Chapter 19

Expert Witness Depositions

by
Raoul Kennedy

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Henry L. Hecht

CHAPTER 19

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RAOUL KENNEDY*

"In these times when it is impossible to know everything, but becomes necessary for success in any vocation to know something of everything and everything of something, the expert is more and more called upon as a witness both in civil and criminal cases. In these days of specialists their services are often needed to aid the jury in their investigations of questions of fact relating to subjects with which the ordinary man is not acquainted."

—*Francis L. Wellman,*
The Art of Cross-Examination, *94 (4th ed. 1936).*

Had Wellman been possessed of clairvoyance, he could have added, "And all the foregoing is going to increase exponentially during the twentieth century and into the twenty-first century." Today, the pervasiveness of experts in litigation is exceeded only by the daunting task of the lawyer who must master enough of the expert's—frequently arcane—area of expertise either to effectively (1) depose the hostile expert or (2) prepare and present testimony of a friendly expert.

This chapter addresses both challenges. First, it discusses the rules governing expert discovery in light of the 1993 and 2000

* Raoul Kennedy is a partner in the San Francisco office of Skadden, Arps, Meagher & Flom LLP.

amendments to the Federal Rules of Civil Procedure (FRCP). Second, it provides a checklist of tips and pointers for effectively preparing one's own expert for deposition. Finally, it presents the ten subjects that should be covered to allow a lawyer with even minimal experience in taking depositions and with little or no knowledge of the expert's field to discover effectively and efficiently an opposing expert's opinions and the underlying bases for those opinions.

Rules Governing Expert Discovery

Federal Rule of Evidence (FRE) 702 permits an expert trial witness to testify in the form of an opinion if the testimony is related to scientific, technical, or other specialized knowledge and if that testimony would assist the trier of fact to understand the evidence. The opposition is then entitled to cross-examine the expert fully about the bases and reasons for each opinion.[1]

Amendments to FRCP 26

Despite considerable controversy surrounding changes to the FRCP that were proposed by the Supreme Court in 1993 (including changes to FRCP 26), significant amendments took effect on December 1, 1993, because Congress failed to pass legislation to block the revisions.[2] The 1993 amendments radically altered the manner of disclosing experts' identities and the means of discovering their opinions in four principal ways:

1. The identities of all expert trial witnesses must be disclosed well in advance of trial;
2. Testifying experts must provide comprehensive written reports of their expected testimony and additional information about themselves;
3. Depositions of experts are conducted as a matter of right; and
4. A party has a continuing duty to supplement material changes in an expert's basis for testimony.

Further amendments to FRCP 26 were enacted in 2000 to ensure that these revisions would be adopted and observed uniformly in the federal courts. The most important 2000 amendment was the abandonment of the 1993 "opt out" provision, which authorized courts to alter or reject the new disclosure requirements.

Through these changes, the amendments ensured that expert information would be available in every case, on a different timetable, and in a changed format from the former regime.[3] This chapter focuses on the current requirements of FRCP 26, beginning with a brief discussion of practice under the former FRCP 26.

Discoverability of the Opinions of Testifying and Nontestifying Experts

Before 1970, federal courts were divided regarding the discoverability of expert opinions.[4] In 1970, the FRCP were amended to set forth a specified procedure for discovering both facts known and opinions held by experts that the experts acquired or developed in anticipation of litigation or for trial.

The basic scheme established by the 1970 amendments upholds one of the fundamental purposes of the work-product rule, which is to prevent one side from laying back, doing nothing, and then taking advantage of the opponent's industry.[5] In furtherance of that goal, case law following the 1970 amendments provides that, in the absence of exceptional circumstances, the only retained experts who can be discovered are those who will actually testify at trial.[6] Conversely, when an expert has not been retained to assist in the defense or prosecution of a case, there are no work-product considerations, and that individual's expertise is subject to discovery even when the individual had no interest or stake in the litigation.[7]

The 1970 amendments to FRCP 26(b)(4) subdivided experts into four categories for purposes of discovery. The first category is experts a party expects to use as witnesses at trial; that is, testifying experts. The second category encompasses three types of nontestifying experts:

- Experts retained or specially employed in anticipation of litigation or preparation for trial, who are not expected to testify;
- Experts informally consulted in preparation for trial, but not formally retained; and
- Experts whose information was not acquired in preparation for trial; that is, in-house experts, percipient experts, and research scholars.

These categories retain their relevance even after the 1993 amendment, and each is addressed in turn below.

Testifying Experts

Mandatory Disclosure Under FRCP 26

Identity of Testifying Experts

Under the current FRCP 26, parties are *required* to disclose to other parties the identity of any expert witnesses to be used at trial to present evidence under FRE 702, 703, or 705.[8] The timing of the disclosure is set by court order or stipulation of the parties. Absent such order or stipulation, the disclosure must be made at least ninety days before trial or the date the case is to be ready for trial. If the expert testimony is intended only for the purpose of contradicting or rebutting evidence offered by another party on the same subject, the disclosure must be made within thirty days after the disclosure made by the other party.[9]

Written Report

Disclosure of a witness who has been "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony" must include a written report prepared and signed by the witness.[10] The report required by FRCP 26(a)(2)(B) must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the data or other information considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.[11]

FRCP 26(b)(5)(A) requires a party to notify other parties if material subject to disclosure is being withheld based on a claim of privilege or work-product protection. The party must describe the nature of the documents, communications, or things not produced

or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Depositions

Under FRCP 26, a party is entitled to depose any expert who has been identified as one who will offer his or her opinions at trial. The deposition is to take place after the required report disclosing the expert's opinions has been provided.[12] According to the Advisory Committee's Note on the 1993 amendments to the rule, "Since depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the depositions of [those] experts should be reduced, and in many cases the report may eliminate the need for a deposition."[13] Because experts are not parties, technically they need to be subpoenaed.[14] In practice, however, experts are almost always made available for deposition on a reciprocal basis without the necessity for a subpoena.

Duty to Supplement

FRCP 26 also contains a duty to supplement that is broader in scope than under the previous rules. Under FRCP 26(e)(1), a party has the duty to supplement or correct the expert's report and deposition responses " (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (B) as ordered by the court."[15] Such supplemental disclosures are to be made at least thirty days before trial.

Nontestifying Experts

The mandatory disclosure requirements of the 1993 amendments do not affect practice concerning nontestifying experts. Discovery practices regarding such experts, therefore, follow the practice preceding the 1993 amendments. The following categories of nontestifying experts will be discussed in this section: (1) retained or specially employed experts, (2) informally consulted but not retained experts, and (3) experts whose information was not acquired in preparation for trial, such as in-house experts, percipient experts, and research scholars.

Retained or Specially Employed Experts

Discoverable on Showing of Exceptional Circumstances

A separate procedure exists for discovering the identity and learning the opinions of experts who have been retained or specially employed but who are not expected to be called as witnesses at trial. Traditionally, facts known or opinions held by such experts are discoverable only on a showing of exceptional circumstances; that is, a showing that it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.[16]

Nothing in the former rules or the accompanying advisory committee's note explained precisely what constitutes "exceptional circumstances." Professor Albert Sacks, a reporter to the committee, has suggested that such circumstances include those in which one party has had the opportunity to conduct experiments or tests concerning an item or piece of equipment that is no longer available, or in which the number of experts in a field is small and those available have already been retained by other parties in the case.[17]

The courts are divided over whether exceptional circumstances must be shown to discover the identity of a retained or specifically employed expert or only when a party seeks to discover facts known or opinions held by a retained or specially employed expert,[18] or whether exceptional circumstances must be shown to discover even the identity of such an expert.[19]

These conflicting lines of cases were considered by the Tenth Circuit Court of Appeals in *Ager v. Jane C. Stormont Hospital & Training School for Nurses.*[20] The court concluded, after carefully analyzing the Advisory Committee's note to FRCP 26, that exceptional circumstances must be demonstrated to ascertain either the identity of, or other collateral information concerning, a retained or specially employed expert who is not expected to be called as a witness at trial.[21]

Unfortunately, the *Ager* decision does not provide counsel with any guidance on how to learn enough about a retained or specially employed expert to establish that there are exceptional circumstances justifying revelation of his or her name and knowledge. This information can be obtained, however, through interrogatories such as the following:

1. Have you retained or specially employed any experts in anticipation of litigation whom you do not expect to call at trial?

2. If yes, please describe the types of experts retained (in other words, their fields of expertise) and the nature of the services that they performed in anticipation of litigation or preparation for trial.

Interrogatories drafted in this manner avoid the *Ager* court prohibition against seeking the specially retained expert's identity without a showing of exceptional circumstances. Such interrogatories also avoid offending the prohibition against seeking facts known or opinions held by a specially retained expert absent a showing of exceptional circumstances.[22]

What Constitutes "Exceptional Circumstances"?

Most courts have interpreted the "exceptional circumstances" requirement as meaning an inability to obtain equivalent information from other sources.[23]

In particular, cost alone has generally been found insufficient to satisfy the requirement. For example, in *Shell Oil Refinery,*[24] the plaintiffs' expert opined that it would cost from $230,000 to $315,000 to duplicate tests performed by Shell employees, who the court concluded were retained or specially employed in preparation for trial. The court held that because the plaintiffs were capable of duplicating those tests, cost alone did not constitute exceptional circumstances.

In *Coates v. AC&S, Inc.,*[25] the court ruled that exceptional circumstances were present even though both the plaintiff and the defendants had been provided with tissue samples from the plaintiff's decedent. Both sides had sent the samples to multiple experts in an effort to ascertain whether the death was due, as the plaintiff alleged, to mesothelioma. The court ordered the parties to disclose the identity of all doctors to whom the samples had been sent, regardless of whether the doctors would be called as witnesses at trial. The court justified this order as being needed to prevent "shopping" of the samples, and on the ground that examination of tissue samples from a deceased person was sufficiently analogous to an independent medical examination to entitle all parties to the type of discovery permitted in the independent medical examination arena.[26]

The defendants protested that sending samples to more than one doctor was reflective not of "shopping" but of the difficulty of rendering a definitive diagnosis of mesothelioma. The court rejected this argument, stating, "The reality for the situation is

that if a number of other experts have been consulted herein, but who could not make a definitive diagnosis, and these experts are not called as witnesses, then the jury could be misled regarding the truth of plaintiff's condition."[27] The court failed to explain how this differs from any other situation in which a party has consulted multiple experts before finding one who would offer an opinion favorable to that party's position. It is, in short, difficult to reconcile the *Coates* decision with philosophy underlying the work-product rule.

In *Pearl Brewing Co. v. Joseph Schlitz Brewing Co.*,[28] the plaintiff's experts, who were not expected to testify at trial, had created a complicated computer program concerning beer marketing. Another plaintiff's expert, who was expected to be called at trial, based his conclusions on this program. The defendant protested that its expert would be unable to understand the program without an explanation of certain undefined shorthand codes. The court granted discovery from the nontestifying experts, but only for the code explanations, emphasizing that the defendant was not trying to use the plaintiff's efforts to establish its own case but was instead attempting only to expedite analysis of the proffered testimony of the plaintiff's experts.

Informally Consulted Experts

A separate category of nontestifying experts includes those informally consulted in preparation for trial but not retained or specially employed.

Neither the identities nor the opinions of informally consulted experts are discoverable, even if exceptional circumstances exist.[29] Relying on *Ager,* the presiding United States Magistrate Judge *in Kuster v. Harner*[30] explained that the restriction on discovery of nontestifying experts constitutes a specific limitation on the general rule of discovery found in the former FRCP 26(b)(1). As a result, the judge denied a motion to compel a response to an interrogatory seeking the identity of all persons consulted or retained in anticipation of litigation or preparation for trial who were not expected to be called as trial witnesses.[31]

Based on *Ager,* the task confronting an opposing party is to confirm whether an expert who is purportedly of the informally consulted variety does, in fact, fall within that category. The decision in *Ager* enumerated the following factors that should be considered in determining whether a given expert was informally consulted, or retained or specially employed:

1. The manner in which the consultation was initiated;
2. The nature, type, and extent of information or material provided to, or reviewed by, the expert in connection with his or her review;
3. The duration and intensity of the consultative relationship; and
4. The terms of the consultation, if any (for example, payment or confidentiality of test data).

