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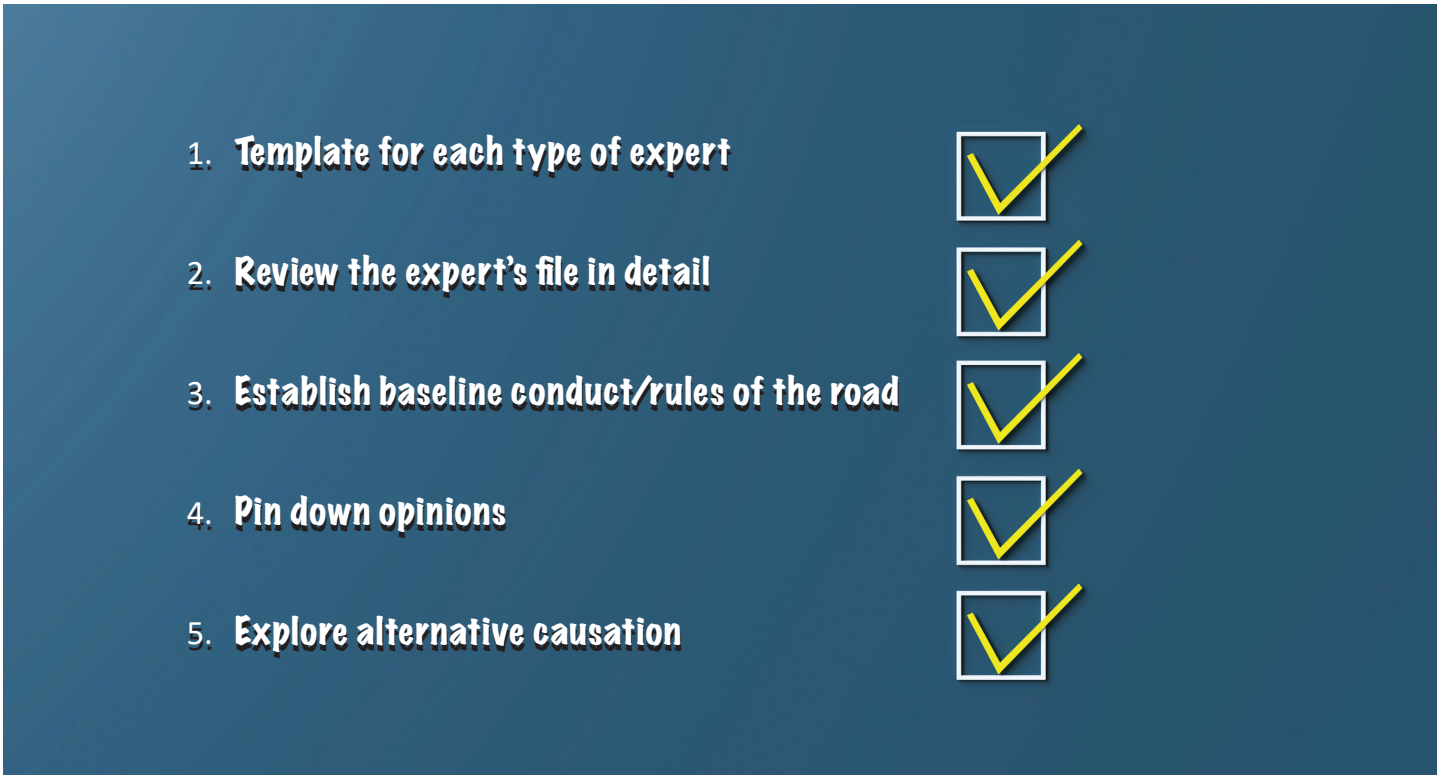

Back to the basics of expert depositions

CREATE A DEPOSITION TEMPLATE FOR EACH TYPE OF PROFESSIONAL YOU WILL LIKELY DEPOSE AND LET IT BE YOUR GUIDE AS YOU EXPLORE THE EXPERT'S CASE FILE

As a new lawyer, I had a hard time finding articles and information on taking expert depositions written for those who, like me, did not have a clue what they were doing. Over time I got the hang of things, but I am still close enough to the days of my first expert depositions that I wanted to write an article focused on the little things that many experienced lawyers forget they even need to explain. I hope newer lawyers will find value in the methods of my madness and more experienced lawyers will take at least something away from my approach.

