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More so than any other part of discovery, expert depositions present the attorney with a chance to score big or lose considerable ground. This chapter will cover both taking and defending experts. Anyone who’s taken or defended an expert deposition knows that the stakes are high. A properly prepared attorney will sniff out weaknesses in an expert’s methodology and identify areas where an expert may concede key points.

At a time when trial experience is scare, the expert deposition is the new proving ground for young litigators. While much of fact discovery remains routine and tedious, expert depositions provide a meaningful chance to strategize in real time. Moreover, your opponent is never closer than at an expert deposition. No judge is present to temper or mediate. All too often, the gloves come off when dealing with an expert, as opposed to a sympathetic plaintiff. Expert depositions present an optimal opportunity to size-up the expert and opposing counsel before trial.

**Choose an Expert—Do Your Homework**

Success with expert depositions starts with research and planning. First, use an expert when something is truly beyond the scope of a jury. For example, hire an expert when dealing with issues such as lost profit or medical causation.

When retaining an expert for your case, four attributes are a must:

1. Necessary professional skills and experience in the field of interest;
2. Strong academic background;
3. Integrity (as opposed to a witness-for-hire); and
4. Good communication skills.

To identify prospective experts, ask your colleagues for recommendations. Search relevant literature in the field. Use comprehensive proprietary databases such as:

- [http://www.lexis.com](http://www.lexis.com) (Their compilations of expert witness information are listed in the Legal Reference materials section of their Litigation area of law directory.)
- [http://www.westlaw.com](http://www.westlaw.com) (Their database of expert witness information is called Profiler.)
- [http://dri.org](http://dri.org) (DRI members can search by expert name or topic and keyword, view the expert’s profile, areas of expertise, a listing of any pertinent documents, as well as a listing of previous inquiries on that expert by other DRI members.)

Once a prospective expert has been identified, that expert must be vetted. Work through these steps:

A. Investigate the expert’s own marketing materials and web page;
B. Find blogs where the expert discusses his expertise;
C. Use services such as Lexis/Nexis, Westlaw, DRI, etc.;
D. Examine the expert’s course/teaching materials;
E. Review what the expert has published;
F. Analyze any prior deposition and trial testimony; and
G. Meet with the expert!

When choosing your expert, this last step is extremely important. An expert with impeccable qualifications may fall flat in person. You want someone who is a good teacher and communicator to simplify your technical story on direct examination. Find an expert who is intelligent and credible, to deal honestly and effectively on cross. You also want an expert can balance scientific/technical “certainty” with the strong belief that his position is correct.
Finally, consider “local flavor.” For example, will your Harvard expert appeal to an Alabama jury?

Don’t be afraid to talk money. Negotiate the expert’s rate. Never agree to a contingent fee tied to the success of your case. Memorialize terms of compensation, including travel and other expenses, in your retention agreement.

Opposing counsel will ask your expert compensation-based questions, so you must know the answers beforehand. Understand how much of an expert’s total compensation (per year) is tied to legal consulting compared to practicing the expert’s underlying discipline. Know what proportion of his or her legal work is dedicated to serving the defense versus plaintiffs.

A word on experienced litigation experts: In a practical sense, many competent, objective experts derive their living from litigation-driven consulting. In choosing an expert, you must balance the potential that the expert will be portrayed as one-sided or biased with that expert’s benefits. Hiring an expert connected to a consulting firm offers certain efficiencies, resources, and general know-how that those less experienced will not have. Be aware that experts within certain disciplines are simply more likely to focus on litigation consulting than those in other disciplines. For example, engineers often consult, but this is less common for medical doctors who typically spend much time treating patients.