Counsel should be able to discover this information through variations of the interrogatories suggested above, such as:

1. Have you had any contact of any sort with any experts other than those whom you have identified as potential trial witnesses or described in response to questions (1) and (2) concerning retained or specially employed experts?[32]
2. If your answer to the preceding interrogatory is in the affirmative, please state separately, for each such expert, the following:
   - The manner in which consultation was initiated;
   - The precise nature, type, and extent of information or material provided to the expert in connection with his or her review;
   - The precise nature, type, and extent of material, if any, reviewed by the expert in reaching an opinion;
   - The duration of the consultative relationship, including, but not limited to, the date of the first contact with the expert, the date of the last (or most recent) contact, the total number of contacts, and the total number of hours expended by the expert on the matter; and
   - The terms of the consultation, including, but not limited to, terms of payment; amount of payment, if any; confidentiality of test data or opinions reached by the expert; and the plans, if any, for the expert to render any future services.

The In-House Expert

The distinction among the categories of nontestifying experts becomes blurred when an expert, who has been employed or has served as a consultant for one of the parties and has acquired a certain amount of expertise as a consequence of that employment, acquires additional expertise as a nontestifying consultant who assists in the preparation of a lawsuit.

The cases that have dealt with this problem have permitted discovery when a party's "in-house" expert had investigated a matter as part of his or her regular duties and not in anticipation of litigation.[33] Applying a similar test, the court in *Grinnell Corp. v. Hackett*[34] permitted discovery concerning a master's degree thesis that had been written by an in-house expert for one of the parties. On the other hand, in *USM Corp. v. American Aerosols, Inc.*,[35] the court disallowed discovery for work done by an in-house expert who was not to testify at trial and who was merely consulted informally concerning a matter in litigation.

One district court judge has adopted a dramatically different rule. He found that an expert is someone who not only possesses expertise but is also in a position to testify "neutrally and not as a partisan." He then found that employees are necessarily partisans, can never be experts, and are, therefore, subject to discovery on the same basis as any other ordinary witness.[36]

Most courts that have addressed the question have concluded that "retained or specially employed" means "something more than simply the assignment of a current employee to a particular problem raised by current litigation."[37]

Additional criteria that tend to move an employee into the retained or specially employed category—with the potential for discovery—include having the employee's work directed by lawyers or by the legal department, having the employee report only to the legal department or outside counsel, and having the employee's written report directed only to the legal department or outside counsel. On the other hand, the fact that the employee did not receive any additional compensation for the particular work is generally nondeterminative. Finally, the mere fact that the employee's work is used not only to defend a lawsuit but also to improve the company's products or operations does not, without more, preclude an employee from falling within the retained or specially employed category.[38]

In *Marine Petroleum Co. v. Champlin Petroleum* Co.,[39] the court found that the expert in question had been operating as a general consultant and was subject to discovery up to the point when the employer received an "issue letter" from the Federal Energy Administration, advising that the company might be in violation of petroleum price regulations. The court found that from that point on, the expert was a specially employed expert and his work was not discoverable.

In *Inspiration Consolidated Copper Co. v. Lumbermen's Mutual Casualty Co.*,[40] the court was confronted with the task of determining the discoverability of opinions held by an accountant who had performed three separate functions: (1) regular auditor for one of the parties; (2) consultant for one aspect of a complex, interrelated case; and (3) trial witness concerning another aspect of the dispute.

The parties conceded that the information acquired in the third category was discoverable. The court held that the second category of information fell within general work-product protection and was discoverable only on a showing of exceptional circumstances. The first category was found not to enjoy any work-product protection whatsoever and was subject only to the relevancy standards that govern discovery generally.[41]

An even more complex separation task arose in two personal injury cases, in which the same expert demonstrated a remarkable penchant for switching sides. In *Barkwell v. Sturm Ruger Co.*,[42] the plaintiff claimed that there were defects in the safety of a gun manufactured by the defendant. The defendant hired a consultant who had testified for the plaintiff's lawyer in previous gun safety defect cases. When the plaintiff attempted to notice the deposition of his former expert, the defendant objected, explaining that it had no intention of calling the expert as a witness at trial and that the plaintiff had failed to demonstrate "exceptional circumstances" that would justify deposing the expert in his role as consultant.[43]

The court had little difficulty in finding that the plaintiff was not entitled to depose the expert concerning information he had developed as a consultant in the present case. The more troublesome question was whether the expert could be deposed concerning the opinions formed or facts learned while employed by the plaintiff's counsel in connection with previous cases. Although this information had been acquired in anticipation of litigation, the court held that the work-product rule was intended only to prevent a party from taking advantage of the efforts of an adversary, and therefore did not apply to opinions held or facts learned in connection with other litigation. Hence, the court ruled that the expert could be questioned concerning the expertise he developed while working with the plaintiff's counsel on earlier cases.[44]

This same expert surfaced again in *Sullivan v. Sturm, Ruger & Co., Inc.*,[45] in which counsel for the plaintiff sought to depose him. The defendant objected and a motion to compel by the plaintiff

ensued. In ruling on the motion, the judge noted that in 1976 the defendant had retained the expert as a consultant in the *Sullivan* case. Thereafter, the expert wrote to counsel for the plaintiff in the *Barkwell* case, discussed above, indicating that he desired to work for the plaintiff in that action. Subsequently, Sturm retained this expert for a second time as a consultant in the *Sullivan* matter. The defendant argued that because it employed this expert both before and after his employment by Barkwell, his employment by the defendant was entitled to protection from discovery. The judge was neither persuaded nor amused. He held that the expert could be deposed concerning facts known and opinions held by him before his employment by the defendant the second time. The court also found that defendant was responsible for making the expert available for deposition and made clear that sanctions would be imposed if the defendant persisted and contended that it had no control over him.[46]

Percipient-Witness Experts

Percipient witnesses who also are experts (for example, treating physicians) and who possess information that was not acquired in preparation for trial are not subject to the discovery available under FRCP 26(b)(4)(A). These witnesses can be deposed, however, like any other percipient witness. For example, defendant-physicians are allowed to testify concerning their medical opinions relating to their treatment of a plaintiff without providing the plaintiff's counsel with their written expert reports.[47]

If a percipient expert witness is not listed in response to an interrogatory seeking the identity of experts that the other party intends to call as witnesses, whether that expert can testify as an expert or only as a percipient witness depends on the facts. In *Baran v. Presbyterian University Hospital,*[48] for example, the court held that the defendant-physicians who treated the plaintiff fit into the category of "actors or viewers" and not the category of experts retained for purposes of litigation, and thus could testify about their medical opinions without providing information required by FRCP 26(b)(4)(A).[49] The district court also pointed out that the plaintiff had deposed both defendant-physicians before trial and could have asked them for their ultimate opinion concerning the malpractice issue.

When a party's expert is a percipient witness as an expert who has a relationship with the other side, the conflict may preclude

the witness's testimony. For example, in *Miles v. Farrell*,[50] a doctor who treated the plaintiff both before and after being retained by one of the defendants was not permitted to testify either as an expert or a treating doctor because of the conflicting roles he had played in the case.

The Research Scholar

There are a growing number of disputes concerning the right to depose the "research scholar," an expert who has no percipient information concerning the case and who has no desire to work for any of the parties, but who has relevant knowledge or expertise gained only through research or otherwise. Compelling disclosure of subpoenaed information from a research scholar may be denied or restricted when compliance would force an unreasonable burden on the scholar from whom production is sought. The reported decisions discussed below have employed a balancing test, weighing the need and the relevance of the requested information against the harm or burden on the research scholar, in deciding whether to quash or modify a subpoena in this context.

In *Wright v. Jeep Corp.*,[51] one of the parties to a personal injury action arising out of a rollover accident attempted to subpoena a professor and research scientist who was the principal author of a report on rollover accidents. The professor had no firsthand knowledge of the case and had not been retained as an expert by either side. He objected to the subpoena on numerous grounds: the First Amendment protects him, as a researcher and writer, from having to testify against his will; a professor can claim academic privilege; the subpoena sought privileged and confidential documents; testifying would be burdensome; and forcing him to testify would have a chilling effect on future research.[52]

Though expressing sympathy for the professor's plight, the court held that "[t]he solution is not to cover up the information or its data . . . but to use the tools available to lessen the burden and to permit the information to become available,"[53] and to ensure that the professor is properly compensated. The court specifically found that compelling the professor to testify did not violate any First Amendment rights and would not tend to chill scientific research.[54]

In *Dow Chemical Co. v. Allen*,[55] the government threatened Dow with cancelling its right to manufacture herbicide, based on the government's reaction to studies published by the University of Wisconsin finding animal toxicity in such herbicides. Dow sought

copies of all notes, reports, working papers, and raw data relevant to the university's research, arguing such materials were necessary to evaluate whether earlier completed studies were accurate and whether proper protocol and methodology were followed.

The university argued that disclosure of such information would be unduly burdensome with respect to both the present state of the study and its future efficacy as a medical research project. Specifically, the university argued that dissemination of the data into the public domain would invalidate the usefulness of such studies as a basis for further scientific research and papers; that years of research effort, professional reputations, and credibility would be lost by such forced disclosure; and that the capacity of an academic institution to be free from unwarranted intrusion disclosure would jeopardize, resulting in the stifling of academic freedom.

In evaluating the competing interests, the district court found that the hardship such disclosure would place on the university outweighed the need for such information. In so deciding, the court considered the issue raised by Dow in support of disclosure: first, whether Dow had sufficient access to enough relevant data that if confronted with adverse material at trial, it could test the validity of the studies; and second, whether the data were essential to raise a negative inference that if undisclosed information revealed changes in protocol, Dow could argue that earlier studies were flawed or erroneous.

Evaluating both factors, the appellate court affirmed the lower court's determination that the plaintiff had failed to show the requisite necessity. Because the undisclosed research that had been requested would not be relied upon at trial, the plaintiff's alleged need for this material was unwarranted.

In *In re Snyder,*[56] the same research scientist who had been subpoenaed in *Wright* was again subpoenaed for deposition and production of data that led to his rollover report. As in *Wright,* the expert was not a party or otherwise retained as an expert. The court in *Snyder* agreed with *Wright* that there is no general academic privilege that protects an expert from being either subpoenaed to testify or required to produce documents in his or her possession. Nevertheless, the court found that the former FRCP authorized issuance of a protective order to quash the subpoena if it was unduly burdensome. The court quashed the subpoena, finding it to be unduly burdensome because of the breadth of the documentation that it sought.

The *Snyder* court was equally concerned about the potential chilling effect on scientific research of the indiscriminate issuance of subpoenas to involuntary, nonparty expert witnesses to testify and produce documents in litigation. The court found that the potential for harassment through the discovery process might deter members of the public from studying defects in products or practices. The court thus recommended that members of both the legal and research communities propose amendments that would increase certainty in the scope of discovery from involuntary expert witnesses.

The Second Circuit addressed the same subject in a thoughtful opinion in *Kaufman v. Edelstein*,[57] holding that the factors to be considered in determining whether an unwilling expert should be compelled to testify include

1. The extent to which the expert is being called because of his or her knowledge of facts relevant to the case rather than to give opinion testimony;
2. The extent to which the testimony sought pertains to a previously formed and expressed opinion or to a new one;
3. The uniqueness of the witness's knowledge;
4. The extent to which the party seeking the testimony is unable to obtain a comparable witness willing to testify; and
5. The extent of the oppression the witness will suffer by being required to testify.

The Second Circuit was again confronted with the research scientist's duties in *Mount Sinai School of Medicine v. American Tobacco Co.*[58] That case arose out of a number of product liability suits in which the plaintiffs alleged that their decedents had died from a combination of cigarette smoking and exposure to asbestos. Although no one from Mount Sinai was expected to testify as an expert in any of those cases, the plaintiffs planned to present expert witnesses who would rely on seminal studies that had been done by members of the Mount Sinai staff.

