

PREPARING YOURSELF TO TAKE AN EXPERT'S DEPOSITION

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A. Remembering the Basics:

Many times, the most dominant witness in a modern-day trial is the opposition's expert. A trial lawyer cannot do justice to his clients until he has mastered the ability to take an effective deposition of the opposition's expert.

Effective cross-examination of opposition's expert at trial depends a great deal on an effective deposition. The lawyer must have a working knowledge of an unfamiliar subject matter on many occasions. Anything short of gaining this working knowledge, puts the case and client at a great risk. There are no shortcuts in the preparation necessary for a thorough effective deposition of an expert.

Keep in mind the following list when preparing for your deposition:

- * Thorough knowledge of case facts.
- * Understanding technical areas to be covered in deposition.
- * Be familiar with vocabulary, statutes, regulations, standards, and controlling case law pertinent to your case.
- * Meet with your client.

- * Interview and/or depose witnesses.
- * Meet with your independent expert witness.
- * Depose adverse party.
- * Review any publications authored by opposition's expert.
- * Research any relevant treatises and publications.
- * Check out expert with other attorneys.
- * Prepare deposition checklist with specific questions (you are trying to educate yourself, not opposing counsel).

B. Depositions vs. Other Forms of Discovery:

Forms of discovery such as requests for admissions, interrogatories and requests for production of documents are very important in organizing and mapping out the direction of the attorney's case. They should mainly be used to get prepared for the deposition. The deposition of the expert can be much more beneficial after the collection of all pertinent documents. These documents can be used by having the expert explain them or by using them to show flaws in his analysis. Therefore, these forms of discovery are important, but mainly as background.

Depositions are not only the most common form of discovery, they are also the most effective. The deposition can be taken upon oral or written questions. Although it is usually advisable to conduct oral depositions, depositions upon written questions have the advantage of being economical,

particularly when the deponent is located far away. James L. Underwood, A Guide to Federal Discovery Rules (American Law Institute 1979).

Because of the limitations of the deposition upon written questions, oral depositions are usually worth the extra cost and should be employed in almost every case. Some attorneys avoid taking depositions because of a belief that they may not be worth the expense, or that they will “educate” the opponent and force him to learn the case. Dennis R. Suplee, Depositions--Objectives, Strategies, Tactics, Mechanics, and Problems, Def. L.J. (Sept. 1983) at 426.

These concerns are valid, but are outweighed by the need to take the depositions.

There are several advantages of depositions over other forms of discovery. First, the taking of depositions enables an attorney to observe the expert witness and evaluate his potential effect on a jury. The attorney is also being granted a rehearsal with this witness prior to trial, which enables the attorney to plan the most effective examination technique for the expert at trial.

Second, a deposition allows the attorney to pose follow-up questions suggested by the expert’s testimony. Additionally, the attorney’s observations of the expert’s reactions, as well as the substance of the responses, should alert the attorney to areas to more deeply probe.

Third, in a deposition the attorney has the element of surprise. Although the opposing attorney has prepared his expert for the deposition, the deposing attorney should seek every opportunity to elicit responses to questions for which the witness is not prepared. He should also attempt to lock the expert into a

position he or she must take at trial. If this is done, the expert may be unable, after the deposition, to testify credibly at trial to any other opinions based upon any other facts other than ones disclosed at the deposition.

These advantages should be weighed against the obvious disadvantages of taking a deposition. The disadvantages are the expense of a deposition, the fact the deposition will alert the opposing attorney to deposing attorney's evidence and direction of litigation, and may very well open the door for harmful testimony by the expert. Nevertheless, it is almost always advisable to depose the opponent's expert.

C. When to Take Deposition:

Deposition procedure has two stages: noticing and taking. A party may give notice of a deposition at any time after the action is commenced. A plaintiff may serve a notice of deposition upon a defendant simultaneously with the summons and complaint. However, the plaintiff must wait thirty days after the action is commenced before he can take the deposition of any person without leave of court.

To take a deposition in less than thirty days after service of process, the plaintiff must obtain leave of court, unless (1) a defendant has shown himself ready to proceed by engaging in discovery of his own, or (2) the proposed deponent is about to go beyond the subpoena power of the forum court. This is a good reason to include initial discovery, requesting the name of any expert to be used by the opposition, with the filing of the original complaint. This along

with requests for all pertinent documents in the case helps to determine the flow of discovery and the identification of possible deponents.

The deposing attorney must realize that his objectives when deposing an expert are different than when deposing any other type of witness. The attorney's tactics must therefore also be different.