*It goes without saying that you should do your homework on these issues before deposing your opponent’s expert as well. As discussed further later in this chapter, dig deep into both the scientific discipline and the expert’s background.*

**Required Expert Disclosures**

**Identify All Testifying Experts**

Under Federal Rule of Civil Procedure 26(a)(2)(A), “[a] party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.”
Disclose All Opinions and Supporting Facts

Pursuant to Fed. R. Civ. P. 26(a)(2)(B), a party must disclose a written report prepared and signed by the witness, which includes four key elements:

1. Complete statement of all opinion and the bases and reasons for those opinions;
2. Facts or data considered by the witness in forming the opinions;
3. Any exhibits to be used as a summary of or support for the opinions; and
4. Qualifications of the witness, including:
   - List of all publications in the last 10 years;
   - Compensation to be paid;
   - List of all other cases in which the witness has testified as an expert at trial or by deposition in the last four years.

On December 1, 2010, important amendments to Fed. R. Civ. P. 26 took effect. Rule 26(b)(4)(B) now expressly protects draft expert reports from disclosure, creating a “work product” protection for them. The rule “protect[s] drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.” Id. Similarly, Rule 26(b)(4)(C) protects communications between an attorney and a testifying expert as work-product, with three exceptions. Communications remain discoverable where they (i) relate to the expert’s compensation, (ii) identify facts the expert considered in forming an opinion, or (iii) identify assumptions provided by counsel and that the expert relied upon to form an opinion. Id.

The protections of provisions 26(b)(4)(B) and (C) do “not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions.” 2010 Advisory Comm. Note. The 2010 Advisory Committee further explained:

[T]he expert’s testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party’s counsel about the opinions expressed is unaffected by the rule. Counsel are also free to ques-
tion expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed.

*Id.* (emphasis added).

During the process of developing an expert’s opinions and crafting a report, beware of excessive attorney input. Even though Fed. R. Civ. P. 26 now protects draft reports and certain communications from mandatory disclosure, not all states afford the same protection. And the federal rules will allow for disclosure in some instances—for example, when an attorney identifies assumptions used in the expert’s report. As a practical matter, you absolutely must work with the expert to ensure he or she can identify the key factual issues required to develop his or her opinion. You also must ensure that the expert properly presents, in his or her report, all the elements needed to satisfy Rule 26(a)(2)(B)—including providing a complete statement of his or her opinions and bases thereof. But don’t write it for him or her. The report should be the expert’s own—not yours. Allow your expert to take ownership from the start. After all, ultimately, the expert will testify to those opinions, not you.

Take care that your expert makes a timely, complete disclosure, including all primary and supporting opinions, and a comprehensive list of material on which he or she relied. This is not the time to hold back. Consider that your opponent may choose to refrain from deposing your expert. In that case, your expert will not be afforded an opportunity to clarify or otherwise provide additional explanation. Under this scenario, if your expert’s disclosure, by itself, is lacking, the judge may strike any unsupported opinion.

Finally, Rule 26(e) imposes a duty on the party to make corrections, additions, or other changes to its expert disclosure by the time of the party’s pretrial disclosures. See also Rule 26(a)(2)(E). This duty extends to information in the expert’s report as well as information provided during his or her deposition. Rule 26(e).
Timing of Disclosure

Federal Rule of Civil Procedure 26(a)(2)(D) requires that parties make mandatory disclosures as ordered by the Court, but not later than 90 days before trial. Any rebuttal testimony must be disclosed 30 days after the disclosure made by the other party.

Required expert disclosures present a key source of information for both parties. For your own expert, thoroughly review the required disclosures. In many cases the expert opinion is barred because a party failed to adequately and timely disclose. See, e.g., Avance v. Kerr-McGee Chemical LLC, No. 5:04CV209, 2006 WL 3484246 at *6 (E.D. Tex. Nov. 30, 2006) (setting forth four factors that court consider to determine whether to exclude untimely expert opinion: (1) the explanation, if any, for the failure to comply with the rules; (2) the importance of the testimony; (3) the potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure any such prejudice); Lidle v. Cirrus Design Corp., No. 08 Civ. 1253, 2009 WL4907201 *6–7 (S.D. N.Y. Dec. 18, 2009) (examining the same factors); Wang Laboratories, Inc. v. Mitsubishi Electronics America, Inc., CV 92 4698 JGD, 1994 WL 471438 *2 (C.D. Cal. April 14, 1994) (“[C]ourts generally consider the prejudice to the opponent of the evidence, the possibility of curing the prejudice and the explanation of the proponent of the evidence as to the reason for delay.”).