Initially, the tobacco company defendants served a sweeping subpoena duces tecum on Mount Sinai, in a case that was pending in the New York State court system. Mount Sinai successfully moved to quash.[59] The tobacco companies then served a somewhat narrower subpoena on Mount Sinai in connection with cases

pending in federal court in Louisiana and Pennsylvania. Mount Sinai filed a motion to quash in the district court in New York, alleging that (1) the subpoenas were barred by res judicata and collateral estoppel; (2) under New York law there is an absolute privilege that applies to a scholar's work; and (3) even if there is no absolute privilege, researchers enjoy a qualified privilege, and the tobacco companies failed to demonstrate that their interest outweighed those of the researchers. Mount Sinai moved, in the alternative, for a protective order allowing the subpoenaed documents to be redacted to eliminate potential matters of privacy.

The district court denied the motion to quash but issued a protective order designed to ensure the privacy of the individuals who participated in the studies. On appeal, the Second Circuit affirmed, emphasizing that because the subpoenaed matters consisted largely of computer tapes and other support documentation, the burden to produce them was less. In addition, the parties had agreed that when necessary to protect the anonymity of study participants, pertinent identifying information could be redacted. The court also noted that the tobacco companies were not seeking to compel any member of the Mount Sinai staff to testify or prepare a report.

Against that background, the court considered, and rejected, each of Mount Sinai's specific objections:

- First, because the subpoena in the federal-court action was narrower than the one that had been quashed in the state-court action, the court found that the state court ruling did not have any preclusive effect.
- Second, the court found that there was no absolute privilege covering production of the requested documents. The decision indicates that New York law might have resulted in a different ruling had the tobacco companies sought to compel any of the Mount Sinai staff to testify.
- Third, the court acknowledged that the Seventh Circuit recognizes a qualified scholar's privilege, but found no indication that New York had done so. Further, the court found that even if the existence of such a qualified privilege were assumed, its underlying basis is to eliminate the possibility that research results discovered before publication would be vulnerable to preemptive or predatory publication by others. Because, the results of the materials in question had all been published years before, this consideration was absent.

The Second Circuit did, however, recognize the need for an appropriate protective order to protect the confidentiality of the studies' participants.

In *Bluitt v. R.J. Reynolds Tobacco Co.*,[60] a district court upheld a magistrate judge's decision to quash a subpoena issued by tobacco manufacturers. The discovery sought all raw data underlying a study published by a university relating tobacco smoke to cancer in women. The university was neither a party to the case nor retained by either side. It sought to quash the subpoena on the basis that some of the underlying information sought was privileged, confidential, and/or proprietary under Louisiana state law.

In upholding the decision to quash the subpoena, the district court found the following: (1) the information the university sought to withhold was confidential,[61] and (2) the tobacco company failed to show the requisite need for the information to overcome the confidentiality of the documents. In support of the second finding, the court concluded that all the standard criteria by which scientific research normally is evaluated had been fully presented and disclosed. Moreover, the court noted that although in *Wright* there was a "high probability"[62] that the results of the author's research would be used in the instant case, there were twelve other environmental tobacco smoke lung-cancer studies available to the tobacco manufacturers. The court did not find it necessary to reach the issue of whether the university's documents were protected by an absolute privilege.

Privileges Relating to Expert Witnesses

If you do not understand the scope of the attorney-client privilege and the work-product rule as they relate to communications with experts, you may unwittingly lose their protections. As a general rule, communications between counsel and their experts, unlike communications between counsel and their clients, are *not* protected by the attorney-client privilege—because the relationship does not satisfy the "client" prerequisite and the communication may not satisfy the "confidential communication" prerequisite. Similarly, the work-product privilege, which protects counsel's mental impressions and conclusions prepared in anticipation of litigation, does not, in all circumstances, protect an expert's mental impressions and conclusions prepared in anticipation of litigation. These privileges as they apply to communications with experts are discussed next.[63]

Expert Attorney-Client Privilege and the In-House Expert

As noted above, communications between lawyers and their experts are generally not protected by the attorney-client privilege. A special issue arises, however, when the expert is an employee of a corporate client. Under such circumstances, is the communication from the employee-expert protected under the attorney-client privilege?

In *Upjohn Co. v. United States*,[64] the Supreme Court refused to "lay down a broad rule or series of rules to govern all conceivable future questions in this area," but did endorse a subject-matter approach to the issue of whether such communications are privileged. The Court considered the subject matter about which counsel's advice was sought by the corporation and whether the communication was made by an employee in the performance of his or her duties of employment.

In *Upjohn*, the Court rejected the "control group" test, under which the ability of the corporate employee to control decision making in the area in which the lawyer was advising the corporation was the key. The court noted that lower-echelon employees frequently possess information that counsel needs, and it reasoned that the purpose of the privilege can therefore be achieved only if relevant communications by such employees are protected. The court reasoned that, in fact, the lawyer's advice will frequently be more significant to noncontrol-group members than to those who officially sanction the advice, and the control-group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. After analyzing the varying, and frequently inconsistent, results that courts have reached in trying to determine control-group membership, the Court also rejected the control-group test because it lacks the degree of certainty necessary if the privilege is to function effectively.[65] Thus, under *Upjohn*, an employee-expert's communication may be privileged, depending upon the subject matter of the communication.

Expert Witnesses and the Work-Product Rule

In dealing with experts, you must be aware that what you transmit to your expert may be the subject of attempted discovery and that the results of such attempts may be successful. Otherwise, you may find the other side using your own work product to its advantage.

The mental impressions, conclusions, opinions, or legal theories of any lawyer or other representative of a party concerning

litigation clearly are protected, unless shared with third parties, including experts.[66] All other work product is only conditionally protected; it is discoverable on a showing that the party seeking discovery has substantial need of the materials in preparation for that party's case and is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.[67]

Work-Product Rule and Categories of Experts

As discussed above, there are four types of expert witnesses recognized under the FRCP, and separate work-product considerations apply to each type. There is no specific litmus test for determining the discoverability of conditionally protected materials, and in each situation, counsel must examine case law to determine how the work-product rule has been applied.[68]

Trial Witnesses

A common question in determining whether conditionally protected materials are discoverable concerns the status accorded the work product that is created before the expert is designated as a trial witness. Generally, work done by an expert when acting as a consultant or as a percipient witness becomes discoverable when the witness is designated as a testifying expert.[69] And work done by an expert once that expert is designated as a trial witness is not protected.

Nonwitness Experts Retained or Specially Employed

Although a nontestifying consultant's opinion generally is not discoverable, you should keep in mind that if a consultant renders an opinion and shares that opinion with an expert who testifies at trial, and if the trial expert concedes that he or she relied in part on the consultant's report, the consultant's report and opinion may then become subject to cross-examination under FRE 703 and 705.[70]

Informally Consulted Experts

Neither the identities nor the opinions of informally consulted experts are discoverable, even if exceptional circumstances exist.[71]

Percipient Experts

Experts whose information was not acquired in preparation for trial are the federal equivalent of percipient experts under state practice. Their knowledge does not constitute work product, and

they can be either contacted informally or deposed like any other third-party witness under FRCP 30.

Duration and Extent of Work-Product Protection

The reported federal decisions are split three ways on how long the work protection applies to materials used by experts. The three positions may be summarized as follows:

- At one extreme are the cases such as *In re Murphy*[72] and *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*,[73] finding perpetual protection of work product.
- At the opposite extreme are cases holding that work product is protected only during, and in connection with, the case in which the protected work product was prepared.[74]
- A third, intermediate position is that work-product protection applies only in the case for which the material was prepared or in a second, closely related case.[75]

In *Federal Trade Commission v. Grolier, Inc.*,[76] the Supreme Court adopted the first approach and held that attorney work-product protection applied under FRCP 26(b)(3)(A), even though the litigation had terminated six years earlier and there was no related litigation involved. The decision in *Grolier*, however, also rested independently on an interpretation of Exemption 5 of the Freedom of Information Act,[77] which may limit the applicability of the ruling.[78]

Waiver of Work-Product Protection

One line of cases holds that the transmission of documents to an expert, without more, does not waive work-product protection and does not render discoverable portions of documents containing the most highly protected work product: a lawyer's mental impressions, conclusions, opinions, and legal theories.[79] Facts contained in such transmissions, however, may be discoverable on a showing under FRCP 26(b)(3)(A)(ii) of substantial need and unavailability from other sources without undue hardship.

Other cases have taken the position that anything that is transmitted to an expert who will actually testify at trial could conceivably have influenced the expert's opinion and, therefore, is discoverable.[80] For example, *Bogosian v. Gulf Oil Corp.*[81] was rejected, albeit with "trepidation," in *Intermedics, Inc. v. Ventritex, Inc.*, when the court held that a lawyer's work product disclosed to an expert who will testify at trial is discoverable, unless an extraordinary

showing of unfairness is made that goes well beyond interests generally protected by the work-product doctrine.[82] One of the primary concerns that the court in *Intermedics* had with *Bogosian* was the threat that the lawyer's communications with his own expert could affect the independence of the expert's thinking. The court found that communications from a lawyer could not only influence the expert's opinion, but could also furnish the expert with the opinion itself; because such communications would reflect directly on the credibility and reliability of the expert, they were held to be discoverable.[83]

In a federal case, the court suggested the lawyer opposing a claim of waiver of work-product protection for material given to an expert should ask the judge to conduct an in camera inspection if the transmissions contain a combination of lawyer opinion, work product, and facts.[84] In *National Steel Products Co. v. Superior Court*,[85] a California state court outlined a three-step process by which a judge could conduct an in camera inspection to rule on a claim of work-product privilege. First, the judge determines if the report reflects lawyer impressions, opinions, conclusions, legal research, or theories. Second, the judge determines whether the material is advisory. If the material is advisory, it is protected by the conditional work-product privilege; if it is not advisory, the material is discoverable. Third, if portions of the material are not privileged, the judge should determine whether other good cause for discovery outweighs the policy underlying a conditional work-product privilege.[86]

Scientific Expert Testimony

Pre-*Daubert* Standard

For many years, the test used by federal courts to determine the reliability of scientific testimony proffered at trial was that established in the 1923 seminal case of *Frye v. United States*.[87] In *Frye*, a district court held that lie-detector results[88] were inadmissible in a criminal action:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principal or discovery, the thing from which the deduction is made must be sufficiently

established to have gained general acceptance in the particular field in which it belongs.[89]

Under *Frye,* a party was precluded from offering scientific expert testimony unless it could show that the expert had relied on scientific techniques that had gained "general acceptance" in the particular field in which the technique was offered.[90] This requisite showing of general acceptance for purposes of reliability was based on a presumption that courts were ill-equipped to make such determinations.[91] Accordingly, courts were needed to gauge expert "consensus" in order to rule on whether the proffered evidence was sound and reliable; this practice would often lead to the unfortunate result that relevant evidence was excluded.[92] The *Frye* test, or some modified version thereof, remains in force in various state jurisdictions.

The *Daubert* Standard

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,*[93] the U.S. Supreme Court in 1993 addressed the question of whether a petitioner's unpublished recalculations of previously published scientific data met the acceptable standard of reliability for admissible evidence. The Supreme Court determined that, in fact, the role of the trial court was not to decide whether the proffered scientific testimony or the information on which it is based had acquired "general acceptance" in the scientific community. Instead, the trial judge faced with a proffer of scientific expert testimony must decide whether it is relevant and reliable.[94]

The proffered evidence is relevant and reliable under *Daubert* if the court determines that it is "scientific knowledge" (reliable) that will "assist the trier of fact to understand the evidence or to determine a fact in issue" (relevant).[95] In order to qualify as scientific knowledge as opposed to "junk science," an inference or assertion must be derived by the scientific method.[96] The ultimate inquiry under the holding of *Daubert* is thus not whether the expert's conclusions are correct, but whether his or her methodology is sound.[97]

The *Daubert* court identified four factors for determining whether a particular inference, theory, or technique is scientific knowledge; that is, whether it is reliable:

1. Whether it can be and has been tested;
2. Whether it has been subjected to peer review and publication;

3. Its known or potential rate of error; and
4. Whether the theory or technique has acquired "general acceptance," because, although that standard is not controlling, it is still an important factor in determining admissibility, particularly if it has been satisfied.[98]

The *Daubert* standard quickly came to be first clarified and then expanded. In *General Electric Co. v. Joiner*,[99] the Supreme Court held that because it was principally in the trial court's domain to exclude unreliable expert testimony, the proper standard of review of a trial court's *Daubert* rulings was merely abuse of discretion. In *Kumho Tire Co. v. Carmichael*,[100] the Supreme Court further expanded the scope of the trial court's "gatekeeping function" outlined in *Daubert* to apply not only to testimony from scientific experts, but also from technical and other specialized experts as well. Together the "*Daubert* Trilogy"—*Daubert*, *Joiner*, and *Kumho Tire*—and its progeny compose the modern federal standard for admissibility of expert testimony.

