



## In this Issue

- [From the Chair](#)
- [From the Editor](#)
- [Strategic Concerns of the Material Alteration Defense](#)
- [Are You Getting Through to the Jury? The Importance of Respect](#)
- [Tips to Successfully Prepare Your Expert for Deposition and Trial Testimony](#)
- [Latent Lessons: Fischer and the Law of Subrogation](#)

In court, the trick is  
knowing the most and  
explaining it the best.



Court-qualified scientists, engineers  
and researchers finding real answers  
in product testing, scientific evaluation  
and forensic analysis for over 40 years.

Join a Committee

## Committee Leadership



**Committee Chair**  
Christopher A. Bottcher  
Sirote & Permutt  
[cbottcher@sirote.com](mailto:cbottcher@sirote.com)



**Vice Chair**  
Colette R. Magnetta  
Acker & Whipple

[ColetteMagnetta@ackerandwhipple.com](mailto:ColetteMagnetta@ackerandwhipple.com)



**Newsletter Editor**  
Andrew DeSimone

## Tips to Successfully Prepare Your Expert for Deposition and Trial Testimony

by Diane S. Davis



An expert witness is a fundamental component to the defense of most cases and often the deciding factor to successful resolution of your client's case. Expert witnesses possess specialized knowledge in cases ranging from ordinary traffic collisions to complex business transactions. Once retained, counsel has a burden to properly prepare the expert for his upcoming deposition and/or trial testimony. The process of preparing your expert should start immediately so that you will have sufficient time to determine your witness' strengths and weaknesses. This article will address critical tips to properly prepare for and manage the deposition and trial testimony of a retained expert.

### Tip One: Investigate and review the expert's background prior to retention

Before retaining an expert, counsel should investigate the expert's background, including *Daubert/Frye* challenges, professional publications, and prior testimonial experience. Counsel should also review the expert's curriculum vitae to assess whether the expert is qualified to offer testimony on the subject areas at issue. Any potential issues regarding the expert and his ability to offer opinions on a particular subject should be evaluated ASAP.

### Tip Two: Become familiar with the legal foundation for appropriate rules of evidence that governs expert testimony

Often, opposing counsel deposes your expert in preparation for trial. However, opposing counsel may depose your retained expert for the purpose of a *Frye* or *Daubert* motion to challenge, limit, or exclude the testimony of your expert. FRE 702 provides that a witness who is qualified as an expert by knowledge, skill, training or education may testify in the form of an opinion or otherwise if:

- a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b. the testimony is based on sufficient facts or data;
- c. the testimony is the product of reliable principles and methods; and
- d. the expert has reliably applied the principles and methods to the facts of the case.

Under FRE 703, an expert may base an opinion on facts or data that the expert has knowledge of or personally observed. FRE 703 allows experts to rely on inadmissible evidence to support their opinions, if typically relied upon in their work. However, if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose those facts to the jury only if their probative value substantially outweighs the prejudicial effect. While the Federal Rules of Evidence only apply in federal courts, many states have either adopted the Federal Rules of Evidence or interpret their own evidence rules based on the federal rules. Thus, counsel should meet with the expert and discuss any potential challenges to his testimony to hopefully avoid them.

### Tip Three: Conduct appropriate discovery to obtain documents to assist the expert in formulating his or her opinions

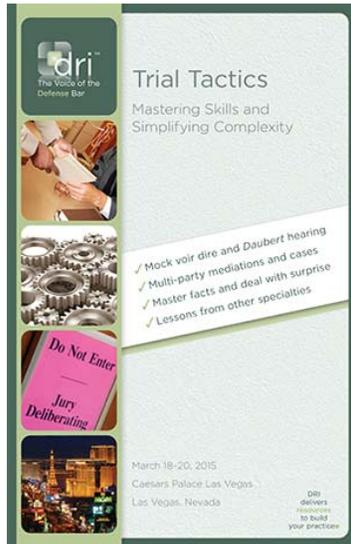
During the factual discovery phase, counsel must obtain any information/documents that necessary for the expert to developing his opinions. In addition, counsel must communicate regularly with the expert regarding material developments that arise so that the expert can integrate the relevant information into his opinions. Please be careful of the documents that are



Sturgill Turner Barker & Moloney  
[adesimone@sturgillturner.com](mailto:adesimone@sturgillturner.com)

[Click to view entire Leadership](#)

### Upcoming Seminar



### [Trial Tactics](#)

**March 18-20 2015**  
**Las Vegas, Nevada**

### DRI Publications



[Writing a Reservation of Rights: A North American Compendium](#)

### DRI Social Links



[PDF Version](#)

forwarded to the expert, including email communications, as this information will likely be in the expert's file and could be discoverable by opposing counsel.