Bottom line: Avoid late disclosure of expert opinion if at all possible. Otherwise, your expert may be barred from offering all late opinions at trial. See Avance, 2006 WL 3484246 at *6 (granting motion to strike untimely expert opinion offered in the form of affidavits). In the event that you must disclose late (despite your best efforts), ensure that your expert discloses these opinions as soon as possible, prior to or during deposition. Prepare your expert to address not only the bases for this new opinion, but the reasons why the opinion was not disclosed at the proper time.

Effect of Consulting Experts

Complex cases often require hiring an additional expert to consult. Such a consultant is frequently used at the outset of a case. He or she may provide a worst-case scenario, conduct preliminary tests and research, or focus on
case strategy. This consulting expert may not possess the style or charisma that makes a testifying expert successful—and he doesn’t need to. The consultant works in the background.

Rule 26(b)(4)(D) provides work-product protection for the work of litigation consultants. “Ordinarily, a party may not… discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.” Id. (emphasis added); see also Rule 26(b)(3)(A) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s… consultant…”).

The party seeking to overcome the qualified work-product privilege for consultants must show “exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.” Fed. R. Civ. P. 26(b)(4)(D)(ii). Thus, unless opposing counsel can meet their burden of showing “exceptional circumstances,” the consultant remains free of the mandatory disclosure requirements imposed on a testifying expert.

**Dual-Hat Experts:** Be cautious before choosing a consulting expert who may later become your testifying expert. If you decide to designate your consultant as a testifying expert, you may be required to disclose all materials provided to and exchanged with that expert. Under the 2010 amendments to Rule 26(a)(2)(B), the testifying expert must disclose “the facts or data considered” in forming his or her opinions. The pre-2010 rule referenced “data or other information.” The 2010 Advisory Committee noted:

> The refocus of disclosure on ‘facts or data’ is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that ‘facts or data’ be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by the expert.
Id. In practice, the analysis is often highly dependent on the facts of the case. Compare *Yeda Research and Development Co., Ltd. v. Abbott GmbH & Co. KG, 292 F.R.D. 97, 113–15 (D. D.C. 2013)* (finding party waived the work product protection of expert’s work as a consultant by designating him as a testifying expert witness, because the sought-after material, created during his role as a consultant, were nevertheless relevant to his expert testimony); with *Sara Lee Corp. v. Kraft Foods, Inc., 273 F.R.D. 416, 420 (N.D. Ill. 2011)* (finding that dual expert’s materials were protected as they “clearly ‘relate[d] solely to [the expert’s] role as consultant, even taking into account the preference for disclosure when dealing with an expert who wears two hats’”).

If you ultimately choose to share your consulting expert’s work with your testifying expert, you may be required to provide any work generated by your consultant that your testifying expert considered. Here again, this discovery battle is best avoided. *Monsanto Co. v. Aventis Cropscience, 214 F.R.D. 545, 549 (E.D. Mo. 2002)* (waiving work-product protection when testifying expert reviewed consultant’s test results as the test “focus[ed] on the exact scientific findings that are central to the legal arguments the parties have advanced”); see also *Long Term Capital Holdings, L.P. v. United States, No. 01-CV-1290 (JBA), 2003 WL 21269586 at *2 (D. Conn., May 6, 2003)* (stating exceptional circumstances “may exist when a non-testifying expert’s report is used by a testifying expert as the basis for an expert opinion, or where there is evidence of substantial collaborative work between a testifying expert and a non-testifying expert.”).

Remember, these rules apply to your opponent as well. Careful cross-examination may reveal that the opposing expert is working with a consultant who was not disclosed.