In 2000, FRE 702 was amended to reflect the *Daubert* standard, with its focus on reliability:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[101]

In assessing the admissibility of proffered scientific testimony, attorneys should be mindful of other potentially applicable provisions as well, such as FRE 703 (expert opinions may be based on otherwise inadmissible hearsay if based on facts or data of a type reasonably relied on by experts in the field), FRE 706 (trial judge may appoint an expert of the court's own choosing), and FRE 403 (relevant evidence may be excluded if its probative value is outweighed by danger of unfair prejudice, confusion, or misleading jury).[102]

Familiarity with the *Daubert* factors is, therefore, essential to planning what questions are appropriate to ask of an expert at a deposition.

Preparing One's Own Expert for Deposition

The key to a successful deposition of your client's expert is careful preparation. This includes anticipation of the types of questions and the areas of inquiry the expert is likely to encounter. The carefully prepared expert should be able to function at the deposition with only minimal assistance from the lawyer for the party who retained the expert. An expert who is not carefully prepared will likely perform inadequately at the deposition, regardless of how actively you attempt to interject.

The task of preparing your own expert is simplified immeasurably by remembering that the deposition's primary purpose is to discover *all* the expert's opinions and *all* the bases for those opinions.[103]

Need for Preparation

Preparing experts to testify should begin during the auditioning process. By the time you are required to designate expert witnesses, you should have determined whether the selected experts have jury appeal, respond to instructions, can explain their areas of expertise clearly to the jury, and can stand up well to cross-examination.[104]

Under FRCP 26(b)(4)(A), experts who are expected to be witnesses are subject to deposition before trial. The deposition of an expert who is required by the disclosure provisions of FRCP 26(a)(2)(B) to provide a written report, however, may not be taken until the report has been served.[105] Thus, under FRCP 26, lawyers are forced to begin preparation of their experts well before trial.[106]

When scheduling a deposition preparation session, tell the expert what work you expect the expert to have completed by the time you meet. For example, before the preparation session, you will probably want the expert to (1) have read all materials counsel has sent;[107] (2) have completed the tests, experiments, and other work that you have requested; and (3) have thought through all important aspects of the case, particularly possible questions from the opposition and how to respond to them.

You should divide the preparation process for your own experts into procedural and substantive aspects. Prepare checklists for each of these two areas (or use the checklists below), and then check off items as they are accomplished. This not only simplifies preparation of the expert, but also reduces the risk of overlooking an important aspect of preparation. Such checklists provide a valuable tool for

testimony, both during the deposition and at the actual trial. Appropriate checklists may include the following items:

Procedural Checklist

- Location of deposition or trial
- What to wear
- Purpose of expert's testimony at deposition or trial
- Deposition and trial procedures; for example, where to sit, questions by judge or jurors
- Objections, how to respond, and areas about which you recommend the expert not testify at deposition or trial
- The parties and lawyers who will be there, and their interests in the litigation
- Handling hypothetical questions
- Habits and idiosyncrasies of other lawyers who will be at deposition or trial
- How to avoid arguments with other counsel

Substantive Checklist

- Compensation
- Expert's qualifications
- Nature of expert's assignment
- Materials consulted or relied upon; every document that expert should review before testifying
- Attorney-client or work-product problems
- Expert's file contents; what to bring to deposition or trial and what not to bring
- Work already performed on case and any work still to be performed
- Opinions reached and bases for them
- Inconsistencies and how explained
- Anticipated scope of opposing counsel's cross-examination of expert
- Review of how expert will explain technical concepts and language
- Review of points that you want the expert to make and that will be established in whole or in part through the expert's direct examination at trial
- Expert's view of opposing experts, what their testimony will probably be at deposition or trial, and the strengths and weaknesses of their testimony

- Expert's education of you about technical concepts about which you are unclear
- If desired, jury consultant session with expert to improve expert's presentation[108]

Explaining Deposition Procedures to an Expert

Purposes of a Deposition

Both experienced and inexperienced counsel often overlook the possibility that the expert may not be fully conversant with the nature and purposes of a deposition.[109] Even with experienced experts, you should explain how the expert's testimony fits into the overall framework of the particular case and exactly what is expected of the expert at the deposition.

You must make clear to the expert whether you want to use the deposition as a vehicle for persuading the other side of the correctness of your position in the hope that the case can be settled before trial, or whether you want to reveal as little about the case as possible during the deposition so that your position is a surprise at the time of trial.

If you follow the former approach, the expert should be encouraged to adopt an advocate's stance; that is, fully explain answers, volunteer testimony that may not be specifically called for by the opponent's questions, and, in general, try to "sell" your side of the case at every available opportunity. If the latter approach is followed, you should remind the expert to respond only to the particular questions asked; to use "yes" or "no" answers whenever possible; to resist the temptation to elaborate on answers; and, in general, to avoid assisting opposing counsel with insights or observations not directly called for by the examiner's queries.

Deposition Procedures

When dealing with experts who are relatively inexperienced with testifying, your deposition preparation should include the same information that is covered with lay witnesses. You should familiarize the witness with deposition procedures, as well as the nature and purpose of a deposition, so that you and the expert approach the deposition with the same understanding. Those procedures include the following:

- The expert is under oath.
- The expert should be sure that he or she understands a question before answering it. The expert can ask for clarification if necessary.
- The expert should not talk at the same time as another person because the reporter cannot transcribe more than one person's words at a time.
- All parties may review the deposition transcript. Opposing counsel may comment on revisions to the transcript.

Objections

If the expert is not an experienced witness, you should explain the purpose of objections in lay language.[110] Explain that objections may be made to the form or the substance of questions, including, as discussed below, certain hypotheticals. In addition, explain that if an objection is made only to the form of the question, the expert will be required to answer.

The expert should be told to listen carefully to the objections because they frequently contain clues from you that indicate what the expert should do in responding to questions or that provide the expert with a basis for not answering questions. For example, if you object to a question as vague and ambiguous because it is indefinite about time, the expert should be encouraged to explain her inability to answer the question as phrased because of the vague time frame. You should tell the expert that when you raise your hand, it is a signal for the expert to listen to the forthcoming objection before attempting to respond.

Any areas in which you do not want the expert to answer questions should be discussed ahead of time, and the expert should be told to notify you before responding to a question when the answer would disclose such material. You should explain that you cannot instruct the expert not to answer a question, but that you should suggest (or advise) that the expert not answer, and the expert can follow this advice.[111]

Throughout the preparation session, remember that your communication with the expert will seldom be protected by the attorney-client privilege. Some communications may enjoy work-product protection, although this protection rarely survives the deposition stage of the case.[112]

Distinguishing Friend from Foe

The expert should be able to distinguish friend from foe, especially in multiple-plaintiff and multiple-defendant cases. He must know which lawyer represents which party and how each lawyer's interests coincide with, or differ from, those of the expert's employer. The expert must distinguish when to be wary and when not to frustrate the efforts of an ally. It is most important for you to acquaint the expert with potential questions and how they relate to the lawsuit.

The expert should be provided with, or shown, each party's FRCP 26(a)(2) disclosure statements (or responses to interrogatories concerning experts), so that the expert knows who are the opposing and allied experts. You should ask for the expert's view of the other experts. If your expert is friendly with, or has high regard for, an opposing expert, you should anticipate a question regarding that friendship or esteem, and you should help the expert determine how to disagree with the views of the friend, mentor, or idol.

Habits and Idiosyncrasies of Other Counsel

Lawyers employ various tactics in examining witnesses, ranging from charm (in hope of getting the witness to drop her guard) to abuse (in hope of intimidating the witness). You should prepare the expert witness for any tactics you know the opposition is likely to use. For example, through design or otherwise, lawyers frequently ask an expert a long list of questions that the expert knows nothing about, either because the questions have nothing to do with the case or because they concern areas that are unrelated to the expert's singular role in the case. During deposition preparation, experts should be counseled not to be embarrassed or disconcerted if they must repeatedly answer, "I do not know."

Avoiding Arguments with Other Counsel

Because expert witness depositions are concerned largely with opinion testimony, the risk of argument is greater than in the depositions of factual witnesses. The expert should be instructed to resist the temptation to argue with the other lawyers, particularly if the expert has an argumentative nature. Tell the expert that her credibility and ability to persuade may be undermined if she is perceived as an advocate. In addition, tell her that when tempers flare, she is more likely to blurt out a damaging or poorly conceived answer.

Identifying Nature of Assignment

The expert must understand, and should be able to articulate, her assignment in the case, preferably in twenty-five words or less. It is embarrassing when an expert at the deposition stage of a case cannot succinctly state what work she has performed on a file. Moreover, an expert who has a solid understanding of her assignment can better control the deposition, distinguish relevant from irrelevant questions, and avoid answering questions that do not relate directly to her assignment in the case.

In framing the expert's assignment, it is frequently helpful to look at relevant jury instructions for the elements that must be satisfied to prevail in the case, and then to select the particular elements that the expert will be relied on to establish or disprove. The expert will then know which questions call for information the expert has not been hired to address. In addition, knowing the scope of the assignment can be important as the case proceeds, for an expert who offers opinions at trial in an area not included in the expert witness's disclosure statement may create reversible error.[113]

The value of the expert knowing the scope of the assignment is well illustrated by the following example. In a products liability case involving a claim of defective manufacture (as opposed to defective design), the plaintiff may be required to prove that the product differed from the manufacturer's intended result or from other similar products. Neither the plaintiff nor the plaintiff's expert is obligated to redesign the product in a nondefective form or to conceive of an optimum product. It is sufficient, for example, if the plaintiff's expert has determined that a particular failed metal part has a greater number of voids or fissures than are contained in its nondefective counterparts. The expert who understands the limited nature of the assignment can deflect questions such as, "What is the minimum number of voids and fissures that you think a part of this kind should have to be nondefective?" by stating that he or she has not been called on to make such a determination, but has focused entirely on analyzing the differences between the failed part and its nondefective counterparts.

Another example: In multidefendant tort litigation, the individual defendants are not responsible for establishing how the accident occurred; rather, counsel for a particular defendant need only show that the accident was not caused by an act or omission by his client. Thus, when it is alleged that an automobile accident occurred because of excessive speed and inattention on the part

of various drivers, as well as a malfunctioning traffic light, counsel for the defendant that manufactured or maintained the signal light need only show that the light was performing properly. The assignment of the expert for the manufacturer could thus be limited in scope to determining whether the signal light was properly functioning at the time of the accident. If the expert is then asked her opinion concerning the driving of some other defendant, the design of that traffic signal as contrasted with other traffic signals, or anything other than the expert's precise assignment, the expert can respond without hesitation that the question relates to areas that she has not been called on to consider.

File Contents

In state courts that do not require predeposition disclosures, during the deposition preparation session, you should ensure that the expert's entire file is assembled so that it can be produced at deposition, if required.

The expert should make a written notation in the file of any items that are temporarily unavailable because of size or that have been removed. In that way, the expert need not rely on her recollection when asked about the contents of the file at the deposition. Similarly, if the expert's file contains anything that you believe should not be produced because of privilege or other considerations, this material should be removed from the file and put in a safe place so there will be one less housekeeping detail to worry about during the actual deposition. But, as discussed above, keep in mind that any privileged work-product material provided to, and referred upon by, your expert is no longer protected and must be produced.