#### **Tip Four: Determine whether an expert report is necessary and the specific timeline for production to opposing counsel**

Because the expert report will be used as the road map for cross-examination of your expert, counsel must understand the opinions conveyed in the report and the basis for those opinions. A well-written report should contain the following information: (a) a complete discussion of the opinions and their underlying basis; (b) the facts or data relied upon by the expert witness to formulate his or her opinions; (c) the qualifications of the expert witness including a list of publications; (d) previous expert testimonial experience; and (e) a discussion of compensation for deposition and/or trial testimony in the particular case.

Moreover, counsel should obtain copies of all documents that the expert relied upon to formulate his or her opinions and make certain that the appropriate documents are produced within the applicable time frame. If the documents are not produced prior to the deposition, the retained expert should be prepared to bring those materials to his or deposition. Opposing counsel will likely question the retained expert about the documents supporting their opinions; therefore, counsel should ensure that the expert is familiar with the substance of the materials provided.

#### **Tip Five: Meet with your expert prior to the deposition to discuss deposition procedures and anticipated testimony**

When dealing with inexperienced experts, deposition preparation should include the same information addressed with lay or fact witnesses, *i.e.*, that the expert will be under oath; the expert should be sure to understand a question before answering it and can ask for clarification if necessary; and the expert should not talk at the same time as another person. Moreover, counsel should explain the purpose of objections. Advise the expert to listen to the objections for any clues or indication as to whether the expert should not respond to the question. Provide your expert with the opposing party's expert disclosures. And counsel should discuss with the expert the parties and their attorneys in the litigation. This will assist the expert in navigating the various interests within the litigation.

#### **Tip Six: Review the prior deposition and trial testimony of your retained expert**

During the deposition, opposing counsel will question your expert about prior deposition and trial testimony. At trial, the judge will allow the opposing party to question your expert about prior testimony that involved similar issues. Therefore, counsel should investigate the expert to determine any specific cases that might undermine his current opinions. Counsel should obtain the transcripts of his expert's previous deposition and trial testimony and review the transcripts to determine the scope of the previous testimony.

#### **Tip Seven: Familiarize your expert with the opinions of the opposing experts**

Use your expert's knowledge of the opinions of the opposing party's expert as an invaluable tool for your expert's deposition or trial testimony. Your expert should develop an appropriate rebuttal of the opposing party's expert prior to the deposition and offer an analysis of the strengths and weaknesses of the opposing party's expert. Moreover, the retained expert can also offer a critical analysis of the methodology that the opposing party's expert utilized to develop his opinions. In certain cases, it may be worthwhile to have the retained expert attend the deposition of the opposing party's expert.

#### **Tip Eight: Presenting Your expert Witness' opinions at trial**

If the case is not resolved prior to trial, your expert's testimony is paramount. Your expert must be able to clearly articulate his opinions and their basis to the judge and/or jury. Counsel should spend significant time evaluating how the expert witness should convey his opinions so that a lay person can easily understand and to avoid technical language and jargon. A well prepared expert witness will play a significant role in persuading the trier-of-fact to rule in favor of your client.

#### **Conclusion**

Expert witnesses often play decisive roles in litigation. There are significant risks when counsel fails to properly prepare his expert witness for deposition and trial testimony. Proper preparation allows counsel to discover and analyze any issues

regarding his expert's opinions that would prevent an expert from adequately conveying his opinions. Extensive and timely preparation of an expert witness prior to his deposition or trial will increase the likelihood that your expert can provide a good presentation of his opinions and hopefully result in a favorable outcome for your client.

***Diane S. Davis*** is a senior attorney with Funderburk Funderburk Courtois, LLP, a defense firm in Houston, Texas. She is licensed to practice law in Texas and Louisiana. Ms. Davis' practices areas include products liability, premises liability, commercial litigation, construction litigation and various employment related matters. In addition to her membership in the DRI, Ms. Davis is also a member of the Houston Bar Association, American Bar Association, and Claims and Litigation Management Alliance.

[Back](#)