

I. INTRODUCTION

Litigation often boils down to a battle of the experts. Cross-examination of a defense expert witness is arguably the most challenging and definitely one of the most important tasks of the plaintiff's attorney. A defense expert generally has superior knowledge, education and experience in their field of expertise which makes it difficult to discredit his or her opinions. The stakes are very high as a defense expert's testimony can literally make or break a case. A successful cross-examination of a defense expert can often lead to a successful settlement or jury verdict while an ineffective cross-examination can lead to a low settlement offer or zero verdict.

The purpose of this paper is to outline the steps necessary to prepare for the cross-examination of a defense expert and to offer strategies for the successful cross-examination of a defense expert. The writers have also included some useful forms at the conclusion of this paper.

II. THE THREE P's: PREPARATION, PREPARATION, PREPARATION

The importance of preparation for the cross-examination of a defense expert cannot be overstated. Winging it rarely, if ever, works. Our office puts a great deal of emphasis on preparation before the deposition and trial cross-examination of each defense expert.

Preparation includes securing discovery from the defense experts, learning all there is to know about the defense experts and understanding and commanding the facts and theories of the case.

A. Securing Discovery from Experts

The first step to a successful cross-examination of an expert witness is to secure discovery from the expert witness. In that regard, the following is a thumbnail sketch of the discovery tools available for expert witnesses and how we use them to prepare for the cross-examination of an expert witness.

1. Request for Disclosure

The first tool used to conduct expert discovery is a request for disclosure pursuant to Texas Rule of Civil Procedure ("TRCP") 194. Include a request for disclosure with the service of the petition. Attached hereto in Appendix "A" is a standard form of Request for Disclosure.

TRCP 194.2(f) imposes a duty on the responding party to disclose certain information about its testifying experts; however, under the rules of procedure, a party is required to make a request under TRCP 194 to trigger the duty to designate. The timing of this disclosure is governed by TRCP 195.2, but in practice the timing of expert

designation pursuant to TRCP 194.2(f) is usually governed by the court's Level III discovery control plan (TRCP 190.4).

The disclosures required by TRCP 194.2(f) are as follows:

1. The expert's name, address and telephone number;
2. The subject matter on which the expert will testify;
3. The general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
4. If the expert is retained by, employed by, or otherwise subject to the control of the responding party:
 - a. All documents, tangible things, reports, models or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
 - b. The expert's current resume and bibliography.

There has been little guidance from the courts concerning how much detail must be provided in response to TRCP 194.2(f)(2)-(3) concerning the subject matter of the expert's testimony and the mental impressions and opinions of the expert.¹ In practice, many attorneys do not set forth the general substance of the mental impressions and opinions of the expert and the bases for them in response to a request for disclosure. Instead, only the subject matter on which the expert will testify is disclosed.

Deciding whether to engage in a discovery dispute concerning the sufficiency of the disclosures pursuant to 194.2(f)(2)-(3) is dependent on a number of factors. It is the opinion of the writers that if the other disclosures (*e.g.*, the expert's report) sufficiently summarize the mental impressions and opinions of the expert, then it is not worth the effort to attempt to obtain a more precise disclosure. On the other hand, if the mental impressions and opinions of the expert and the bases for those opinions are not clearly set forth in the disclosures or report, every effort should be utilized to reduce the expert's opinions to written form.

It is vital that the plaintiff's attorney receive all of the information, documents and tangible things required to be disclosed pursuant to TRCP 194.2(f)(4). Each expert's current resume and bibliography must be produced. As discussed below, counsel for the plaintiff will want to thoroughly examine the resume and bibliography for any

¹ The following cases provide some guidance on these issues: *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996); *Lewis v. Western Waste Industries*, 950 S.W.2d 407 (Tex. App.—Houston [1st Dist.] 1997); *West Texas Gathering Co. v. Exxon Corp.*, 837 S.W.2d 764 (Tex. App.—El Paso 1992). **GET WRIT HISTORY / SHEPERDIZE!!!!!!!**

misrepresentations or prior inconsistent statements. Additionally, it is essential to obtain all of the documents, models, tangible things and data compilations prepared by or for, reviewed by, or provided to the expert in anticipation of the expert's testimony. This documentation will assist the plaintiff's attorney in understanding the foundation for the expert's opinions and lead to a more successful cross-examination.

2. Court-Ordered Expert Reports

The rules of procedure do not require an expert to prepare a report. Moreover, the rules of procedure are silent as to the contents of an expert report. TRCP 195.5 provides the mechanism by which one can request a court-ordered expert report. If an expert report has not been produced or a report is produced that is incomplete, it is prudent to motion the court for a court-ordered report pursuant to TRCP 195.5.

According to TRCP 195.5, "If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition."

It is essential to have all of the expert's opinions and the factual bases for them reduced to writing in the form of an expert report. Requiring an expert to reduce his or her opinions to writing prevents the expert from giving a surprise opinion at trial. A written report of an expert outlining his or her opinions is an excellent tool in helping counsel prepare for the expert's deposition or trial cross-examination.