Compensation

The amount of compensation paid to the expert is almost certain to come up during deposition,[114] and experts should be prepared to deal with it. Federal courts generally agree that FRCP 26(a)(2)(B) requires disclosure of more than simply the expert's hourly rate, although there is no agreement on the threshold standard that must be met in order to compel disclosure of other information related to compensation.[115] If experts do not bring their time records to the preparation session, they should at least consult those records before testifying so that they can give a reasonably accurate estimate of the total amount of time spent on the case, a breakdown

of how the time was spent, and an estimate of the total charges incurred. Experts who try to estimate hours worked and dollars billed may guess wrong and thus provide the opposition with a basis for cross-examination at trial, while experts who profess not to have such estimates may seem unprofessional or evasive.

Work Performed on Case, Opinions Reached, and Bases for Them

The expert should be prepared to delineate the substantive work he has performed on the case and the approximate amount of time spent on each activity.

When asked for his opinions, the expert should be prepared to give them precisely and with confidence. If a report has not already been prepared, which may be the case in state court proceedings, numerous or complex opinions should be written and made a part of the file so the expert can refer to them. The expert also should be able to recite the particular facts or other matters on which each opinion is based.

Inconsistencies

The expert should be prepared to deal with whether he has encountered anything that is either inconsistent or not fully consistent with the opinion reached. For example, if there is contradictory eyewitness testimony and the expert has adopted the testimony of one witness while excluding that of the other, the excluded testimony must be regarded as inconsistent and the expert should be prepared to justify the reasons for rejecting that testimony. If inconsistencies are numerous or if, during preparation, the expert has difficulty remembering inconsistencies, a written record should be made of them and incorporated in the file.

Hypothetical Questions

Although hypothetical questions are permissible both on direct and cross-examination of experts,[116] they are difficult to frame in a non-objectionable manner. Most hypothetical questions asked at a deposition omit one or more essential foundational elements, assume facts not in evidence, or are otherwise objectionable as to form.[117] Cautious counsel whose expert is being deposed will frequently object on foundational grounds to every hypothetical question. The witness should be alerted to this strategy before the deposition.

Hypothetical questions are used frequently to try to draw concessions from experts. Therefore, explain to the witness that you will object to incomplete hypotheticals or hypotheticals assuming facts not established during discovery.

An expert who answers an incomplete hypothetical, or one that the evidence does not support, typically will either be speculating or creating an avenue for potential impeachment. A proper objection, vigorously adhered to, either will get a better-framed question or will avoid the risk of an imprecise answer.

If you fail to object at the deposition to a hypothetical question that is defective because it assumes facts not in evidence, the objection may be waived. Therefore, before the deposition begins, advise your expert not to volunteer answers to these questions when you object.

Questions Outside Expert's Area of Expertise

Because the expert is not your client, you ordinarily do not have the right to instruct her not to answer a question.[118] But you can, and should, inform the expert that she is not obligated to answer questions—or guess or speculate—about matters outside her field of skill or expertise.

Questions Outside Expert's Designated Area of Expertise

An expert will frequently have expertise beyond that of her *designated* area of testimony. In addition, lawyers often use multiple experts with overlapping fields of expertise, electing to limit the intended testimony of each to avoid needless duplication or potential conflict. For a variety of tactical purposes (such as catching the expert unprepared, or creating a conflict between the testimony of the expert and another expert who has been designated to testify in that area), opposing counsel frequently ignore these limitations and attempt to depose the expert in areas outside the designated scope of intended testimony. In response to such questions you should argue that opposing counsel's proposed examination is in violation of the designated scope of expertise.

As noted above, a lawyer generally has no right to instruct an expert not to answer a question on any ground. There is, however, nothing to prohibit counsel from *advising* the expert that she should not feel obligated to respond to questions that are outside the designated area of testimony and to which the expert is unprepared to give a definite response. You should obtain the expert's

agreement in advance that the expert will heed such advice. If the expert is uncomfortable with this, you should advise her of the area of expertise in which she has been disclosed and that tell her she has the right to confine her opinions to that area. If the expert remains uncomfortable with your directive, and her gratuitous testimony is likely to hurt your case, you should consider withdrawing the expert as a trial witness.

Preparing to Depose One's Own Expert

In preparing the expert for deposition, you should alert your witness that you may wish to conduct your own examination after your opponent finishes his questioning.

Examining one's own expert is relatively rare but should be considered if there is a substantial possibility that the expert will not be available to testify at trial. Examining one's own expert requires the same preparation that is needed for direct examination at trial.[119]

Remember to question the expert on her qualifications. This foundation will be necessary to permit the introduction of the deposition at trial; the trial court must be satisfied that the expert has the requisite qualifications to offer an opinion on the disputed issue.[120]

In addition, if you intend to offer your expert's deposition at trial, before beginning the deposition, think of all possible objections that may be made at trial. Use that information to help you elicit unobjectionable testimony from your own expert at the deposition.

Deposing the Opponent's Expert

Purpose of Expert's Deposition

To be sure, the expert may be discredited during the deposition, but that is generally not the deposition's primary purpose. The questioner's ultimate goal is usually not to impeach or impugn the expert to gain tactical advantage regarding the expert's credibility, but rather to focus on learning *everything* the expert thinks about the case, has been told or learned about it, and has done or plans to do in connection with it. By following the format outlined in this chapter, even the most inexperienced questioner can make sure that these objectives are accomplished.

How *Not* to Depose an Expert

All too many examiners begin an expert's deposition with no clear plan. Lacking any other organizational framework, they simply

begin with the top paper in the expert's file (or the first line in the expert's report), ask the expert about that item, and then proceed through the balance of the file, item by item. Not only is this procedure time-consuming, but it does not ensure that the questioner has learned everything the expert thinks about the case and the basis for each conclusion the expert has reached. Using this approach, the questioner can come away from the deposition without a full and complete understanding of all of the work the expert has already performed and the precise basis for each of the expert's opinions. This approach also fails to establish whether the expert has any plans for doing further work and, if so, the nature of that work.[121]

Other questioners skip around haphazardly in an apparent effort to trick the expert with a nonsequential questioning technique. Although this method may reveal useful inconsistencies or contradictions in the witness's testimony, it also fails to fulfill the questioner's intention of learning everything about the expert's work on the case. Still other lawyers begin by asking for the expert's ultimate opinion and then become so confused or overwhelmed that they fail to inquire systematically into the factual or other evidentiary bases and underlying reasoning of each element of the opinion.

It may be helpful for the questioner to imagine himself as a psychiatrist and the expert witness as a patient. As with the psychiatrist, the questioner's goal is to get the patient to talk freely, with a minimum of interruption and interjection by the questioner. Unlike the approach used on cross-examination at trial—keeping the opposing expert tightly constrained and restricted to giving yes and no answers—the aim of most depositions is to get the expert to talk openly and give complete explanations without holding anything back.

How to Depose an Expert: Ten Subjects That Should Be Covered

Although there are exceptions, an expert ordinarily should be questioned about each of the following ten subjects, discussed in turn below.[122]

1. Education and Employment Background

Start with the expert's formal education, other training and experience, awards, employment history, and experience as a trial consultant and witness. Why? Because you need this information to determine whether the expert is qualified to testify, to avoid surprise at trial, and to evaluate whether different or more experts are needed to compete favorably with the opposition's expert.[123]

For example, in a case involving a handling problem with an automobile, the questioner can explore whether the expert has ever participated in competitive driving or racing, in addition to the expert's employment background. As another example, in a medical-malpractice action involving the general removal of a cataract, the questioner should find out how many cataract operations the witness has performed or assisted in and compare this information with the professional experience that the questioner's expert may be able to catalog for the jury.[124]

Background information can be elicited in succinct form by asking the expert, "Please state your educational background, starting at the high-school level." You should then ask whether the expert has had any other training (for example, correspondence courses or seminars) that bears in any way on the work performed or to be performed in the present case.

Next, ask questions about the expert's employment history in chronological order, beginning with the first full-time job and including details of any military experience. You should ask questions about part-time or temporary jobs because this information also may shed light on the expert's work on the present case. For example, if the case involves a claimed automobile defect, ask whether the expert has ever worked for an automobile manufacturer, participated in designing the part of the vehicle in question, or worked as an automobile mechanic.

Depending on the area of expertise, ask whether the expert has any other relevant qualifications. For example, when deposing a doctor, ask whether he is board certified, and, if so, in what specialty. When deposing an engineer, ask the deponent to identify the states where he is licensed.

Finally, ask about any other relevant information, such as whether the expert has done the following:

- Maintained membership in any professional societies or organizations;
- Taught or lectured in a relevant area;
- Written any articles, books, or papers in the area;
- Participated in drafting any relevant legislation, such as a regulation, or testified before any legislative body that has considered legislation or regulations relevant to the case; and
- Done anything else that may have had a bearing on the expert's work on the case.

Generally—but as discussed below, not necessarily—you should not cross-examine the expert regarding any of this background information during the deposition. Learning about it is all that is necessary. Moreover, it is probably better not to give the witness a practice session in responding to your cross-examination before the trial.

Although you must learn the witness's educational and employment background at some point before trial, tactical considerations may militate against your developing this information at the deposition. For example, suppose you know the expert will be unavailable to testify in person at trial, and the deposition is being video recorded. You may want to ignore qualifications altogether or, to make your strategy less obvious, touch on them only briefly when questioning the witness. Your hope is that opposing counsel will neglect to qualify the expert at the deposition and that the absence of a *qualified* expert will increase your client's settlement value or weaken the opposition's case at trial. You might try the same strategy if the expert is from out of state or makes such a poor personal appearance that opposing counsel may try to introduce the deposition at trial instead of calling the expert as a live witness. Absent such tactical considerations, however, you should thoroughly explore the expert's qualifications. Note, however, that even if you fail to explore the expert's qualifications, opposing counsel will generally rectify these omissions by properly qualifying the expert by asking appropriate questions during her portion of the deposition.

Also consider the situation where the expert has been deposed, and neither examining nor opposing counsel has questioned the expert concerning her qualifications. If it later develops that the expert will not be available to testify at trial, *opposing* counsel should consider calling another expert—for the sole purpose of establishing the qualifications of the unavailable expert—so that the unavoidable expert's deposition transcript can be read at trial. But be forewarned: This may require designation of an additional expert under FRCP 26(e).[125]

2. Prior Experience as Expert

Having learned about the expert's overall educational and employment background, the questioner next should ascertain the witness's prior experience in litigation as an expert. If the witness has never before been retained as an expert, this phase of the deposition

will be extremely brief. When the expert has been retained in other cases, substantial interrogation is needed to learn the following:

- How long has the expert been testifying in litigation matters on either a part-time or a full-time basis?
- During that time, in how many cases has the expert been contacted as a consultant, given a deposition, testified at trial, or otherwise given expert testimony under oath in a hearing or other judicial or legislative proceeding?
- In what percentage of *each* category given above has the expert worked for the plaintiff or the defendant, respectively? Many experts work almost entirely, if not exclusively, for one side or the other in litigation, but are understandably reluctant to reveal this fact. A general estimate of the overall breakdown of cases in which the expert has been hired is insufficient. If the witness's responses in this area seem to be ambivalent, counsel should press for the specific names and locations of past cases in which the expert has actually testified at a deposition or in court for each side.
- How many of the expert's prior cases, if any, have involved the same fact situation or issue as in the present case? For example, this may be the first case involving a bus that an expert in automobile accident cases has encountered.
- In what other types of cases has the expert been consulted, been deposed, or testified at trial? This question is particularly germane to the professional accident-reconstruction expert, who estimates accident speeds and time of impact one day, criticizes the design of a helicopter the next day, and, in between, attacks or defends the coefficient of friction of a bathtub. With this expert, the questioner should develop as many different areas as possible to later show that the expert will offer opinions on almost any subject.
- Has the expert previously testified on behalf of the same law firm or defendant? Many defendants, and lawyers on both sides, fall into the habit of repeatedly using the same expert. The questioner should find out the total number of cases in which the expert has been retained—not just those in which she has testified—by both the opposing lawyer and the opposing party.

