert gives you a full, clear, and unequivocal answer to every question -- you will not be able to use the answer for your purposes if you allow him to wiggle or weasel. Remember this: The better the question is, the harder the expert will try not to answer it. Be patient, be persistent, and be clear to the witness that he is not going to get a new question until he fully and clearly answers the last one. Do not let opposing counsel interfere with your examination; be prepared to call the court on the first occasion that opposing counsel attempts to coach the witness or to otherwise interfere with your examination. Especially if your case is in federal court.

Finally, at the conclusion of your questioning, ask the expert if he has anything else that he needs to do or plans to do between the deposition and trial. This question will often help you stave off a new opinion ambush at trial. If you have done your job well, the deposition transcript will have all of the information you will need when you get ready to move to exclude the expert's opinion testimony.

F. Excluding expert testimony.

Alabama in 2012 amended Rule 702 of the *Alabama Rules of Evidence* to essentially adopt Rule 702 of the *Federal Rules of Evidence*, which is a codification of the *Daubert* standard. Under either rule, a qualified expert's scientific or technical opinion testimony must help a trier of fact to understand the evidence or to determine a fact in issue; it must be based on sufficient facts or data; it must be the product of reliable principles and methods; and the expert must have reliably applied the principles and methods to the facts of the case. The *Daubert* decision provides the framework for assessing whether the opinion testimony is scientifically (or technically) reliable.

The *Daubert* standard asks:

1. Whether the expert's technique or theory can be or has been tested -- that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

2. Whether the technique or theory has been subjected to peer review or publication;

3. Known or potential rate of error of the technique or theory when applied;

4. The existence and maintenance of standards and controls; and

5. Whether the technique or theory has been generally accepted in the scientific community.

F.R.C.P. Rule 702, Advisory Committee Comments, 2000 Amendments.

These five queries on *Daubert's "non-exclusive* list" have been supplemented with five more:

6. Whether the expert is proposing to testify about matters growing naturally or directly out of research he conducted independent of the litigation, or whether he developed his opinion directly for purposes of testifying;

7. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

8. Whether the expert has adequately accounted for obvious alternative explanations;

9. Whether the expert has been as careful as he would be in his regular professional work outside his paid litigation consulting; and

10. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Id.

None of the factors is by itself dispositive, but all are relevant to the determination of the reliability of the expert testimony. If you have properly prepared for the opposing expert's deposition, you will have covered each of these factors.

Be aware that a court will determine that some experts are "qualified by experience" who may be allowed to express opinions without demonstrating that they have followed a Daubert-compliant methodology. Treating physicians are a good example, but many judges, especially in state court, will drop back to the "qualified

by experience" rationale to admit testimony that they probably should not be letting through the gate.

The first inquiry is whether the expert is qualified to offer the opinions he wishes to offer. If you focus only on the witness' qualifications, your challenge will probably fail because it is the very rare expert who does not possess some technical or scientific knowledge that will be helpful to the jury. Focus instead on whether the expert's qualifications actually furnish a basis for explaining the opinions he proposes to express: "The issue with expert testimony is not the qualification of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Berry v. City of Detroit,* 25 F.3d at 1342, 1351 (6th Cir, 1994); *see also, U.S. v. Frazier*, 387 F.3d at 1244, 1265 (11th Cir, 2004); *Harvey v. Novartis Pharm. Corp.*, 895 F. Supp. 2d 1206, 1211 (N.D. Ala. 2012). Never assume that simply because the opposing expert has extensive background and experience in a certain field, he is qualified to opine on the specific issues for which his opinion testimony is to be offered.

The second area of attack is the same area covered by *Daubert* -- reliability. Each of the ten factors is important, but they have to be analyzed in respect of the methodology employed by the expert in reaching his opinion, instead of in respect of the opinion itself. If you have an opposing expert who proposes to testify that plaintiff's lung cancer was caused by consuming eggs, the trial court cannot properly exclude that testimony simply based on your argument that egg consumption does not cause lung cancer. Instead, to justify the exclusion, you must focus on the methodology and demonstrate to the court the methodological

flaws in the expert's reasoning that caused the opinion to be unreliable. You should be able to demonstrate the methodological flaws by reference to each of the *Daubert* factors.

The third area of attack is fit, a rarely encountered area. Fit refers to the situation in which the expert is clearly qualified to express the opinion, and has followed a reliable methodology to reach that opinion, but the opinion is not relevant to any issue in the case. Suppose that the qualified expert in the case I hypothesized above, based on a reliable methodology, proposes to testify that consumption of eggs is associated with colorectal cancer. That opinion doesn't "fit" in the case because the plaintiff had lung cancer. This is an obvious example; the cases in which fit has been successfully invoked have not always been so clear.

Most experts are sufficiently qualified, and most are prepared to express a relevant opinion. In almost every case the most fertile area for challenge will be methodology. You must discover the methodology followed, and you must demonstrate that use of such methodology was improper, if you hope to have the opinion excluded.