**Preparing to Defend Your Expert’s Deposition**

**Build Trust**

You and your expert will have many opportunities to communicate prior to receiving a deposition notice—during the retention process, as he or she crafts his or her opinions, and while preparing the required disclosures.
Establishing a rapport with your expert early on will pave the way for a successful deposition later.

Why is it important to build trust early on? Your expert is the key source for information that may be used to impeach him or her. He or she knows the science, and may have identified weaknesses or gaps in the scientific underpinnings of the case. As the attorney defending his or her deposition, you don’t want any surprises. If your expert trusts you, he or she is more likely to be open with you about possible impeachment issues and other minefields.

To build trust, from day one you must communicate to your expert that his or her honesty and credibility is paramount. If the science does not support an aspect of the case, he or she needs to know that you will not push him or her to go against that science. If he or she is concerned over a prior statement from a published article, your expert needs to know that you will work with him or her to explain the nuance. Only in gaining your expert’s trust will you be assured full disclosure on these important topics. Doing otherwise could lead to a surprise cross-examination that could be disastrous to the credibility of your expert, and ultimately to your case.

**Think Like Your Opponent**

To properly defend your expert, you must identify the key topics your opponent will target. At a minimum, prepare extensively and adequately with the expert by reviewing and articulating his or her opinions and bases. Identify the weaknesses in your expert’s methodology with your expert.

What concessions are scientifically justified, thus inescapable? Make sure you and your expert discuss these and that you are aware of any concessions he or she will make at the deposition.

Scour your expert’s publications and prior testimony (including prior deposition testimony) for anything that may be used against him or her. Question the expert about possible impeachment material in his or her publications.

In complex cases, various experts often overlap. Is there an opportunity for your opponent to go beyond the scope of one expert’s opinions to
gain an advantage? Your expert should have a sharp sense of other experts on your team. It is up to you to make sure your expert understands the big picture or your opponent will exploit his or her ignorance. It may help to have your expert review the reports of his or her fellow testifying experts to get a sense of the scope and boundaries of each expert’s opinion in the case, but you then must disclose that your expert reviewed those reports to your opponent. In the alternative, spend some time carefully reviewing what your expert should leave to other experts in the case.

Finally, are there “bad” documents that your expert has not reviewed? Consider carefully whether to show these documents to your expert. Full disclosure will allow his or her to be prepared to properly explain it—for example, that fact or document is not on point. However, if your expert has reviewed it, he or she cannot back away from it on cross-examination. As a general rule, if you believe that your expert will appear uninformed or, even worse, will misinterpret the document if shown it for the first time at deposition, prepare him or her. No one wants to be blind-sided.

**Stand in the Shoes of Your Expert**

You want your witness focused on the task at hand: listening carefully to every question, providing full, complete, honest answers, and disclosing all opinions and bases thereof—all while avoiding any traps set by the cross-examiner. To accomplish this, ask yourself: What are my expert’s primary concerns and how can I address them?

For example, your expert may be concerned about the procedural aspects of the deposition. If he or she has testified many times before, he or she may only require a quick review of the ground rules. However, if your expert (however experienced outside the courtroom) is new to litigation, explain the process in more detail. Review the limited nature of your role during the deposition. Go through the types of objections he or she may hear, depending on what is allowed in that jurisdiction. For an inexperienced expert, attorney-posturing may be a jarring experience. Make sure he or she understands that attorney bluster is just that. Most importantly, be sure the expert understands that a deposition is not like the collegial pro-
fessional meetings he or she may have attended, at which participants are respectful and deferential to one another’s opinions, even if they do not fully agree. Rather, in the context of the deposition, the expert must be willing and able to stand firm in his or her answers even in the face of attack.

If the deposition is to be videotaped, tell your expert well in advance. If appropriate, suggest attire (suit and tie, blazer, etc.). Impress upon your expert that every word will be recorded. A deposition is not a casual conversation. He or she must choose words carefully.