TRCP 195.5 should be utilized when an expert's report is incomplete or conclusory. For example, a motion for court-ordered deposition should be filed when an expert gives the conclusory opinion that "the nurses acted appropriately and within the standard of care on the evening in question." Motions for a court-ordered expert report in this situation will help to ensure that counsel is not caught off guard during cross-examination of the expert.

3. Oral Depositions

TRCP 195.4 provides that counsel may take the oral deposition of testifying experts. Pursuant to TRCP 199.2(b)(5), a notice of oral deposition can include a request for production to the witness. Hence, counsel should include a request for production in the notice of deposition of each expert witness. Requiring the witness to bring material to the deposition that was not included in responses to a request for disclosure is important for cross-examination purposes. Attached hereto in Appendix "B" is a form of notice of oral deposition for an expert witness and provides a comprehensive list of documents that should be requested.

The following is a list of categories of items that should be included in the request for production to the expert prior to his deposition²;

- resume, curriculum vitae, bibliography
- published materials (including books, articles and speeches)
- time records, billing records, diaries
- complete litigation file (including all items reviewed by expert)
- authoritative treatises
- any lists of prior case in which expert has rendered medical opinions (as required to be generated in federal cases)
- certificates, licenses, awards
- models, photographs, other exhibits
- copies of prior depositions and/or trial transcripts (remember that the rules only require that the requested items be in the expert's constructive possession)
- reports and drafts of reports
- notes

4. Disallowed Expert Discovery Tools

TRCP 195.4 states that one can only obtain discovery of expert witnesses through a request for disclosure, an oral deposition, or an expert report generated pursuant to TRCP 195. Therefore, interrogatories, requests for production not included in a notice of deposition, requests for admissions and depositions by written questions are not allowed.

B. Know Your Enemy

Once the basic discovery products have been secured from the expert, the next step is to thoroughly research the background of the expert. Preparing for cross-examination by investigating the expert will assist in mitigating the potentially damaging testimony of the defense expert.

1. Scour the Curriculum Vitae

Professionals, and particularly medical doctors, use their curriculum vitae as a measure of their accomplishments. Often, the curriculum vitae of an expert is riddled with exaggerations concerning his or her accomplishments. If an expert has exaggerated his or her qualifications, the jury may easily infer that the expert has also exaggerated his or her testimony in the case. One should obtain the curriculum vitae of the expert as early as possible during the discovery phase. Each line of the curriculum vitae should be verified for accuracy. Verify the accuracy of the expert's education, licensure, certifications, internships and residencies, etc. The expert should be questioned concerning whether the expert has ever failed any board examinations.

² Note that many of these items should be produced in response to a request for disclosure. Counsel should negotiate that the items requested in the notice of deposition be produced prior to the deposition in order to have ample time to review the items produced.

A standard set of questions should be asked of each expert concerning his or her qualifications. The examiner should elicit testimony that the curriculum vitae is accurate, nothing has been misrepresented, and that the curriculum vitae is representative of the expert's qualifications to give opinions in the lawsuit. After positive testimony has been given by the expert concerning the above questions, the examiner should then point out any discrepancies, inaccuracies and exaggerations contained in the curriculum vitae.

If an expert has a license issued by a state or federal agency, every attempt should be made to obtain information concerning the expert's licensure. One can obtain information about the licensure of various healthcare professionals by contacting the following state licensing boards:

Texas State Board of Medical Examiners

333 Guadalupe Street
Tower 3, Suite 610
Austin, Texas 78701
(512) 305-7010

Texas State Board of Chiropractic Examiners

333 Guadalupe Street
Tower 3, Suite 825
Austin, Texas 78701-3942
(512) 305-6700

Texas State Board of Dental Examiners

333 Guadalupe Street
Tower 3, Suite 800
Austin, Texas 78701
(512) 463-6400

Texas State Board of Nurse Examiners

333 Guadalupe Street
Tower 3, Suite 460
Austin, Texas 78701
(512) 305-7400

Additionally, TrialSmith (www.trialsmith.com) is an excellent source of information on the licensure of healthcare professionals.

2. Research the Expert's Publications

The curriculum vitae of an expert should contain a list of publications authored/co-authored by the expert. Additionally, one can utilize PubMed (www.pubmed.gov) to search for publications by an expert. Any book, article or speech

published by the author should be read for prior inconsistent statements. If applicable, get the expert to concede that he or she has taken a different position in his or her writings. This method of cross-examination can be extremely devastating to the expert's credibility.

