

Publish and perish

Preparing for the defense expert's deposition


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By Miles B. Cooper

"I see you wrote a book on the topic you're here to discuss," said the lawyer to the expert during the expert's deposition.

"Yes, I did. Unfortunately," the expert appeared to simultaneously shrug and smirk, "it is no longer in print."

"That's true," said the lawyer while reaching into the lawyer's messenger bag, "but fortunately a friend just happened to have a copy." The lawyer pulled out a book, its pages peppered with Post-its, "I have a few questions." The smirk dropped from the expert's face.

Just the facts

Shortly after passing the bar, the firm sent me off to take a peripheral expert's deposition in a case with triple set depositions. I was given an outline and some instruction. Go over the CV, the expert's income from litigation, plaintiff/defense ratio, past cases, what the expert reviewed, the expert's opinions, and the basis for those opinions. Simple enough. That's what I did, and that's what many lawyers consider to be a thorough expert deposition.

I finished the deposition. In an adjacent conference room, Veen himself was in the fourth hour of another expert's deposition. I slid in quietly and watched a completely different approach. Veen and a paralegal had put in 40 hours of research prior to the deposition. I watched the expert's puffery get peeled away, layer by layer.

Them dratted internets

What used to take 40 hours and multiple libraries can now be done from any laptop. Thank Al Gore. Start with the expert's website. Most people had to hustle for business at some point. But they forget the hustle days. Many forget what they put on their own website. Some write a lot. Blog posts, journal articles, columns… Others modify their website. A trip to the Internet Archive, also known as the Wayback Machine, may locate long-lost items.

As you dig in, you'll get a sense about the expert. Trust your instincts. Some are straight shooters. Some will contort opinions to benefit the side paying the bill. The latter will have said or written something contradictory at some point. You just need to find it.

A general Google search using the expert's name will turn up additional rabbit holes, including favorite platforms. Twitter, YouTube… some people feel compelled to engage. The more they do, the more material there is to undo them.

Review the expert's CV to identify the expert's professional organization memberships. Many organizations have bylaws. Some, particularly medical boards, have rules governing expert testimony. Many experts don't know this and will run afoul of the rules.

Proprietary databases and listservs

Jury verdicts and settlements are collected by various organizations. Historically, ALM – the publisher of VerdictSearch – had the most detailed collection. Use the results to identify prior similar cases. Then contact the lawyers to obtain depositions. If the expert has been at it for a long time, try to get some early depositions. Then compare the current CV to the old one. Some experts get hoisted by their own petard. The first CV might list the first job as bartender. The current CV might now list that same job as security consultant.

Look for cases that went to trial, in particular ones where known trial greats conducted the cross-examination. Then ask that firm for a copy. Much of the deflation groundwork will be synthesized into its purest form, ready to use.

PACER is another good resource. Federal cases require detailed written reports, and *Daubert* motions get filed. Those can sometimes be located on PACER. And sometimes, if you are really lucky, you'll find that the expert cuts and pastes the same content from report to report. If you're really lucky, the expert will forget to change the name or gender.

Right timing

The more you sweat the research, the more the expert bleeds. A question then arises: play the card in deposition or save it for trial? If the expert cannot wriggle away, box them in at deposition. Gutting the expert at deposition increases the likelihood that the defense will settle the case. It is also far easier to fence with a slippery expert in deposition. Pin the expert down in deposition. Then conduct a surgical trial cross exam. Aces up the sleeve for trial can come off as clumsy.

Opposition research

If you don't know your own expert well, consider doing all this research before retention. A good defense team will do the research. Don't get so focused on burning down the defense that you forget your own footing.

Outro

A few hours later, the lawyer wrapped up the deposition. The expert's book contradicted every opinion the expert had written into the expert's report in the case. The expert grabbed the check and scurried out. As the lawyer and defense counsel

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packed up, the defense counsel said, "I understand our mediator has an opening for a second session next week…"

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