G. When and how to challenge.

If the expert's testimony is required to establish one or more elements of your opponent's case, the best practice is to file a motion to exclude ahead of or contemporaneous with the filing of your motion for summary judgment. If the court denies the motion to exclude, renew it in a pre-trial motion *in limine*. If the

motion *in limine* is denied, object to the offer of the expert testimony when the witness appears at trial, and make a record at that time containing the same arguments you made in the previous two motions. Those previous arguments were not preserved for appeal when the motion to exclude was denied or when the motion in limine was denied. If the court overrules your trial objection, set forth your argument again as part of your motion for judgment as a matter of law at the close of your opponent's case, and do it again in your JML motion at the close of all of the evidence. You will not be able to appeal the admission of unreliable expert testimony unless you protect and preserve your record at every stage.

H. Cross-examination at trial.

Your motion to exclude was denied at the summary judgment stage, your motion *in limine* was denied at the pre-trial stage, your objection at trial was overruled, and counsel for your opponent has just directed the expert through his opinion testimony, which was very unhelpful to your case. Your best chance to win at trial is to conduct an effective cross-examination of the expert.

Know and remember from the outset that you -- not the witness -- will be doing the testifying on cross-examination. This is where all of your pre-trial investigation, research, and discovery will pay off. You must carefully design your cross-examination so that the witness is not allowed to do anything more than agree with your statements. You want the jury looking at you for information, and at the opposing expert only for confirmation.

The expert will not like this. Most in my experience like to pontificate, elaborate, and explicate on cross, trying to make themselves look brilliant and you ignorant by comparison. You must not allow him to do this, because it will often work. There are a number of ways to deal with a non-responsive or volunteering expert, but asking the court for help is not one of them. When I get a non-responsive or argumentative answer, I ask the question again, clearly. If I get the same non-response or argument, I go to the board (or the Elmo) and write my question out, and ask if the answer is yes or no. If he refuses to say yes or no, and if you feel like you have some credibility with the jury, you can then ask "Is there some reason you are not willing to answer that question yes or no?"

The reason for all of this is control. You must control the expert, and not let him slip out from under control. You maintain control by making short declarative statements that you know the witness must agree with, and have him agree with each statement. Do not frame a question in such a way as to allow him to elaborate upon, or explain, an answer or to make a speech to the jury. You lose control when you allow that. Do not ask him why, what, or how; you know the answers, simply make a list of all the things favorable to your side that you know he will agree with, and get him to agree with each one. Do not ask him anything that you do not know what his answer will be, unless the answer doesn't matter to your case.

Invariably, the expert will refuse to agree with you on something. When he does, he must be impeached. You have testimony from him that contradicts his refusal to agree with you; otherwise you would not have asked the question in the first place. There is one, and only one, way to impeach the expert with his deposition

testimony. Ask the judge for permission to approach the witness and, when it is granted, ask these questions:

Q. I took your deposition on January 12, 2016?

Q. You were under oath?

Q. A court reporter was there?

Q. This is a copy of the transcript of your deposition?

Q. And at page 45 of that deposition, did I ask this question and did you give this answer:

DO NOT ask: "Do you remember giving a deposition in this case?"

DO NOT ask: "Do you remember telling me _____ at your deposition?" DO NOT ask: "Didn't you testify differently at your deposition?'

Why not ask those questions? Control

Remember during your preparation that you must make your record on your expert challenges through cross-examination. The expert report and deposition transcript that formed the substance of your record on your pre-trial motion to exclude and motion *in limine* will likely not be admitted in evidence and will not be part of the trial record. Whatever record you want to argue from in support of your Rule 50 motions and on appeal, you will need to make through your cross-examination.

I commend to you Professor Irving Younger's article on the Ten Commandments of Cross-Examination. Read them. Learn them. Live them. And always remember and follow Younger's general advice about cross-examination: "Be brief, be succinct, sit down."

II. Post-trial.

If you have done your job at trial, you should have a good record to support your post-trial motion for judgment as a matter of law, and, if that doesn't succeed, for appeal of the erroneous admission of the expert testimony. See *Watts v. Radiator Specialty Co.*, 990 So. 2d 143 (Miss. 2008), for a good example of how counsel's persistence in challenging the expert finally pays off.

III. How to acquire and use your own expert.

If your opponent has an expert, you will most probably need one of your own to address and hopefully rebut the opinion testimony by your opponent's expert. Even if your opponent does not have an expert, if there are issues in the case that can be addressed by an expert, you must give consideration to whether an expert should be retained.

A. Finding your expert.

In most cases, your first and best resource is your client. If your client does not have an employee who can function as an expert, it will most likely know of the experts in the field who can provide expert testimony on the relevant issues. In many cases, even when you intend to utilize a client employee as an expert, it is wise to also retain an independent expert to confirm the opinions of the employee expert. This, again, is a decision that must be based on the nature of the case, the value of the case, and your client's willingness to spend money. If your client is not able to point you in the direction of a good expert, ask your partners, other lawyers who practice in the relevant field, or research the internet for experts yourself. If you

are an ADLA member, you can hire a broadcast email seeking information on available experts; if you are a member of a related DRI committee, you can send a blast email to the committee members seeking assistance and advice.