Use Your Expert to Tell Your Story

Your expert witnesses are often much more critical to the case than the fact witnesses. If the case is complicated and/or the factual history is lengthy, your expert can coherently pull together a large part of your case. If the fact witnesses are “missing,” the expert can substitute for “missing” corporate witnesses to some extent. Make sure your expert understands his or her role in telling the story. Do not wait until trial to discuss this with your expert. Rather, this should be part of your discussions when he or she is developing his or her opinions.

Expect your opponent to “test” your expert on how much he or she knows about the broader aspects of your case. Prepare your expert on every aspect of your factual case that he or she may be asked about at deposition, not just the parts you plan to have him or her explain at trial. If your expert answers too many times “I don’t know about that,” or “That’s not part of what I considered,” he or she will lose credibility with the jury.

Mock Deposition—Practice, Practice, Practice!

Preparing your expert for a deposition can be a lengthy task. The mock deposition is an essential, but not the only, component. Instead of a marathon session, try breaking your preparation up into multiple meetings over a week or two. Several planned meetings allows you to reinforce points made earlier, and will give your expert time to think and develop questions. If possible, meet in person—at least during the mock deposition. If an in-person meeting is not possible, avail yourself of face-to-face video.
Make a plan for each session and give your expert homework after each meeting. For example, the first session may cover basic “rules of the road” for depositions, the expert’s qualifications and publications, compensation issues, his or her affirmative opinions and bases (including the story of your case), and what is beyond/outside the scope for that expert. The second session may then cover the opposing expert’s critique, any weaknesses in your expert’s opinion, possible impeachment issues, and other likely cross-examination topics. A final session can serve as a Q&A practice session, where one attorney cross-examines the expert while another defends him or her.

Prepare detailed questions in the style of your opponent and review them with your expert. Ask him or her challenging, substantive questions, as difficult as he or she will encounter during the deposition. Explain (especially for an inexperienced witness) that he or she must give complete answers to all the questions. He or she will not be allowed to add to answers at a later time. Also, he or she should not guess or speculate, no matter how much he or she is pushed by opposing counsel. By questioning your expert, you will get a feel for areas where he or she may stumble—both substantively and stylistically. This is your opportunity to identify those weaknesses. Build in time to discuss the mock deposition to provide feedback. For your expert, this is the chance to self-critique and become more comfortable with the deposition format.

**Defending Your Expert’s Deposition**

On the day of the deposition, your expert already must be well prepared. Unless specifically instructed otherwise, he or she should come without briefcases and laptops, otherwise you risk your opponent insisting that he or she search his or her hard drive for some missing document on the spot or that he or she catalog all documents he or she brought with him or her as material he or she relied upon. Reassure your expert that the questioner (or you) will provide any hard-copy exhibits he or she may need that day. Leave the cell phone in the break room.
Know the rules of your jurisdiction pertaining to how objections are lodged. Some jurisdictions provide more leeway than others. During the questioning, object as aggressively as the rules allow.

Make your expert aware that your discussions during breaks are discoverable, and opposing counsel will very likely ask to know exactly what was said.

**Deposing Your Opponent’s Expert**

**Why Bother?**

Preparing and conducting an effective expert deposition takes time, effort, and expense. Before undertaking to depose an expert, have clear, focused reasons to do so:

- *Don’t* deposite the expert simply to find out what materials the expert has relied upon.
- *Don’t* deposite the expert just to determine what that expert will say at trial.
- *Don’t* deposite the expert merely because you have the right to do so.
- *Don’t* deposite the expert as a routine step of discovery.

Under certain circumstances, you may not decide to depose an opposing expert. For example, if that expert has submitted a report lacking in substance or support and your judge is one who has been willing to bind a party to such reports, you may forego the deposition and file a *Daubert*-type motion to exclude. See “Establish Grounds for a *Daubert*-Challenge—Know the Law,” p. 89, for brief discussion of *Daubert*.