Create a template outline

Create a template outline for medical experts, treating doctors, technical experts, and any other type of "expert" you encounter, like officers and accountants or other professionals you depose frequently. This way, you do not start out with a blank page every time, especially when there is so much commonality between the various experts. A blank page is menacing, but if you have a template to work from, writing your outline will go faster and the creativity will come naturally. You will also make sure you never forget a topic and it will cut down your outline time by twenty percent. Do not forget to update your template outlines from time to time as you learn new tricks. It takes time to create template outlines, but it pays dividends.

Go over the contents of their entire file in detail

I know this sounds basic, but it is important. The two types of files produced are those compiled by the defense attorney and those prepared by the expert themselves. If the attorney prepared it, it may differ from the file the expert actually worked from. Going over the items in a file is also a great time to find out what documents you requested that were not produced. I like to ask experts whether they prepared the produced file or the attorney did. I ask if they read the document production request and what responsive documents they did and did not have. You can really dig into documents being hidden like bills, communications or articles the expert relied upon. Make sure to follow up with the defense lawyer to get documents that were not produced and reserve your right to re-depose the doctor if they failed to produce responsive documents that they know they should have sent over.

This is also a great opportunity to go over when they received the various items in the file. Find out whether the doctor received the medical records before or after their DME report was drafted. Ask what they received after the DME report was issued and how those documents

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changed their opinions. They will not admit it did, but that creates fertile ground for cross-examination if, for example, they received an imaging study or treating doctor deposition after the DME report was completed.

Experts rarely produce the radiology images in their file and it is important to ask whether they looked at the images themselves. If all they looked at was the image report, that is *Sanchez* hearsay, which will give you some room to either limit their testimony in limine or hack away at their credibility on cross-examination.

You can also ask what documents they did or did not consider. Lazy attorneys love to just put everything under the sun in the file and let the doctor sort out what they need, but the doctor can be asked about anything they received even if they did not review it, so if, for example, there are discovery responses from the defendant that contradict the doctor's testimony, that is good material for examination.

Going over the file will also give you a chance to discuss their Rule 26 disclosure or what documents they may have to keep track of who has hired them and what side they work for. "I don't keep track" is an evasive answer that they should not get away with. They may not keep track in their head, but surely they have records of their active and closed cases and who they worked for. Experts have to run conflict checks so they should have some sort of system to keep track of the plaintiffs, patients, insurance companies, and lawyers that they work with. All documents evidencing who has retained them in the past should be responsive to at least one of your document requests. If you push, you may get information on documents that the doctor did not produce because he or she really did not want to produce them.

Lastly, ask the doctor if they have a template (a/k/a "boilerplate") they use for the DME reports. You should include that in your document request and you might just get lucky. The doctors likely use some type of template that contains, at a minimum, the headers and measurements they take. In a case Tom Feher and I tried, the doctor admitted he used a template for his reports. You can tell because if you compare some of his reports, he uses identical language in the conclusion section saying our client just had sprains and strains. It looks bad in front of a jury if the doctor uses a template saying the client is not injured.

Start with generalities and get more specific

I like to start with what I call "rules." This concept is ripped straight from the legendary Rick Friedman and his book "Rules of the Road." I always get accused by ignorant defense lawyers of this being "improper Reptile questions," whatever that means, but I am thrilled every time when I get to say that they are actually "Rules of the Road" type questions and they should read these books to understand what they are saying if they want to throw around accusations. Given that reading the textbooks of our craft is not eligible for billable hours, I do not anticipate that happening any time soon.

On the other hand, our success is strictly results-orientated, so I highly suggest reading his book to understand the concept better, but the idea is that you can start with generally accepted concepts the doctors have to agree with and then later apply them to the case when the rules they just agreed to contradict their opinions.

