

PRACTICAL CHECKLIST FOR DEALING WITH EXPERTS

(For use in personal injury cases involving wrongful death, car wrecks, trucking wrecks, products liability, medical malpractice, nursing home abuse, and premises liability)

By

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I. PRE-SUIT

A. PICKING YOUR EXPERT

1. Identify the **specific** product/issue involving your case, i.e., if your case involves a strength of materials analysis of an aircraft engine, hire a metallurgist who has dealt with aircraft engines by work history, publications, etc.
2. Try to obtain an expert who deals with the issue involved in your case on several professional levels, i.e., a doctor who teaches at a university, is chairman of a department, examines patients, and/or is called in for special consults.
3. Obtain the expert's CV, make sure it is updated, and discuss with the expert all entries (both good and bad) that are applicable to the issues presented in your case.
4. Have the expert send you publications he has written regarding the specific issue

to: a) educate yourself, b) prevent you getting burned by opposing counsel, and c) to see if the publications are contained in the leading journals in the field.

5. Do an internet search involving your expert. You would not believe what you will find. This is a fertile field.
6. Ask the expert for a list of cases wherein he/she has been retained. Check out those court records and call the attorneys involved (both plaintiff and defense) and get their thoughts, affidavits, depositions, and impeachment materials.
7. Ask your expert if they have ever been excluded from testifying and for what reasons. Ask them where opposing attorneys have been damaging on cross-exam. Identify the weak spots. If they say there are no weaknesses, WATCH OUT.
8. Watch out for the experts who need a lot of money before they can tell you whether you have a viable position or not. Get a clear understanding of fees and costs.
9. See if the expert are willing to have their opinions, etc., reviewed by or discussed with a colleague for their thoughts.
10. Ask the expert what federal/state regulations and/or industry standards regulations are applicable to the case.

11. Evaluate the probable outcome and budget yourself accordingly.
12. Prepare your expert to rule out other causes.
13. Look for previous testing or data from independent sources. Have the expert test a similar product to show why other products in the industry are safe whereas the one at issue has a substantial design and/or manufacturing defect.
14. Get expert to give a “close call” to your opponent so a jury would believe he is fair.
15. Make sure expert has all the data, both good and bad.
16. Get the expert involved early in the case if preservation of evidence is essential.
17. Call experts in the field and have them give you their thoughts on your proposed expert.
18. Percentage of work for plaintiff versus defense.

B. VENUE

1. If you have a great case, do not be greedy. Great cases can quickly be rendered

less valuable. If there is even a remote chance of going to an unfriendly federal forum (not all are necessarily unfriendly), associate local counsel in the home state of the defendant and bring the claim there. 1/3 to 1/2 of one million dollars is better than 100% of 0.

2. Not all state jurisdictions follow Daubert. Even the jurisdictions that follow Daubert will more likely apply those factors based on a level playing field instead of picking or choosing a factor to achieve a desired result. After suit is filed in state court and you get a defense orientated judge, assert a viable federal claim, i.e., Magnuson-Moss (you would get attorney fees), and see what happens.
3. Some states may be more favorable to a certain industry group compared to another due to money, i.e., Alabama's statute of limitations favors the chemical industry, but not the asbestos industry. Compare the plant numbers.

II. PRE-TRIAL

A. PAPER DISCOVERY

1. With your Complaint/Answer, file the appropriate Rule 26 discovery for both retained and specially employed experts.
 - a. The following is an interrogatory that is very useful down the road at trial

:

If you contend you are not liable to the plaintiffs for the incident made the basis of this suit, *for any reason whatsoever*, please state:

1. each and every contention or reason why you are not liable to plaintiffs;
2. each and every fact and/or the basis for each contention or reason why you are not liable.
3. state the name, last known address and last known telephone number of each and every witness, *expert or otherwise*, to correspond with each and every contention or reason why you allege you are not liable to the plaintiffs for the incident made the basis of this suit;
4. Identify each and every *document and/or tangible item* specifically identifying the corresponding reason or contention why you are not liable to plaintiffs sufficiently enough to allow the plaintiffs to obtain the same by a request for production.

b. Below is a recently used follow-up request for production:

1. Produce all literature you alluded to, discussed, referred to, and/or possessed at the deposition of plaintiff's expert.
2. Produce all documents discussed with, reviewed by, relied upon, seen by, and/or considered by all of your experts.
3. Produce all correspondence between your expert(s) and the insurance carriers in this case.
4. Produce all correspondence between your expert(s) and the defendant's attorney in this case.
5. Produce all documents provided to your expert(s) by anyone relating to this case.
6. Produce all documents reviewed by your expert(s) in preparation of their opinions in this matter.
7. Produce all documents, protocols, text and/or raw data relied upon by your expert(s) in the formulation of their opinions.
8. Produce all medical literature your expert possesses, reviewed, etc., adverse to your position in this case.