Why deposite an expert then? Solid reasons to deposite an expert include:

- Limit the scope of the expert’s opinions;
- Show weaknesses in the expert’s preparation or create doubt in his ability;
- Demonstrate lack of scientific rigor and error in the expert’s analysis;
- Demonstrate why the expert’s method fails to answer the question posed, and hence is irrelevant;
• Reveal expert’s lack of objectivity;
• Box-in the expert’s opinion testimony;
• Setup an effective, focused cross-examination for trial;
• Support a *Daubert* motion; and
• Tell your client’s story through your opponent’s expert.

**Know the Science and the Expert**

There are no short-cuts here. If you want to depose an expert, you must be able to question that expert on his own terms. At an absolute minimum, you must thoroughly understand the expertise and the opinions offered by the opposing expert.

Know the field and what is generally accepted. Consult with your testifying and/or consulting expert about the science. Ask them to identify texts and articles that will get you up to speed. Use your own experts to analyze data. Understand how to drill down into the details.

Check out publications such as the Federal Judicial Center’s *Reference Manual on Scientific Evidence* ([http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf)). This was written in response to a recommendation of the Federal Courts Study Committee to assist judges in managing cases involving complex scientific and technical evidence. It includes chapters on statistics, epidemiology, toxicology, engineering, and a number of other fields. This is one of the most useful tools to use when preparing your case and frequently cited by federal courts.

Be sure to read key scientific or professional literature in the field, regardless of whether the opposing expert actually cites to it or relies upon it. You cannot do an effective job if you just look at the expert’s chosen reliance material.

Make sure the deponent expert discloses the bases of his opinion *before* the deposition. Usually, the parties come to an agreement as to when an expert’s reliance material will be produced. Study the deponent’s written disclosures and make sure your expert does the same to properly advise you. Understand the assumptions that are vital to expert’s opinion. Consider
a motion to compel in advance of the deposition if the written disclosure is inadequate.

Examine the expert’s prior reports and testimony. In addition to proprietary search engines, identify past expert reports by checking court files. Call the attorney in the prior litigation who may have the expert’s testimony or report in that case. By examining the expert’s prior work, you will learn about the expert’s style—for instance, how he evades tough questions. Prior testimony often provides important background details, so you will not need to dwell on them during your deposition. You may even find that the expert has previously offered opinions inconsistent with ones offered in your case, or that courts in other jurisdictions have precluded this expert from offering a similar opinion in the past.

Dig deep into the expert’s curriculum vitae. Read his publications. Do his qualifications check out? Do the professional societies he lists exist? Are his opinions within the scope of his education and experience?

Above all, don’t be intimidated by the expert or the science. The more you dig in, the less daunting the expert and his field will become.

**Establish Grounds for a Daubert-Challenge—Know the Law**


In *Daubert*, the Supreme Court charged trial judges with the responsibility of acting as gatekeepers to ensure that “any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert*, 509 U.S. at 589. “This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592–93.

To test whether an expert’s method is sound, apply *Daubert’s* non-exclusive checklist of reliability factors:

1. Technique or theory has been tested;
2. Technique or theory has been subjected to peer review;
3. Technique’s potential or known rate of error;
4. Existence and maintenance of standards and controls; and
5. Technique or theory has been generally accepted in the scientific community.

_id._ at 593–94. Question the opposing expert on whether his method meets these factors.

“[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the ‘scientific method,’” rather than by “subjective belief” or “unsupported speculation.” _Daubert_, 509 U.S. at 579. “[N]othing in either _Daubert_ or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the _ipse dixit_ of the expert.” _Joiner_, 522 U.S. at 146. Use this prohibition on ipse dixit opinions to your advantage. Demand that the deponent expert support every aspect of his opinion with a scientifically sound foundation. If he cannot, then his opinion is inadmissible.

Other factors that courts consider include the following:

1. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. _Joiner_, 522 U.S. at 146.

2. Whether the expert based his opinion primarily on anecdotal evidence. _Newell Rubbermaid, Inc. v. Raymond Corp._, 676 F.3d 521, 527 (6th Cir. 2012) (“Red flags that caution against certifying an expert include reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity.”).