Learning about an expert's prior litigation experience may help to show potential bias. Experts may be examined concerning fees

earned in prior cases.[126] If this information cannot be obtained from any source other than the expert's tax returns, then the examining party is entitled to copies of the returns.[127] In addition, an expert may be examined about (and required to produce) specific documents and writings reviewed for purposes of the case. Additionally, when the expert's opinion is based on experience as an expert witness in similar cases, the expert may be required to retrieve and produce such documents, although the examining party may be required to share in the accompanying cost.[128]

Although the federal courts have yet to address the question, some jurisdictions have imposed limits on this line of inquiry. For example, in *Allen v. Superior Court*,[129] counsel was permitted to examine a medical expert regarding the percent of time and amount of compensation derived from his work as an expert. But the details of his billing and accounting, and the specifics of his prior testimony at trial and depositions, were considered proper subjects of a protective order. In the court's view, "Exact information as to the number of cases and amounts of compensation paid to medical experts is unnecessary for the purpose of showing bias."[130]

When an expert testifies at a deposition or trial, her opinions become a matter of public record and are the proper subject matter for impeachment. However, there is still an open question whether, and to what extent, opinions reached and reports prepared by the expert in previous cases are discoverable. Are they discoverable when the expert was designated as an anticipated trial witness, but the case was settled before the expert was deposed? When the expert did additional work after being deposed, but the case was settled before the expert testified at trial? When the expert was designated to testify in a prior case and reached opinions, but was not actually called at trial?

3. Assignment in Present Case

The questioner should learn the date on which the expert was first contacted, if not already disclosed as required by FRCP 26. The opinions of an expert who was retained on the eve of the required disclosures are frequently subject to attack as not being the product of considered study and analysis. The opinions of an expert who was retained after initial disclosures are subject to attack on credibility grounds. Was the lawyer who disclosed the expert before retention simply clairvoyant and able to argue that the expert would support counsel's case without even knowing the

facts, or did counsel have reason to believe that the expert was sufficiently "malleable" that he would be able to testify for whoever was paying the bill?

You should also ascertain the circumstances of the original contact (for example, letter, telephone call, personal visit) and the nature of the assignment. Significantly, many experts cannot answer this last inquiry because the expert never asked, and the lawyer never explained, exactly the assignment was.

Finally, if the expert was retained in writing, or if there are notes on some of the written materials given the expert by the lawyer, you should review them to see whether they contain compromising admissions or give the expert a distorted view of the case.

4. How Time on the Case Has Been Spent

To ensure that all work the expert has completed on the case is examined during the deposition, there is no substitute for breaking down the expert's time into hours. You should ask how many hours the expert has spent on the case, starting with the date the expert was retained. If the expert professes to be unable to answer this question, establish that the expert is being paid on an hourly basis and continue to press for a best estimate of hours. If adequate disclosures about compensation have not been made, demand production of the expert's time sheets.[131]

Next, determine by general category the way in which the expert's time has been spent on the case and the approximate number of hours expended on each category:

- Hours spent reading and the nature of what has been read—for example, deposition transcripts, interrogatories, answers, other pleadings, or file materials, as well as secondary sources such as books, articles, reports, studies, and medical records.
- Hours spent discussing the case and with whom—for example, opposing counsel, the opposing party, other experts, and independent third parties, as well as the nature of the discussion with each.
- How the balance of the time has been spent. The nature of the inquiry will depend on the nature of the case, but will frequently include such matters as visiting the accident scene, examining and testing parts, examining exemplars or competitive products, doing calculations, and research-

ing comparable properties, businesses, or other similar facts, circumstances, or conditions.

Finally, this is an opportune time in the deposition to inquire about the expert's rates, charges, and manner of billing. Look for any discrepancy between the billing rate or method for time spent at a deposition noticed by the client and the fees, including those at trial, charged to the party who retained the expert.[132]

5. File and Reports

The questioner should next turn to the expert's file. You should first have the expert provide a general inventory of the file and identify the categories included—for example, deposition transcripts, photographs, calculations, medical records, and notes. Generally, it is not necessary at this early stage to go through each item in the file, page by page or line by line. Rather, it suffices to have the general categories identified and the materials marked as exhibits to the deposition. As discussed above, under FRCP 26(a)(2)(B), a report also should have been submitted at the time of disclosure.

6. Assistance the Expert Has Received

Ideally, the breakdown of how the expert's time has been spent will have disclosed whether anyone assisted the expert. To eliminate all uncertainty, however, you should specifically inquire into this area. The identity of each assistant and the precise nature of the work performed by each must be established for several reasons.

- First, it may be desirable or even necessary to depose the assistant to understand fully the nature of the opposition's case. Even if this step is not necessary, it may be worth doing. Frequently, an assistant has had little or no experience testifying and may be far easier to impeach or otherwise discredit than the designated expert.
- Second, the assistant may not fully concur with all the expert's opinions or may otherwise disagree with the expert in some respect.
- Third, particularly in cases in which a significant portion of the work in the file has been done by an assistant, it may be desirable for tactical reasons to demonstrate that the designated expert is actually just a "front" chosen for his or her appearance, manner, or ability to withstand cross-

examination. (By doing so, you can discredit the designated testifying expert.)

7. Expert's Opinions

The questioner is now in a position to move on to the opinions that the expert has reached in the case. This information should be contained in the FRCP 26(a)(2)(B) disclosure statement, but such statements often contain only broad generalities. The deposition provides an opportunity to pin the expert down on the precise opinions, and subopinions, she has reached.

For example, does the expert believe that an automobile part failed before or after the accident? Does the expert feel that the doctor's failure to diagnose cancer was negligent? Does the expert have an opinion concerning the total loss of support and contribution suffered by the decedent's survivors? When the question is less obvious, you should simply say, "Please tell us each opinion you have reached as a result of your work on this case."

But before moving on to the next area in which the expert may have formed an opinion, make sure no opinions have been overlooked by asking close-out questions such as, "Are there any other opinions or conclusions you have reached in this case that you have not already told us about? What are they?"[133]

8. Bases for Each Opinion

The questioner should then ask the expert to state separately for each opinion all facts or other information on which the opinion is based. Again, this information should—but not necessarily will—be contained in the FRCP 26(a)(2)(B) disclosure statement. You should resist the temptation to quarrel with the expert or challenge the basis for the opinion. Rather, strive to give the expert an unfettered opportunity to explain everything on which the opinion or conclusion is based.

At appropriate intervals, ask whether there is "anything else" not previously discussed that forms the basis for each opinion in order to make sure nothing has been omitted. The strategy behind this tactic is twofold. First, it minimizes the risk that the expert will be able to change the factual basis for that opinion at the time of trial, and it certainly renders the expert subject to impeachment if such a change occurs. Second, it may develop facts, lines of reasoning, or other matters that you and your own experts have overlooked and that may have to be taken into account—or that even

undermine or destroy your theory of liability or defense. Problems in your case can be dealt with far more effectively if they are discovered during the deposition rather than at trial.

The kinds of information an expert will offer to support her opinions vary widely.[134] Generally, however, the examiner should try to elicit the following:

- Any admissible evidence—for example, photographs, records, tests, experiments, or statements—on which the expert relies;
- Any inadmissible or arguably inadmissible data—for example, subsequent remedial measures held inadmissible under FRE 404—on which the expert relies;
- All assumptions, conjectures, or reasoning that forms the basis for the opinion;
- Corroboration, if any, for the opinion; and
- Any other reasons the expert may have for reaching or holding the opinion, including any books, articles, or treatises[135] that the expert contends support the opinion.

9. Inconsistencies with Each Opinion

The examiner should ask whether the expert has encountered any fact, article, or other matter—whether contained in material relied upon or elsewhere—that is either inconsistent or not fully consistent with each opinion reached. Assuming the expert is truthful and candid, this line of questioning should apprise you of any weaknesses in the opposition's case, some of which may not have occurred to either you or your own experts.

In addition, answers to these questions frequently provide good ammunition for impeachment of the expert at trial. For example, if at the deposition the expert acknowledges having read certain conflicting or inconsistent testimony, the expert who claims at trial that he has encountered nothing that is inconsistent with the opinions reached will have some explaining to do. Likewise, you may be able to impeach an expert witness with relevant learned treatises, even if the expert has not commented upon them.[136]

10. Other Contemplated Work

Under FRCP 26(e)(1), an expert is required to supplement disclosures made pursuant to FRCP 26(a)(2)(B), and thus this information already may be available. In addition, ascertain whether there is anything further that the expert is scheduled to do in the case—for

example, additional reading, calculations, or experiments. Also find out whether the expert has additional work planned or contemplated, even though not presently scheduled, and the nature of this work. Finally, ask whether, assuming an unlimited budget and ample time, the expert would like to do any additional work to further test, corroborate, or solidify any opinions expressed.

Additional Six Questions That May Be Appropriate

All questions necessary to fulfill the questioner's goal at an expert's deposition—that is, to learn everything the expert thinks about the case and has done or plans to do in connection with the case—have now been discussed. The inexperienced examiner often is well advised to stop there and not attempt further questioning. Depending on the nature of the case and the skill, goals, and experience of the examiner, however, several other areas may be worth pursuing.

1. Trial-Type Cross-Examination

In some instances, it may be beneficial to test weaknesses in the expert's opinions or reasoning by using trial-type cross-examination to discredit the witness at the deposition. This may serve to fluster an inexperienced expert or let opposing counsel know, for purposes of possible settlement, just how weak his client's case might be. As a general rule, however, profitable areas of cross-examination are best left for trial. Otherwise, the expert gets a preview of your intended cross-examination and can learn how to meet it at trial.

2. Assume the Expert Is Correct

An often-effective technique is for the questioner to assume that the opposing expert is correct. For example, in the typical slip-and-fall case, if the plaintiff's expert claims that the plaintiff slipped not because of some foreign substance on the pavement or flooring, but because the surface itself had too low a coefficient of friction that caused it to be slippery, you might ask a line of questions that assume that the floor really was as slippery as claimed. Then you can ask whether the expert has heard of any other similar incidents where there was a low coefficient and someone slipped. If the answer is "no," you can ask how the expert accounts for the seeming lack of consistency.

On a products liability case, where the defendant's expert contends an accident happened because of the plaintiff's habitual misuse of

the product, ask questions such as the following: "Why wasn't the plaintiff injured when misusing the product on an earlier occasion? Why have other misusers of the product escaped injury?"

3. Make the Expert Go to the Extreme

When the expert's opinion seems questionable, the examiner can make it appear ludicrous by applying it to similar but more extreme facts. For example, if an expert states that no automobile gas tank should suffer a fuel loss in a 50 miles per hour accident, you might ask if the expert feels the same way about an accident at 60, 80, or 100 miles per hour.

This line of questioning creates a dilemma for the expert: either commit to some fixed, arbitrary speed (for example, 62.8 miles per hour) above which fuel loss is expected but below which it should not occur, or claim an inability to answer the question without more data. But the expert who needs more data still may not be out of the woods. For example, one expert testified that even in a 300-mile-per-hour accident, he would have to examine the wreckage of the vehicles to know for sure whether the resulting fuel loss had been caused by a defective gas tank.

An expert who can be led to take such an extreme position in deposition testimony will suffer a loss of credibility in the jury's eyes, and opposing counsel will have a strong basis for arguing at trial that the expert—far from being an objective scientist—is simply an advocate seeking to be hired to testify in as many cases as possible. Furthermore, if this information can be developed in deposition, it may have an effect on the settlement value of the litigation in advance of trial.

4. Is the Expert Too Consistent?

Although the professional expert who has testified dozens of times in similar or identical cases may appear abundantly qualified, this experience can often be the expert's greatest weakness. The examiner should fully explore the expert's prior testimony and work performed in earlier related cases.

Suppose, for example, that you learn in thirty previous failure-to-diagnose-cancer cases, the expert testified that the failure to diagnose was not negligent. If you can elicit deposition testimony from the expert that the previous cases occurred in different states, involved different doctors with different levels of experience, and involved different kinds of cancer and different claims of delay, at

trial you can point out that the only consistency in the case is that the defendant's expert always finds a lack of negligence. The plaintiff's expert who travels around the country attacking a particular product or condition is subject to similar impeachment.

Consider another example: The expert who has testified for years—and been paid to testify—about the same supposedly dangerous condition also may be vulnerable to attack before judge or jury if she has done nothing to eliminate the condition. Many judges and jurors expect a well-intentioned person who spends a considerable portion of time testifying about a problem to do something about it.