These tactics are usually dictated by the nature of the case and the purpose of a particular deposition. If the attorney's purpose is to identify and locate areas for further discovery, the deposition should be taken early in the discovery process. However, if the purpose is to gain an understanding of discovered materials and/or the opposing expert's position, the deposition should not be taken until all other needed discovery is complete.

Any party, including under appropriate circumstances the party who noticed the deposition, may move the court to order the deposition taken at a time other than that scheduled in the notice. That time may be earlier or later than the scheduled time. When justified by the circumstances, a motion to enlarge or shorten time may be made upon notice shorter than the five days prescribed by Rule 6(b) Ala. R. Civ. Pro.

The factors relevant to a trial court's determination to enlarge or shorten time would include the same kinds of considerations relevant to deciding what notice is reasonable under subdivision (b)(1), that is: (1) whether emergency circumstances beyond the making or control of the moving party justify the order, (2) whether emergency circumstances caused or controllable by another party justify the order, (3) whether other parties can reasonably be expected to prepare

for the deposition in the time requested, (4) whether the order will require that the trial or other contemplated procedural steps be postponed, or (5) whether it is still reasonable, considering the distance or closeness of the trial date or other relevant circumstances, to reschedule the deposition.

D. Preparing the Notice/Subpoena:

Most depositions are taken under some form of agreement without the necessity of subpoenas; however, they should be utilized in the taking of an expert witness deposition.

When counsel determines that a deposition must be taken, he must schedule it by giving the other side reasonable notice of the date, time and place of the examination, and the names and addresses of those to be deposed. The notice should also contain a designation of the documents and things, if any, that these deponents will be required to produce at the deposition. If the name is unknown, the notice must contain a general description which is sufficient to identify the person to be deposed or the group or class to which he belongs.

Lawrence S. Charfoos & David W. Christensen, Depositions: A Practical Guide, Trial (August 1986) at 25.

Rule 30 Ala. R. Civ. Pro. does not prescribe any particular form. The following model was revised from a form out of Jerome A Hoffman & Sandra C. Guin, Alabama Civil Procedure sec. 6.33:

[NAME OF COURT]

[STYLE OF CASE]

Notice of Deposition

TO: _____

Attorney for _____
_____ [address] _____

PLEASE TAKE NOTICE that at __:__ a.m./p.m., on _____, _____, 19__, at [address] , [deposing party] will take the deposition of _____, whose address is _____, upon oral examination before a notary public [or other appropriate designation], or before some other officer authorized by law to administer oaths.

Attorney for _____

[address]
[phone #]

A deposing party may request that the expert (1) bring to the deposition designated writing or things and (2) permit the deposing party to inspect and copy those materials. The rule promises no protection against bringing the materials, but if the expert objects in writing to inspection or copying, the deposing party can obtain inspection or copying only by motion and order under Rule 37(a) Ala. R. Civ. Pro.. The expert's written objection must be served upon the deposing party within five days after receiving the request for the materials.

A subpoena duces tecum is a writ or a process which requires a witness to bring to court or a hearing certain books or papers which the witness has in his/her possession that may make clear the issues before the court. It has a long

history at common law. The subpoena is a command under penalty; the duces tecum means “you bring with you.”

The subpoena duces tecum is one of the most important writs that can be used by a trial lawyer. Its techniques should be cultivated by the deposing attorney until its use becomes second nature in his quest for evidence. The use of a subpoena duces tecum, based in common law, originally applied only to a person who was not a party to a cause. This has been superseded by Rule 45 of Ala. R. Civ. Pro.. This rule also authorizes the use of a subpoena to compel production of evidence independent of a deposition.

For the expert who is usually not a party, a notice of deposition is unenforceable unless accompanied by a subpoena and, if a witness fails to appear and was not subpoenaed, the court can impose the cost of opposing counsel upon the noticing party. To avoid the risk of sanctions, it is recommended that a subpoena be served even at the risk of antagonizing the witness. Counsel should take into account such factors as the attorney’s relationship with opposing counsel and the witness’s dependability.

E. Researching the Literature:

To maximize the effectiveness of the expert’s deposition, the deposing attorney should obtain a working knowledge of the subject matter. The deposing attorney should read any professional publications which have been written by the expert because you may find some statement or opinion in one of the expert’s own publications that can be used against him during cross-examination.

He should also research top publications in the area of the expert which can be used to compare with that of expert's publications or opinions. The overall objective of the deposing attorney's review of the literature is to obtain an impartial expert's opinion. WestLaw has a database that can search for information on experts. The deposing attorney should also consult with his own expert to assure that he has researched all of the relevant areas and topics.