3. Whether the expert has adequately accounted for obvious alternative explanations. _See id. See also_ Fed. R. Evid. 702 (2000) Committee Note (providing that a court should consider “[w]hether the expert has adequately accounted for obvious alternative explanations.”).

4. Whether the expert “employ[s] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” _Kumho_, 526 U.S. at 152.
In planning your deposition, think about admissions that will be useful at a *Daubert* hearing on admissibility or in motions to strike/exclude an expert. *Daubert* case law is now very well developed in all federal courts and many state courts, but that law differs in substantial ways from jurisdiction to jurisdiction. Start with research of the law that will bind your court. Given how common *Daubert* challenges have become, you may be surprised to learn how the court has dealt with the precise issues that you will confront in the case.

**Depose the Expert**

Taking the testimony of an opposing expert requires skill, patience, and preparation. Done right, deposing an opposing expert can benefit your case immeasurably.

**Prepare and Use an Outline**

Drafting a detailed outline, tailored to your goals, is vital to keeping your deposition on-track. Deposition questions should focus on the basics, consistent with how you conduct the deposition of fact witnesses:


But this is just the beginning. Generally, your outline should address whatever goals you have identified for the deposition.

Often the best approach is to methodically walk through the expert’s report in your outline. Be persistent in asking follow-up questions. If you don’t understand the answer, terminology, etc., ask him to explain. Don’t be intimidated by expert condescension. You must understand the expert’s opinions, so you can attack on cross-examination at trial.

**Box-In the Expert**

To effectively limit the subject matter of his testimony, ask the expert to articulate each and every opinion he holds in the context of the case. Your job is to prevent him from having enough leeway to add opinions at trial. Do the same for the bases of the expert’s opinions. Have him identify all the literature
on which he relies as well as documents that form the bases of his opinions. Always ask him if there’s anything else: Do you have any additional bases for that opinion? Do you have any opinions not already discussed today?

**Identify Exhibits**

Marking exhibits and having support from the record is key. But that must be balanced with the fact that some experts are skilled at taking long periods of time to review exhibits, finding irrelevant material in the paper, and slowing down the process. Have your paper support ready to go, but carefully decide during the deposition which exhibits you need to mark and use. If you are well-prepared, you often will have the record facts to show the expert on the first few instances where he tries to obfuscate. After a while, many experts will come to understand that you have the goods, and they will slow down and fight only on really key points.

Bring peer review articles that support each opinion that you want admitted. Know the materials well enough to cite to the exact page and language. If the expert refuses to accept the statement, be sure to get him to agree that you have properly read or characterized it. If he disagrees with it, be sure to get the detailed testimony as to why.

**The Devil Is in the Details**

Dive into the nuances of the expert’s opinion and reliance materials. There you will find the weaknesses that you can exploit during the deposition and later at trial. Work with your consultants and/or testifying experts to identify problems with the expert’s methodology or issues with his reliance materials. Include these details in your outline.

**Develop Testimony for a Daubert Challenge**

Keep your eye on the ball—which is to elicit admissions that can be used in a *Daubert* challenge, or at trial. Deal in bite sized aspects of the expert opinion and build until you have the full picture. Do not try to get an admission on an ultimate point without first exploring each step related to the methodology or/and factual basis of the opinion.
At all times, strive to identify important materials that the expert did not review. Identify tests that the expert did not conduct or examine. Identify elements of the facts that the expert did not consider in his analysis. Identify any fact that weakens his conclusion.