9. Produce all documents acquired by your expert(s), at the request of or on behalf of defendant or defendant's attorney, and/or any insurance carrier relating in any way to this case.
10. Produce a list of all cases in which your expert(s) have been retained, as an expert within the last five (5) years.
11. Produce all records showing invoices, statements or billing forwarded by your expert(s).
12. Produce all documents showing income your expert has received from the defendant, defendant's attorney and/or insurance companies.
13. Produce all documents pertaining to cases in which your expert(s) have been retained by the defendant, defendant's attorney, and/or defendant's insurance carriers other than this case.
14. Produce all documents evidencing your expert(s) education, work experience, training or skills, including but not limited to curriculum vitae, certificates, memoranda, awards, citations, etc.
15. Produce all documents containing records of any meetings your

expert(s) have had with defendant or defendant's attorney, adjusters, etc., regarding this case.

16. Produce all documents identifying any person from whom your expert(s) may have received any information regarding this case.
17. Produce all documents identifying any person your expert(s) may have contacted to investigate the matters at issue in this case.
18. Produce all documents evidencing any agreement for services between your expert(s) and defendant or defendant's attorney related to this matter.
19. Produce a copy of the report prepared by your expert(s) in this case, as well as any and all notes and/or drafts thereof.
20. Produce a copy of your expert(s) entire file on this matter, including but not limited to records, computer data, notes, charts, memoranda, correspondence, facsimiles, telephone messages, research, research notes, codes, statutes, ordinances, notices, discovery, pleadings, depositions, summaries, compilations or any other material contained within your file, provided to you or reviewed by you. If any documents reviewed or provided to you

has been destroyed, disposed of or is otherwise not contained within your file, please provide a description of said documents, why it was destroyed, at whose direction it was destroyed and when it was destroyed.

B. SUBPOENA

1. If the expert is located in Alabama (or even outside Alabama, if the case warrants such) you can send a subpoena seeking the following items:
 - a. A current curriculum vitae.
 - b. Originals or authentic copies of all standards, regulations, papers, articles, reports, records, studies, analyses, charts, data compilations, written instructions or warnings, and other documents and writings which were or will be reviewed, studied, written or prepared or partially written or prepared by you in preparation for the trial of this case and/or for your deposition in this case.
 - c. A complete list of all cases in which you have been retained and/or testified, including for each such case: the case style and case number; the name and address of the court in which the case was filed, tried or is currently pending, or, if this information is not available, specify whether

state or federal court and identify the town or city wherein the court is located; the approximate inclusive dates during which the case was or has been pending; the name and address of the attorney or attorneys with whom or for whom you worked and whether you were retained by and/or testified at trial or by deposition for the plaintiff or defendant; and copies of all such depositions.

- d. Any reports, letters, photographs, videotapes, memoranda, measurements, calculations, or other writings prepared or reviewed by you pertaining in any way to the above action, including drafts of the same.
- e. Any articles, books, treatises, or other items you have published relative to the subject matter upon which you are expected to testify in this case.
- f. A copy of each and every paper, statement, report, pleading, interrogatory, deposition, photograph, videotape, or other document given to you by the defendants or by someone on defendant's behalf to review in preparing opinions in this case.
- g. Your time sheets, invoices, statements and billing records relative to this case.

tend to use the exact same forms and (believe it or not) use the exact same phrases.

D. DEPOSITIONS

1. Opinions – Everyone has their own style but you may consider immediately asking the expert “Tell me the first opinion you are going to tell the jury in this case.” “Are there any other opinions you intend to offer to this jury?” Get the expert committed to telling you all opinions he/she will offer in the case.

2. Facts – After you get all his opinions, then ask “You have just testified that the first opinion you will render in this case is X. Tell me each fact forming the basis of that opinion.” After you get the expert to identify all facts, ask the expert “Are there any other facts other than A, B, C, D, etc., that provide the basis for opinion number one?”
 - a. At that point, ask where did they derive fact A from. Then you ask the expert where he/she derived each fact from, i.e. depositions, etc.
 - b. Did she disregard other facts? Why?
 - c. Get the raw data. Get any protocols used for the testing.

3. Literature – Have the expert identify each piece of literature supporting opinion number one.
 - a. Ask if there is any peer-reviewed literature which disagrees with that literature, or his opinion. Why is the other literature not relevant to this case? Did they consider that literature? Why was it ruled out for this case?
 - b. Anyone can publish almost anything in any type of paper in our present environment. What constituted the control group? Who funded the paper? The insurance industry? Is it peer reviewed? By whom? What were the circumstances involved? Call up the publication company, authors, etc.
4. Assumptions – Ask the expert each assumption he or she made in reaching opinion number one. You will probably have to flush this out of the expert, but once they have given you the information above, it should be apparent as to what assumptions they are making and then get the expert to admit the assumptions that he or she made.
5. Assistance – Ask the expert what assistance they had in preparing the case, i.e. office staff. You may find that the majority of the work is done by people other than the expert who are not qualified or less qualified than the expert. Compare the assistant's time to the time sheets/billing records. By way of example,

psychologists usually say they gave certain tests to a person, but those tests are usually administered by office staff.