5. Does the Expert Really Fit the Case?

An expert may offer an opinion at the deposition in an area in which she does not appear to have sufficient expertise. In such instances, the examiner should return to the expert's qualifications to determine whether they qualify her to give that particular opinion.

For example, an accident-reconstruction expert who is qualified to render opinions concerning stopping distances and interpretation of skid marks may try to offer opinions concerning automobile design or the driver's subjective reaction to danger. Under these circumstances, you may want to find out whether the expert has:

1. Ever been qualified by a court in the relevant jurisdiction to render such an opinion;
2. Rendered such an opinion in a previous deposition;
3. Obtained a degree or other formal training in vehicle design, psychology, human factors, or other disciplines that would seem to cover the area of opinion being expressed;
4. Read or written on the subject; and
5. Achieved any other expertise in that particular area.[137]

6. What Would Satisfy the Expert?

It is sometimes a good strategy at the deposition to ask what the expert contends the opposing party should have done to avoid the expert's judgment of fault. For example, in a product liability action involving failure to warn of a danger, the defendant's lawyer could ask the expert exactly what kind of warning would have to be given to make the product defect-free. Would the warning

have to be in writing? If so, precisely what wording should it contain? And where should it be placed, distributed, or otherwise disseminated?

Similarly, counsel for a plaintiff, whom the defense has accused of having failed to take proper steps to mitigate damages (be they physical, financial, or otherwise), should consider asking the expert what alternative measure the plaintiff should have taken.

Compelling an Expert to Answer Deposition Questions

It is sometimes necessary for counsel to move to compel an expert to answer questions asked at the deposition. Situations in which this occurs include the following:

- The lawyer for the party retaining the expert has instructed the expert not to answer questions, as if the expert were a client.
- The retaining lawyer refuses to allow the expert to answer a hypothetical question because an essential element is missing or misstated. (Note that the examining party should demand specification of the omission or misstatements.)
- The expert does not bring his complete file to the deposition.
- The expert refuses to answer questions concerning similar pending lawsuits.

When these or similar problems arise during the deposition, you have the option of adjourning it.[138] Generally, however, you should continue questioning the expert. Your position will not benefit from refusing to proceed because the expert or opposing counsel has improperly blocked inquiry in a particular area. Because expert depositions are usually taken close to the trial date, it is imperative that you glean as much information as possible from expert witnesses as soon as possible.

You should then move to compel further discovery responses after the deposition has been completed. The court should be more sympathetic to an examiner who can represent that everything possible was done to minimize the need for the motion. (Notice of the motion must be given to all parties and to the deponent either orally at the examination or by subsequent service in writing.[139]) If the motion to compel is granted, you will have the opportunity to redepose the expert—albeit often uncomfortably close to the time of trial.

Notes

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1. *See* FED. R. EVID. 705.
2. See also "The Federal Discovery Scheme" in Chapter 2.
3. *See* John C. Koski, *Mandatory Disclosure*, 80 A.B.A. J. 85 (1994).
4. *See, e.g.*, Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses 622, F.2d 496, 500 (10th Cir. 1980). *See generally* 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2029 (1970).
5. See "Work-Product Privilege" in Chapter 6, discussing the balance between discovery and work-product protection.
6. *See, e.g.*, Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. 1122, 1134 (S.D. Tex. 1976).
7. *See, e.g.*, Wright v. Jeep Corp., 547 F. Supp. 871 (E.D. Mich. 1982).
8. FED. R. CIV. P. 26(a)(2)(A).
9. FED. R. CIV. P. 26(a)(2)(C)(ii).
10. FED. R. CIV. P. 26(a)(2)(B).
11. FED. R. CIV. P. 26(a)(2)(B)(i)–(vi).
12. FED. R. CIV. P. 26(b)(4)(A).
13. FED. R. CIV. P. 26(a)(2) advisory committee's note (1993). *See also* FED. R. CIV. P. 26(b)(4)(A).
14. See "Subpoenas to Nonparties" in Chapter 3.
15. FED. R. CIV. P. 26(e)(1)(A).
16. *See, e.g.*, Marsh v. Jackson, 141 F.R.D. 431 (W.D. Va. 1992).
17. *See, e.g.*, Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940). *See also* JAMES L. UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES (2d ed. 1985).
18. *E.g.*, *In re* Folding Carton Antitrust Litig., 83 F.R.D. 256 (N.D. Ill. 1979).
19. *E.g.*, Guilloz v. Falmount Hosp. Ass'n, 21 Fed. R. Serv. 2d (Callaghan) 1367 (D. Mass. 1976); Perry v. W.S. Darley & Co., 54 F.R.D. 278 (E.D. Wis. 1971); *see also* Note, *Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 MICH. L. REV. 513 (1982).
20. 622 F.2d 496, 503 (10th Cir. 1980).
21. *See In re* Pizza Time Theatre Sec. Litig., 113 F.R.D. 94 (N.D. Cal. 1986) (following *Ager*, holding that identities of nontestifying experts should be subject to same standard as discovery of their opinions—that of "exceptional circumstances"); Hermsdorfer v. Am. Motors Corp., 96 F.R.D. 13 (W.D.N.Y. 1982) (following *Ager*, rejecting counsel's attempt to circumvent FRCP 26(b)(4)(B) by arguing that defendant's experts were retained to assist in product development, not in anticipation of litigation

or preparation for trial; and reasoning that experts might also have been retained in anticipation of litigation or preparation for trial).

22. On the other hand, such questions elicit the information necessary to satisfy the "exceptional circumstances" hypotheticals proposed by Professor Sacks. *See* UNDERWOOD, *supra* note 37, § 1.04(e).

23. *In re* Shell Oil Refinery, 132 F.R.D. 437, 442 (E.D. La. 1990) (and cases cited therein).

24. *Id.*

25. 133 F.R.D. 109 (E.D. La. 1990).

26. *Pizza Time Theatre*, 113 F.R.D. at 110.

27. *Id.* at 111.

28. 415 F. Supp. 1122 (S.D. Tex. 1976).

29. *See Ager*, 622 F.2d at 501. *See also* Kuster v. Harner, 109 F.R.D. 372 (D. Minn. 1986).

30. 109 F.R.D. 372 (D. Minn. 1986).

31. *Kuster* also includes an especially insightful analysis of the discussion in the Advisory Committee's note to the 1970 amendment to FRCP 26 on discovery of the identity of persons who will not testify.

32. For questions (1) and (2), see the interrogatories set forth in *supra* section "Retained or Specially Employed Experts."

33. *See, e.g., In re* Sinking of Barge Ranger I., 92 F.R.D. 486 (S.D. Tex. 1981).

34. 70 F.R.D. 326 (D.R.I. 1976).

35. 631 F.2d 420 (6th Cir. 1980).

36. Va. Elec. & Power Co. v. Sun Shipbuilding & Drydock Co., 68 F.R.D. 397 (E.D. Va. 1976).

37. Kan.-Neb. Nat. Gas Co., Inc. v. Marathon Oil Co., 109 F.R.D. 12, 16 (D. Neb. 1985); *Shell Oil Refinery*, 132 F.R.D. at 437.

38. Hermsdorfer v. Am. Motors Corp., 96 F.R.D. 13, 15 (W.D.N.Y. 1982).

39. 641 F.2d 984 (D.D.C. 1980).

40. 60 F.R.D. 205 (S.D.N.Y. 1973).

41. *Id.* at 209. *See also In re* Shell Oil Refinery, 134 F.R.D. 148 (E.D. La. 1990) (limiting discovery to opinions formulated by employee-experts in their preparation for trial testimony and foreclosing discovery about their opinions formulated as members of defendant's postaccident investigation team).

42. 79 F.R.D. 444 (D. Ala. 1978).

43. *Id.* at 446.

44. *Id.*

45. 80 F.R.D. 489 (D. Mont. 1978).

46. For an overview of treatment by the federal courts of the discoverability of the identity and opinions of nontestifying experts under the FRCP, see Douglas Alan Emerick, *Discovery of the Non-Testifying Expert*

Witness's Identity Under the Federal Rules of Civil Procedure: You Can't Tell the Players Without a Program, 37 HASTINGS L.J. 201 (1985).

47. *See* Baran v. Presbyterian Univ. Hosp., 102 F.R.D. 272 M.D. Pa. 1984); Keith v. Van Dorn Plastic Mach. Co., 86 F.R.D. 460 (E.D. Pa. 1980).

48. 102 F.R.D. 272 (W.D. Pa. 1984).

49. *Id.* at 273.

50. 549 F. Supp. 82 (N.D. Ill. 1982).

51. 547 F. Supp. 871 (E.D. Mich. 1982).

52. *Id.* at 873.

53. *Id.* at 877.

54. *Id.* at 875. *But cf.* Michigan v. Ewing, 474 U.S. 214 (1985) (affirming dismissal of student from institution of higher learning based on court's "responsibility to safeguard . . . academic freedom, a special concern of the First Amendment"); Sweeny v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) ("The dependence of a free society on free universities means the exclusion of governmental intervention in the intellectual life of a university . . . whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."); Brown v. Trs. of Boston Univ., 891 F.2d 337, 350–51 (1st Cir. 1989) (upholding inadmissibility of statements made by university officials unrelated to tenure review of individual because of "the chilling effect that admission of such remarks could have on academic freedom").

55. 672 F.2d 1262 (7th Cir. 1982).

56. 115 F.R.D. 211 (D. Ariz. 1987).

57. 539 F.2d 811 (2d Cir. 1976).

58. 880 F.2d 1520 (2d Cir. 1989).

59. *In re* R.J. Reynolds Tobacco Co., 518 N.Y.S.2d 729 (Sup. Ct. 1987).

60. No. 94-2318, 1994 U.S. Dist. LEXIS 16933, at *4 (E.D. La. Nov. 22, 1994).

61. FED. R. CIV. P. 45(c)(3)(B).

62. *Bluitt*, 1994 U.S. Dist. LEXIS 16933, at *4.

63. See the discussion later in this chapter concerning the impact of the loss of attorney-client privilege and work-product protection on communications with an expert. See also Chapter 6.

64. 449 U.S. 383, 386 (1981). See "Applying the Attorney-Client Privilege When the Client Is a Corporation" in Chapter 6, discussing the *Upjohn* case.

65. For further insight into the assertion of the federal attorney-client privilege by a corporation and the circumstances under which that privilege can be waived, see *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (holding voluntary disclosure by trustee of corporation in bankruptcy waived debtor corporation's attorney-client privilege for communications that occurred before bankruptcy

petitions filed). *See also In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 658 F.2d 1355, 1361 (9th Cir. 1981) (protections of *Upjohn* extended to include "orientation sessions" before depositions with ex-employee witnesses who were not employees of company at time sessions held).

66. FED. R. EVID. 26(b)(3).

67. *Id.* See "How to Avoid Putting Privileged Documents at Risk" in Chapter 9, discussing work-product protection in the context of FRE 612.

68. *See* JAMES L. UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES 24 (2d ed. 1985). *See also* Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940). *See generally* 8 WRIGHT & MILLER, *supra* note 4, §§ 2021–2050.

69. *See, e.g.*, Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 306 (2d Cir. 1979) (allowing limited admissibility of key 1915 consent decree in antitrust action, when sole expert witness had studied decree and advised lawyers he was unable to reconcile it with defendant's claims; not relevant that expert had analyzed and expressed misgivings about decree before he was designated prospective trial witness). *See* Baran v. Presbyterian Univ. Hosp., 102 F.R.D. 272 (W.D. Pa. 1984) (holding defendant-physicians fit into category of "actors or viewers," not experts retained for purposes of litigation; therefore, they should have been allowed to testify about their medical opinions relating to their treatment of plaintiff without providing plaintiff's counsel with their written expert reports).

70. *See, e.g.*, Lewis v. Rego Co., 757 F.2d 66, 74 (3d Cir. 1985) (holding cross-examination concerning conversations between consultant and trial expert should have been permitted).

71. FED. R. CIV. P. 26(b)(4)(B) advisory committee's note (1970). See also the related discussion earlier in this chapter.

72. 560 F.2d 326 (8th Cir. 1977).

73. 487 F.2d 480, 484 (4th Cir. 1973).