B. Developing your expert's opinions.

Once you have an expert, you are going to want to work with the expert in development of opinions helpful to your case. There are two important things to think about in this regard: communications with the expert, and preparation of the expert report.

1. *Communications with the expert.* Remember that in state court your communications with your expert are probably going to be discoverable, and that some of your communications with your expert in federal court may be discoverable as well. You need to furnish your expert with deposition testimony, pleadings, documents, and anything else that he needs in order to conduct the type of examination necessary to form an opinion. It is preferable to have your expert tell you what documents he needs, instead of you selecting the documents for the expert to review. It looks bad on cross-examination when the expert has to admit that the lawyer selected the documents that he would review. Because you can never be sure what of your communications with the expert may be discoverable, it is preferable to have most of the communications with the expert by telephone.

2. *Preparation of the expert report.* F.R.C.P. Rule 26(a)(2)(B) provides that the expert report must be "prepared and signed by the witness." Some courts

have sanctioned lawyers for being unreasonably heavily involved in the preparation of the expert report. The best practice is to furnish the expert with the list of the six items required to be included in the expert report by the rule, and have the expert provide the initial draft of the report. You can then discuss the draft with the expert by telephone and he can provide a final report based on your discussions. You should not send a letter, an e-mail, or anything else in writing to the expert suggesting changes to the draft report.

C. Discovery directed to your expert.

Counsel for your opponent is going to want to conduct the same type of discovery toward your expert and his opinions and reasoning as you will be directing toward your opponent's expert. You can expect to receive interrogatories inquiring about the expert, requests for production or a subpoena for documents related to the expert and his opinions, and a deposition notice. It is important that you include in your interrogatory answers a full and complete statement of the facts known and opinions held by your expert, and a summary of the grounds for each opinion he proposes to proffer. Be aware that anything omitted from your interrogatory response will likely be excluded from evidence at trial. The same holds true for responses to requests for production or a subpoena *duces tecum*; make sure the expert provides everything that he has reviewed and that he is relying upon. His failure to do so may impact the admissibility of his opinion testimony at trial. Finally, prepare your expert carefully for his deposition and make sure he is prepared

to identify each opinion he has, the bases for each of those opinions, and the reasoning or methodology by which he arrived at those opinions. Do not be afraid to ask questions of your expert yourself in the event that counsel for your opponent has created some uncertainty or ambiguity about the opinions or their bases.

D. Defending against the *Daubert* challenge.

Just as you will be challenging your opponent's expert, expect that your opponent will challenge your expert testimony. The response to a *Daubert* challenge is simply the opposite of what I have discussed above in the challenge. You must introduce evidence into the record, whether at a motion to exclude, motion *in limine*, or objection at trial stage, to establish that your expert is sufficiently qualified, that he followed a scientifically reliable methodology in reaching his opinion, and that the opinion fits the case. Unless you have selected the wrong expert, it is generally a lot easier to oppose a motion to exclude expert testimony than it is to successfully oppose the introduction of expert testimony.

E. Your expert at trial.

Usually the last interaction you have with your expert is in preparing him for trial and then directing him at trial. There are important considerations in each of these tasks.

1. *Preparation for direct examination.* Preparation for the direct examination of your expert is a tedious, painstaking process that requires your careful attention. You must script the direct examination for your preparation with the

expert, so that you and he are able to rehearse it, but then you must conduct it at trial in such a fashion that it looks neither rehearsed nor scripted. You need to be very careful to prepare yourself and your expert so that you do not have to lead him, because that will draw an objection and will distract the jury in the middle of your presentation of important opinion testimony.

In my experience, and most judges prefer this, the best way to qualify your expert is to simply announce to the court the name of the expert and go forward and list all of his background, and then ask him if you have correctly stated his qualifications. A lot of lawyers like to embellish the credentials, but in my experience that generally irritates the judge and doesn't make much headway with the jury. I only recommend that where you have an expert who so severely out-credentials the other expert that even the jury will understand the distinction. After qualifying your expert, ask him to tell the jury the compensation agreement that you have reached for his services, and have him tell the jury how much he has been paid to date for those services. From there, you can proceed in any order you prefer, but you need to cover what opinions he has reached, the process by which he reached those opinions, what documents he reviewed, what other information he had available, and what independent investigation he performed.

2. *Preparation for cross-examination.* You will also need to thoroughly prepare your expert for the cross-examination from opposing counsel that will be coming after you sit down. Since you know what that cross-examination will involve, based upon the report and deposition testimony your expert has given, as well as any articles in the field your expert has written, you need to go through with

your expert each topic that he can expect to be cross-examined about, and learn from him what he will have to say in response to those issues. Caution your expert about being argumentative, loquacious, or overbearing. Jurors respect academic types; they are not so fond of bombastic blusterers. Above all else, remind your expert to be courteous to the opposing counsel, to the judge, and to the jury, and to stick to his guns on his opinions when under cross-examination.