In the following example, a plaintiff alleged that Chemical X caused his Disease Y. To support this allegation (that X caused Y), plaintiff’s expert offered many studies which suggested that a broad category of chemicals (which included Chemical X) may cause Disease Y. The expert was initially confident that he had ample support in the peer review literature to support the opinion. But after discussing each and every study, and obtaining admissions that the precise chemical (or in some cases disease) at issue in the case were not reviewed in the studies, defense counsel effectively isolated the gaps in this expert’s analysis and obtained a sweeping admission:

Q. And you are not aware of a single study, epidemiological or otherwise, that associates Disease Y with Chemical X, are you?
A. Not except, in this case.
Q. Okay, Well, there certainly is no study in the world literature that concludes or even suggests that Chemical X causes or exacerbates Disease Y. Do you agree with that statement?
A. Absolutely.

After such testimony, this expert’s opinion was barred on two grounds—unfounded extrapolation and ipse dixit reasoning.

**Ask About Compensation and Witness Preparation**
Always ask about the expert’s hourly rate, the total compensation for the work, and whether there is any contingent amount involved. Always find out how much of an expert’s total compensation (per year) is tied to legal consulting compared to practicing the expert’s underlying discipline. For his litigation work, ask what proportion is dedicated to serving plaintiffs versus the defense. Such testimony may be useful to show that an expert has a particular bias. Remember, your own experts will be asked the same questions. See “Choose an Expert—Do Your Homework,” p. 75.
Be sure to find out how and what the expert did to prepare the opinion in the case. Not only how much time was spent, but witnesses and lawyers with whom he spoke, places visited to prepare, examinations or tests he conducted. A good way to explore this is by referencing the expert’s invoices, which you should request prior to the deposition.

**Keep Yourself in the Driver’s Seat**

You may encounter a master at obfuscation, an expert who steadfastly avoids answering clear questions. *Do not argue* with the expert. If the expert continually launches into long, non-responsive answers, stick to your guns. Build your record by repeating the question. Explain to the evasive expert that you will be forced to ask the judge to order an answer if he continues to refuse to answer your questions. Then be sure you actually do go to the court, even if on motion after the deposition. Do not suggest to the expert that you are “giving up” and not going to come back to insist on the answer to which you are entitled.

Videotaping the deposition may help to minimize bad behavior.

**Get the Logistics Right**

**Payment:** Unless the parties agree otherwise, the rules require that the party seeking to depose the expert pay a reasonable fee for doing so:

Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert’s facts and opinions.

deposition as reasonable given the issue, but denying reimbursement for travel expenses).

Consider making an agreement with opposing counsel regarding expert fees for both sides. Typically, the parties agree that each side will pay the opposing expert a pre-disclosed hourly fee for time spent during the deposition, each side to pay its own expert any time spent in preparation and travel expense.

**Recording:** First, hire a dependable court reporter. Ask for an estimate of when to expect the transcript. Court reporters often can provide a “rough” transcript if necessary, or for an additional fee will expedite a final one. Most court reporters also offer real-time reporting, which allows you to view the testimony during the deposition. Request real-time reporting in advance, as it generally requires some set-up prior to the deposition. Some attorneys find real-time reporting quite helpful; for others, it distracts them from focusing on the witness. Try it and decide for yourself.

Second, hire a dependable videographer. In the event you are able to elicit damaging admissions or otherwise helpful testimony from the expert, the impact on the jury of a video recording (as opposing to a dry reading of the transcript) will pay for the cost of the videographer. Be sure to include your intent to video the deposition in your notice to the opposing party.

Finally, ensure that the room reserved for the deposition is suitable. It should be quiet, temperature-controlled, and of sufficient size. The court report and videographer require room for their equipment and a low level of background noise for the recording devices to work properly. If possible, reserve a smaller, “break-out” room so you can work unimpeded during breaks. Provide basic amenities (such as water) for all.

**Conclusion**

For young attorneys, successful expert depositions are often the first step to trial experience. As emphasized in this chapter, preparation is key. But a successful expert deposition also requires enthusiasm. Indeed, many lawyers enjoy the profession because it offers the opportunity to learn about a
range of subjects. Working with experts presents a unique chance to explore often interesting topics. Don’t let the science overwhelm you or dampen your enthusiasm. A good expert will take you through the steps. Ask questions. Strategize. Have some fun!

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