74. United States v. Leggett & Platt, Inc., 542 F.2d 655, 660 (6th Cir. 1976); United States v. Int'l Bus. Mach. Corp., 66 F.R.D. 154, 178 (S.D.N.Y. 1974).

75. Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557 (2d Cir. 1967); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 153 (D. Del. 1977); Midland Inv. Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134, 138 (S.D.N.Y. 1973). *See also* 8 WRIGHT & MILLER, supra note 4, § 2024.

76. 462 U.S. 19 (1983).

77. 5 U.S.C. § 552 (2002).

78. *See, e.g.*, Powell v. United States, 584 F. Supp. 1508 (N.D. Cal. 1984) (dictum) (questioning government's reliance on Grolier in asserting work-product privilege in response to Freedom of Information Act request for information on criminal proceeding that had terminated twenty years earlier).

79. *See* Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1984); Hamel v. Gen. Motors Corp., 128 F.R.D. 281 (D. Kan. 1989); Carter-Wallace, Inc. v. Hartz Mountain Indus., 553 F. Supp. 45 (S.D.N.Y. 1982).

80. Gilhuly v. Johns-Manville Corp., 100 F.R.D. 752 (D. Conn. 1983); Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982); Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977). *See also* Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs, 480 F.3d 278, 301–03 (4th Cir. 2007); William Penn Life Assur. Co. v. Brown Transfer & Storage Co., 141 F.R.D. 142 (W.D. Mo. 1990); Occulto v. Adamar, Inc., 125 F.R.D. 611 (D.N.J. 1989).

81. 738 F.2d 587 (3d Cir. 1984).

82. 139 F.R.D. 384, 387 (N.D. Cal. 1991).

83. *Id.* at 397.

84. *See Hamel*, 128 F.R.D. at 284.

85. 210 Cal. Rptr. 535 (1985).

86. *Id.* at 489–90.

87. 293 F. 1013 (D.C. Cir. 1923).

88. *Id.* The court refers to a "systolic blood pressure deception test," a precursor to the modern polygraph test.

89. *Id.* at 1014.

90. *Id.*

91. *See id.* ("[T]he opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it.").

92. *See* People v. Leahy, 8 Cal. 4th 587, 601–02 (Cal. 1994).

93. 509 U.S. 579 (U.S. 1993).

94. *Id.* at 589.

95. *Id.* at 590.

96. *Id. See also* Cabrera v. Cordis Corp., 134 F.3d 1418, 1420 (9th Cir. 1998).

97. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1318 (9th Cir. 1995) (*Daubert II*) (reviewing *Daubert* case on remand); United States v. Arnold, 3 Fed. Appx. 614, 616 (unpublished opinion) (9th Cir. 2001) (*Daubert* factors not relevant to expert's testimony regarding *modus operandi* of alien smuggling because testimony's reliability depends on knowledge and experience of expert rather than methodology or theory behind it).

98. *See Daubert*, 509 U.S. at 593–95.

99. 522 U.S. 136, 142–43 (U.S. 1997).

100. 526 U.S. 137, 141 (U.S. 1997).

101. FED. R. EVID. 702.

102. *See Daubert*, 509 U.S. at 595.

103. See *infra* section "Purposes of a Deposition." See also "Purposes of a Deposition" in Chapter 2.

104. FRCP 26(b)(4)(C) provides that "[u]nless 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 this subdivision]." This language differs significantly from that of various state statutes. For example, California Code of Civil Procedure, section 2034.430(b), limits the fees recoverable from the opposition to the time the expert actually spent at the deposition. Under FRCP 26, a party seeking discovery from an expert must reimburse the expert not only for actual time spent in deposition, but also for time spent in preparation, particularly in complex cases. S.A. Healy Co. v. Milwaukee Metro. Sewage Dist., 154 F.R.D. 212 (E.D. Wis. 1994). FRCP 26(b)(4)(C)(ii) provides that when exceptional circumstances justify discovery of a percipient or specially retained witness who is not expected to testify at the trial, the non-discovering party must "pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions."

105. FED. R. CIV. P. 26(b)(4)(A).

106. See "Preparation Sessions: When, Where, How Often, and with Whom" in Chapter 5.

107. In the process, you should assume that anything given to an expert witness may become the subject of discovery if that witness is disclosed as a trial witness.

108. Such a session is not privileged. See *supra* section "Privileges Relating to Expert Witnesses."

109. See Chapter 7.

110. See "Making Objections" in Chapter 14.

111. See later sections of this chapter concerning questions outside the expert's designated area of expertise.

112. See *supra* section "Privileges Relating to Expert Witnesses."

113. *See, e.g.*, Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980) (discussed in text accompanying notes 21–24); Weiss v. Chrysler Motor Corp., 515 F.2d 449 (2d Cir. 1975).

114. FRCP 26(a)(2)(B)(vi), for example, requires that experts disclose in their written report the compensation to be paid for their work and testimony in the case.

115. *Compare* Cary Oil Co. v. MG Ref. & Mktg., Inc., 257 F. Supp. 2d 751, 757 (S.D.N.Y. 2003) (requiring requesting party to show "reasonable suspicion" that compensation arrangement "materially changed" expert's opinion) *with* Amster v. River Capital Int'l Group, LLC, No. 00 Civ. 9708 (DC) (DF), 2002 U.S. Dist. LEXIS 16595, at *3 (S.D.N.Y. Sept. 4, 2002) (requiring requesting party to show "plausible argument" that total amount of compensation could be relevant to showing of bias) *and* Boselli v. Se. Pa. Transp. Auth., 108 F.R.D. 723, 726 (E.D. Pa. 1985) (permitting

requesting party to obtain compensation information because it would be "useful" for purposes of effective cross-examination).

116. *See, e.g.*, Rohrbaugh v. Owens-Corning Fiberglass Corp., 965 F.2d 844 (10th Cir. 1992); Trademark Research Corp. v. Maxwell Online, Inc., 995 F.2d 326 (2d Cir. 1993).

117. See *supra* section "Explaining Deposition Procedures to an Expert: Objections," concerning how to explain the nature of objections to an expert. *See* FED R. CIV. P. 32(d)(3)(A), 32(d)(3)(B). *See, e.g.*, Cordle v. Allied Chem. Corp., 309 F.2d 821 (6th Cir. 1962) (because hypothetical questions on same subject matter could have been substituted for questions actually asked of expert if proper objection had been made at deposition, grounds for objections to testimony at trial waived for failure to make them at deposition). See also "The Question Calls for Speculation" in Chapter 14, discussing objections to a hypothetical.

118. See "Instructing a Witness Not to Answer" in Chapter 14.

119. See "Surprise! You're on Candid Camera: Video Depositions Can Demand Different Techniques by Both the Examiner and Defender" in Chapter 17, discussing the value of video recording an expert who is not expected to be available for trial.

120. Compare this suggestion with the next section in this chapter, discussing the strategic considerations in deposing an opposing expert about his or her qualifications.

121. See *supra* note 15, discussing the possibility that additional work by an expert after his or her deposition may require a supplemental report by the expert (see FRCP 26(e)(1)) and may be the basis for an argument that the deposition should be reopened (see FRCP 30(d)(1)).

122. When an expert has provided a written report as required under FRCP 26(a)(2)(B), some of the ten points may already be covered in whole or in part.

123. Among other things, the examiner needs to learn during the deposition whether to bring a *Daubert* motion to limit or exclude the expert's testimony. See *supra* section "The *Daubert* Standard."

124. It is not necessary to object at the deposition to the witness's competence to testify as an expert. Counsel can wait until trial to do so. Objections to the competency of an expert witness, or to the relevance or materiality of testimony and the like, are not waived by failure to make them before or during the deposition. FED. R. CIV. P. 32(d)(3)(A). See also "Objections That Are Preserved" in Chapter 14.

125. *See, e.g.*, Price v. Seydel, 961 F.2d 1470, 1474 (9th Cir. 1992) (holding court may exclude testimony of witness not listed in pretrial witness list, based on evaluation of the surprise or prejudice to opposing party, opposing party's ability to cure prejudice, whether waiver of rule against calling unlisted witness would disrupt order by trial of case, and evidence of bad faith or willfulness in failing to list witness).

126. Collins v. Wayne Corp., 621 F.2d 777, 783 (5th Cir. 1980).

127. Hawkins v. S. Plains Int'l Trucks, Inc., 139 F.R.D. 679 (D. Colo. 1991). *See also* Terwilliger v. York Int'l Corp., 176 F.R.D. 214, 216–20 (D. Va. 1997).

128. *Hawkins*, 139 F.R.D. at 681.

129. 198 Cal. Rptr. 737 (1984).

130. *Id.* at 453, 198. *See also* Russell v. Young, 452 S.W.2d 434 (Tex. 1970).

131. Although FRCP 26(a)(2)(B)(vi) requires disclosure of "the compensation to be paid for the study and testimony," this often produces nothing more than the expert's hourly rate in the case. See *supra* note 116, discussing discovery about compensation to be paid.

132. As noted, FRCP 26(a)(2)(B)(vi) requires only that the expert disclose "compensation." Thus, counsel will need to develop this detailed information in the deposition.

133. See "Closure" in Chapter 11.

134. *See* FED. R. EVID. 703 (Bases of Opinion Testimony by Experts):

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field informing opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

135. See "Learned Treatise" in Chapter 13.

136. *See* FED. R. EVID. 803(18) (Learned Treatises).

137. Information about the expert's previous trial experience can also be obtained from jury verdict reporting services, which typically index lower-court cases by name and type of expert. Useful data about experts and their publications can be located using computer-assisted research services, such as LEXIS/NEXIS and Westlaw. Depending on the individual's field of expertise, information can also be found on specialized research services, such as Index Medicus (for doctors) and Knight-Ridder's Dialog Information Services, Inc. (for other fields).

138. See "Concluding the Testimony" in Chapter 23, discussing the adjournment of depositions. See also "How Long May the Deposition Last?" in Chapter 3, discussing the limitation of a deposition in federal practice to one day of seven hours, absent agreement or court order (FRCP 30(d)(1)). Counsel frequently reach agreement to allow a deposition of more than one day in cases where the expert's report is particularly voluminous and complicated.

139. See Chapter 15, discussing motions to compel and for sanctions.

ABOUT THE PRINCIPAL AUTHOR AND EDITOR

Henry L. Hecht is co-founder of The Hecht Training Group, consultants on skills training for lawyers (www.HechtTrainingGroup.com), and on the faculty of the University of California, Berkeley, School of Law (Boalt Hall) (www.law.berkeley.edu).

From 1973 until 1983, he had an active litigation practice, first with the Watergate Special Prosecution Force as an Assistant Special Prosecutor, and then with Heller Ehrman LLP of San Francisco, California.

Since 1983, in addition to teaching at the Law School, he has designed and conducted in-house training programs at more than 65 law firms, corporate law offices, government agencies, firms of consulting experts, and bar associations across the country. Using the "learning by doing" method, he has presented workshops on deposition, negotiation, motion practice, and trial skills.

In 1991, he co-founded The Hecht Training Group, which brings together a group of attorneys as trainers who each have taught lawyering skills for more than 20 years.

Mr. Hecht has lectured and written extensively for the American Bar Association (ABA), the American Law Institute-American Bar Association (ALI-ABA), the Practising Law Institute (PLI), California Continuing Education of the Bar (CEB), and the National Practice Institute (NPI). In addition, he is a member of the Advisory Board of ALI-ABA In-House CLE and an elected member of the American Law Institute (ALI).

His publications include a book, *Effective Depositions*, 2nd ed. (ABA 2010); two mock case files, *Scoops v. Business-Aide, Inc: A Liability and Damages Case File*, 5th ed. (2009) and *Donna Taylor v. Shape-Up Stores, Inc.: A Damages Case File*, 2nd ed. (with V. O'Brien) (2009); and three multi-media CD-ROMs, *Mastering Motions: Mechanics*

and Techniques (with T. Hallahan) (PLI 1999), *Taking Effective Depositions: Mechanics and Techniques* (PLI 1997), and *Defending Depositions: Mechanics and Techniques* (PLI 1997).

Mr. Hecht is a graduate of Harvard Law School (J.D. cum laude 1973) and Williams College (B.A. magna cum laude 1968).