This technique is great for more than just expert depositions and it is very simple to use. Mix in both leading and open-ended questions for the best results. Some examples of questions include asking if the doctor agrees that MRIs will not show trauma after five weeks or so when they are typically taken, that they would never make a surgery recommendation solely on an MRI because surgery is done to alleviate symptoms and surgery is not a good idea if an injury is asymptomatic, that asymptomatic conditions can be made symptomatic by trauma like a car crash, or that it is possible to have an MRI that does not show brain damage but still have a traumatic brain injury.

Once you have established baseline conduct and the rules of the game, you can go over how their opinions contradict them. If the doctor or expert disagrees with a basic rule or generally accepted opinion in the medical community, you have just created a great point for cross-examination and have found an issue you can likely get other defense experts to disagree with that doctor on.

Bias

If you can establish that an expert is biased, nothing else they say matters. That's why my dad likes to start his expert depositions, and usually his trial cross-examinations, with bias. Tom Feher starts his expert depositions with, "You can agree that you are not biased at all based on who is paying your bill in this case, right?" Obviously, they are and their first answer out of the gate is a lie. They know they will not keep getting hired if they continually give unfavorable opinions and this mind trick is genuinely fun to play. You can stay on this topic and ask something like, "You have never ever testified that a rear-end collision caused the need for surgery, right? Every time you gave that exact same opinion, that was an unbiased opinion completely unaffected by who hired you or how much money you make testifying for defendants, correct?" An entire article could be written on bias, but this is a fun take on a classic topic.

Kennemur objection: the juice may not be worth the squeeze

Imagine you are in trial, and a defense expert just testified on cross that the plaintiff's doctor committed malpractice in performing the surgery. In their deposition, the doctor said the surgery was unnecessary. Is that a violation of *Kennemur*? It sure sounds like it, but there is an argument to be made that those are the same thing. You object and the judge calls for a side bar and asks the defense attorney to show him where it says that in the deposition. You had all

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this momentum, you were crushing the defense expert and now you are stuck in five minutes of silence while the defense lawyer slowly reviews the deposition transcript with the jury waiting and the witness thinking about what to say next. If you are lucky, the objection is sustained, the testimony is struck (because you asked that it be) and you move on.

Even if the objection is sustained, the cost might not be worth it. The jury has no idea what just happened, the defense lawyer and their expert just scored some points with the improper testimony and the sidebar took the wind out of your sails. The testimony is out there, even if struck, and you just got bogged down and had to start all over. There are certainly benefits to having that testimony stricken but the juice is not always worth the squeeze.

The trial judge usually does not read all the expert depositions in advance of the testimony and it will always take time to prove the absence of something in a deposition. It is not the protection you need it to be because it is a momentum killer that drains time and energy. Think long and hard about *Kennemur* objections in trial because its practical protections are not quite what they should be.

Get real

Lawyers have a tendency to try to talk like lawyers and construct sentences in a way that looks good on a transcript as opposed to having a conversation with the expert. There is merit in that tactic, but not always. Sometimes doing things just because you see others do it makes you feel comfortable and getting outside that comfort zone can feel awkward. That awkward zone is often when you get your best questions out. This is a deposition, not trial, and you have the freedom to experiment a little bit. Do not worry about sounding stupid or getting belittled by a Defense lawyer. Sometimes you need to get experimental.

For example, ask if the expert would ever allow their kids to use a subject walkway. Ask if they would ever build their house without a handrail. Ask if they would believe that an accident did not cause their injury if they were the one that got hit and some doctor that does 99% defense work said their pain was caused by natural degeneration only. Ask if they would make life-or-death medical decisions based on their testimony. Ask if they are calling your client a liar when they say, "the objective evidence does not match up with the subjective complaints."

These questions may be objectionable at trial but see what happens in deposition. Also, do not let the doctors get away with clever phrasing to avoid saying what they really mean. Call these doctors out on what they are really saying and do it in a way that sounds conversational. These are all questions that do not necessarily need answers to be effective and there is so much power in speaking the truth in ordinary language compared to tricky doctors using medical terminology to disguise what everyone knows they are actually saying. The contrast is beautiful and a deposition is a good time to take those risks with questions you are unlikely to ask for the first time in trial.