6. Admissions – Get the expert to make admissions concerning your expert/methodology/etc. For example, she is qualified, her methodology was correct, her factual basis was in the record, etc.

7. Daubert – Cover the following: Has the theory or technique been tested? Has the methodology been subjected to peer review and publications? Has the expert been able to quantify the rate of error in his/her methodology? Is the technique accepted within the relevant scientific community? Has the expert used the same degree of care as would be expected in the profession outside of the litigation context?

8. Qualifications – Get the expert to explain how his education, experience, etc., make him qualified to render an opinion in this particular case. Try to get the expert to say he is an expert in numerous areas or get opinions from him in areas beyond his field.

E. MOTIONS TO EXCLUDE, SUMMARY JUDGMENT, AND *IN LIMINE*

1. These motions (usually filed by the defense) are procedural methods used to exclude the expert from testifying. However, they are also used to obtain more

information from the expert to cross-examine him or her at trial. By way of example, in a Summary Judgment Motion, the expert may prepare an affidavit which can be used later on to impeach his deposition testimony, his trial testimony or the information provided in answers to interrogatories and/or expert reports.

2. In order to get your Judge to side with you, it is helpful to abide by the old rule “Show me. Don’t tell me.” Bring the product to Court. Show him or her what you contend is the defect.

3. Although it is against everything we were taught, you may consider cross-examining your own expert at the deposition to prevail in a Daubert hearing or, if you do not intend to have the expert live at a trial (believe it or not that may occur), you may ask the expert “Do you have an opinion as to whether or not Nurse Y breached the standard of care exercised by emergency room nurses in the national medical community who are practicing emergency room medicine”, etc.

III. TRIAL

A. Voir Dire

Question the jury on the best evidence the *opposing* expert has against your theory and/or the most damaging part of *your* expert’s testimony B it give you credibility, i.e., DNA evidence in a criminal case. Ask the venire their experiences with the subject matter of the expert’s testimony.

B. Opening Statement

Tell a story with a theme tied into your expert's opinions. Usually, a chronology works well. Tell the jury why they should rule in your favor. Tell them what the opposing expert will say, and why they should disregard that testimony. Face up to your weaknesses. Only tell the jury about your expert's opinion, etc., you know *will* get into evidence because later on, if the evidence is ruled inadmissible, opposing counsel will shove it down your throat in closing.

C. Direct Testimony

Show me, don't tell me. Get the expert off the stand and have her "teach a class" using every possible demonstrative piece of evidence. Have the expert use everyday situations to explain her testimony. The lawyer should not be asking a whole lot of questions or questions that go on forever. Have the expert explain the weaknesses of the of the opponent's case and why the jury should believe you and not your opponent. Tie this in to your opening.

D. Cross-examination of opposing expert.

1. In cross-examination, oftentimes, the focus is on how much the expert is paid, the number of times the expert has testified for the particular lawyers or defendant. Although this is important, do not get bogged down in issues that are on the periphery of the opposing expert's opinion. Use the

blitzkrieg approach-if you have the evidence which goes to the central issue of the case, hit it hard, hit it fast, and sit down. In talking with jurors, they appreciate the shorter cross-examination of the expert exposing his major flaws, especially after the expert has spent a lot of time testifying on direct.

2. One of the major advantages of choosing not to depose the opposing expert are as follows: a) opposing counsel will not know where you are coming from, b) opposing counsel will more likely advise his or her expert to more readily agree with items with issues brought out on cross-examination for fear that he or she has “got something” i.e., previous depositions from other jurisdictions, etc. Due to this fact, it is much easier to control the opposing expert based upon this “fear,” c) Opposing counsel will be less prepared on your line of questioning, i.e., when you refer to literature, and d) you may be able to touch on matters opposing counsel may have filed a Motion *In Limine*, on before the trial because he or she does not know what you will ask the expert. Opposing counsel may be less likely to object before the jury.
3. Do not argue with the expert, especially since the subject matter is in his or her field.

Rebuttal:

Depending on the circumstances, impeachment evidence is not discoverable. If in doubt, disclose and render the opinions in your case-in-chief. The advantage is surprise, such may have a devastating impact on what the jury just heard, and you get the last word.

Closing:

Tie in what you told the jury back in voir dire and opening as it relates to your theme. Point out the broken promises of your opponent. Use as much demonstrative evidence as possible. Since you get to argue, use everyday examples to explain your case. Use the judges instructions to bolster your case and defeat your opponents. However, to maintain credibility, discuss your weaknesses, and why the jury should disregard those weaknesses.

CONCLUSION

Most of the information set forth above was through the tough lessons of defeat. Defeat is the best teacher because it hurts, and you tend to remember what hurts. However, through these lessons learned, you can turn “Defeat into Victory” as so aptly stated by Field Marshall Viscount William Slim.

P.S. President Harry Truman did not care for experts because they never admitted they were wrong. “If they admitted they were wrong, they wouldn’t be experts now would they!”