Most lawyers will have to obtain professional assistance in their initial efforts to identify the contents of technical literature. A trained public librarian at the local public library may be able to provide all the assistance that is needed. However, attorneys should consider using specialized experts in the field of technical information retrieval. Scott Baldwin, Francis H. Hare, Jr. & Francis E. McGovern, The Preparation of a Product Liability Case, 2nd Edition 1993.

After actual acquisition of the hard copies of the relevant material, organization of the material is so important. Counsel must reduce the mass of material to a few publications that can actually be used. The following steps are a suggested approach to the organization of the literature.

1. Each item should be indexed on a master list.
2. Each item should be scanned to determine the relevance to the issues at hand. If the item appears to be irrelevant, it may be discarded. If the item appears to be relevant, proceed to step three.
3. Each potentially relevant item should be briefly summarized and a copy of the summary should be attached to the item.

4. Each item and the summary should be numbered and placed in a file or permanent safekeeping.

5. Prepare a topical outline of the points or contentions involved in the case. Each item is then labeled to reflect which of the points or contentions are discussed. From the listing of points or contentions counsel will be able to select the items to be used.

6. After selecting items intended to be used, a bibliography of the selected items should be prepared.

7 Each item must now be cited under the appropriate topic of the point or contention involved in the case. The topical outline containing the references of the literature will be used in the discovery and trial of the case. The entire process is tedious, but it will yield great dividends. *Id.* at 305.

The deposing attorney should make absolutely certain that during the portion of the deposition where certain documents are discussed, the question and answer clearly identify the document involved. Vague references to “this report or that drawing” may be clear to those attending the deposition, but will often be meaningless in the typed transcript. *Id.* at 505.

F. Communicating With Your Expert Regarding The Depositions:

The deposing attorney should also communicate with his own expert for purposes of preparation. The expert can recommend treatises, talk to colleagues to find out about the opposing expert’s work habits and standing in the field, as

well as provide the attorney with a working knowledge of the technical area involved.

The deposing attorney should refrain from asking his expert to provide suggested questions or traps, because the attorney is the expert in the legal field and should remain in control of the deposition. However, it may be useful to have the expert present at the examination of another to suggest follow-up questions, or to clarify the meaning of answers.

The deposing attorney should know as much about the past litigation experience of the opposition's expert before the deposition. A good checklist of areas to cover will help in covering all pertinent topics in the deposition.

Checklist for Deposing Expert:

- I. Biography
 - A. Name and Address
 - B. Employer/ Associates
 - (1) Job title(s)
 - (2) Actual duties
 - (3) Dates
 - C. Educational Background
 - (1) Formal education (chronologically)
 - (2) Degree(s) (type and dates(s))
 - (3) Other "schools"/"courses" (description and dates)
 - D. Experience
 - (1) Job (description and dates)
 - (2) Consulting work (type and dates)
 - (3) Teaching
 - (a) what courses
 - (b) what institutions
 - E. Professional Organizations and Societies
 - (1) Earned membership
 - (2) Voluntary membership
 - (3) Criteria (if certified)
 - (4) Standards or government committee membership
 - (5) Relationship to plaintiff, defendant and/or industry
 - F. Licenses
 - (1) Type

- (2) Field
 - (3) Issuer
 - (4) Dates
 - G. Publications/Lectures
 - (1) Title, date, and publication
 - (2) Copy of manuscript
 - (3) Title, date, and occasion for lecture
 - (4) Patents
 - H. Other Basis of Professional Qualification
 - I. Fields in Which Qualified as an Expert
 - J. Other Persons, Organizations, Literature Considered Qualified and/or Authoritative.
 - K. Opinion of Necessary Basis of Qualification for Expertise in Area.
- II. Other Testimony and/or Consultation
- A. Consultation
 - (1) Who, what, where, why, and when
 - (2) Similar products/issues
 - B. Testimony
 - (1) Who, what, where, why, and when
 - (2) Similar products/issues
 - C. Identify Proceedings and Parties
 - D. Basis of Compensation in Other Instances

Several areas that should be researched ahead of time are:

- * Does the expert have an occupation other than an expert witness.
- * Locate copies of all past depositions given by the expert.
- * Who the expert has testified for in the past. (Plaintiff or Defendant)
- * How much does the expert charge for his testimony.
- * What percentage of his total income comes from being an expert witness.

* How many times has he been used by the opposing attorney.