To impeach on a prior inconsistent statement, such as those found in the expert's published material, the examiner must inform the witness of the content of the statement, the time and the place where the statement was made and the person to whom the statement was made. Tex. R. Evid. 613(a); See *Downen v. Texas Gulf Shrimp Co.*, 846 S.W.2d 506, 510 (Tex. App.—Corpus Christi 1993, writ denied). Then the witness must be given the opportunity to deny or explain the statement. If the witness unequivocally admits making the statement, then extrinsic evidence of the statement is not allowed. *Novey v. Employees Cas. Co.*, 536 S.W.2d 101, 105 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

3. Research Prior Depositions

An exhaustive search for an expert's previous deposition and trial transcripts should be conducted. There are numerous firms specializing in retrieving this information. Trialsmith (www.trialsmith.com) has a database of expert depositions. Posting a query on the TTLA listserver for expert depositions and other useful expert information is another excellent way to obtain information about defense experts.

Read the depositions of defense experts prior to cross-examination for prior inconsistent statements. Utilize these statement to attack the expert's credibility.

4. Other Sources of Information

Perform a Google (www.google.com) search of the expert to see what information can be obtained about an expert. Lexis Nexis and Westlaw both have public records search engines. Go to the hospital website where an expert practices or teaches to search for information about an expert that might be relevant to the lawsuit. Perform a criminal background check of the expert. The point is to thoroughly research as many sources as possible to determine if there are any skeletons in the closet that would be useful for cross-examination.

5. Discover all of the Expert's biases

The bias of each expert should be fully explored during the discovery phase of the trial. Obtain all of the billing, and time records of the expert. During the deposition, elicit testimony concerning the amount that he or she has charged or will charge for reviewing the records, writing each report, attending a deposition, attending the trial and any other potential charges. Ascertain what percentage of the expert's income is derived from testifying or reviewing cases as defense experts often derive a significant percentage of their income acting as consultants/experts. During the deposition, ask how often the expert examines records and testifies at depositions or trial.

Additionally, expose any "defense" bias during the expert's deposition. Ask how often the expert has been retained by the defense attorney or his firm. Learn how many times the expert has reviewed cases for defense firms and/or insurance companies. Question the expert concerning the number of times he or she has been hired by a plaintiff, how many times he or she has given a report, deposition or trial testimony for a plaintiff, what percentage of the expert's work as an expert is for the plaintiff and defense respectively.

If there is complete discovery of the expert's biases during the pretrial phase of a lawsuit, then plaintiff's counsel can often use this information during cross-examination at trial. Jury members will be interested in knowing the expert's financial reward for participating in the litigation. If there is a pattern of bias for the defense, cross-examination on this issue has the potential to discredit the witness. On the other hand, do not cross-examine an expert on bias live at trial without knowing the outcome. The last thing you want to find out at trial is that the expert charges a modest fee and that this case is his or her first case testifying as an expert. Also, be leary of cross-examination on financial bias if the plaintiff's expert charges more than the defense expert as financial bias is a double-edged sword.

Texas Rule of Evidence 613(b) governs impeachment of a witness concerning bias. To impeach a witness concerning bias by proof of circumstances or statements showing bias, the circumstances supporting the claim of bias or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or to deny such circumstances or statement. If the witness unequivocally admits the bias, extrinsic evidence shall not be admitted.

6. Explore the Expert's Qualifications

Texas Rule of Evidence 702 governs the admissibility of expert opinions. According to Rule 702, "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." The trial court acts as a gatekeeper and has discretion to determine the admissibility of expert opinion.³

As a very general rule, the following factors are utilized to determine the legal competency to testify as an expert witness:

- the extent to which the expert's theory has been tested

³ The following cases are the five most important cases concerning admissibility of expert testimony: *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *E.S. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997); *Kumho Tire co., ltd. v. Carmichael*, 526 U.S. 137 (1999); and *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998).

- the degree to which the technique depends upon the subjective interpretation of the expert
- whether the theory has been subjected to peer review or publication
- the potential rate of error
- whether the technique has been generally accepted in the relevant scientific community
- the non-judicial uses which have been made of the technique or theory
- whether the foundational data underlying opinion testimony are unreliable
- whether the expert draws conclusions from data based on flawed methodology

Prior to deposing an expert, one should conduct research concerning the applicability of the foregoing factors. A good source of information is the Plaintiff's expert. Have a conference with the plaintiff's expert to get ideas on areas in which the expert's qualifications might be vulnerable to attack. Address all applicable factors during the expert's deposition.

As a general rule, the trial court will normally allow expert testimony and hold that evidence of lack of qualification or reliability goes to the weight of the evidence. In this regard, the attorney should focus on the weakest of the factors. For example, in a recent medical malpractice case, a local physician acting as an expert for a local defendant doctor testified that 95% of all twins in El Paso were delivered by cesarean section. This testimony was potentially devastating to the plaintiff's case because the plaintiff had chosen to deliver her twins vaginally. We were able to elicit through cross-examination at the expert's deposition that he had not used any math to arrive at his conclusions, had no documentation to support his opinion and merely guessed at the 95% number by eyeballing the delivery sheets of local hospitals. The case eventually settled before trial.