Pin them down

The typical advice given to new lawyers taking their first few expert depositions is always to "pin down the expert on their opinions." This is very sound advice and that is the main objective of an expert deposition, but I have a slightly different way to look at it. What you want to really do is pin down *the defense lawyer* to their own expert's opinions. Once the deposition is over, the defense expert is locked into their opinions. The defense lawyer has no choice but to adopt those opinions and stake their own credibility on their expert's opinions.

For example, if a defense expert testifies that your client is a malingerer and is exaggerating all her injuries or lying for money, that defense lawyer will have to adopt that opinion or risk contradicting their own expert. If that opinion is baseless and offensive, the defense lawyer will have to repeat that baseless offensive opinion when opening, during crosses, during directs, and again in closing. As a result, the defense lawyer's credibility has been staked to their own expert and if the jury is offended by the opinion and finds it to be dishonest, they will not trust anything the defense lawyer says, or at the very least, their credibility will be diminished. Credibility is everything at trial.

Credibility is so important because jurors have a hard time evaluating damages. If a jury has believed every single word the plaintiff's attorney said during trial and does not believe anything the defense lawyer says, it is much more likely to award the damages suggested by the plaintiff's lawyer and will look at the defense's number, if they give one, as offensive and off base.

When preparing your outline, remember that every opinion the defense expert gives is an opinion the defense lawyer will have to adopt. By pinning the expert down, you are really pinning the lawyer down and forcing them to adopt the offensive opinion. Ask questions with that concept in mind. When you prepare for the expert's deposition, identify the opinions you see as most lacking in credibility or most likely to offend ordinary people and pick at those opinions like a scab. Be relentless and explore those offensive opinions like you aren't paying $2,000 an hour to learn them.

Alternative causation

Alternative causation is one of my favorite defenses to hack away at and I almost always make a motion in limine on it. The concept here is that defense attorneys will try to say that the injury was caused by some other event and not the collision. They will hint and insinuate at a million other things that could have caused the injury, but they will not be able to prove any of it. However, just that insinuation can be dangerous and it should be prevented in limine for good reason.

The common example is in back- or neck-injury cases, particularly if your

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client has a physically demanding job. Let's say your client is a warehouse worker and the defense is that the client's back injury was caused by "degeneration." The defense lawyer will ask your client how often they bend and stoop, how often they lift heavy boxes, how often they are on their feet in a given day, etc.

The lawyers will offer a million examples of things that may have worn down the plaintiff's discs and caused injury, but they have one huge problem – their expert will never testify that any of those activities caused the injury because they cannot say that to a reasonable degree of medical probability.

A doctor medically cannot point to any one of those specific activities as the cause of the need for surgery and will just speak more broadly about wear and tear, but if none of those events are the cause for the need for surgery, the defense lawyer cannot insinuate that they are without evidence.

When you take the deposition of their orthopedic surgeon, you ask if they can say to a reasonable degree of medical probability if X activity caused the plaintiff's need for surgery. Go through a whole list and then go through it generally. For example, ask, "Can you state to a reasonable degree of medical probability that the plaintiff's need for surgery was caused by their job working at the warehouse?"

If they say yes, you can attack that expert with their total lack of supporting facts and how little they actually know about your client's job. Unless your client has a prior worker's compensation claim for a back injury, ask when they injured their back, how it happened, what was the mechanism of injury, what they know about the job and whatever else you can think of to show that the doctor cannot point to any specific event as the cause of the degeneration and knows next to nothing about these supposed events in the Plaintiff's life that accelerated the degeneration. They may testify that it all contributed to the degeneration but the jury will get the point that the doctor is just making baseless generalizations without any concrete evidence to back it up.

Occasionally you can even get a doctor to say some prior incident did not cause the need for surgery. If your client has a prior car crash and got better, ask the doctor if they can say to a reasonable degree of medical probability (not certainty!) that the prior crash caused the need for the current treatment.

If they say yes, then you can explain the absurdity to the jury that a prior crash can cause the need for surgery but the current crash could never cause injury. If they say no, you can move in limine to exclude that prior crash altogether. If they say it made the client susceptible, you are good to go as well. Less experienced experts are prone to making the mistake of saying that the job or alternative causation event made your client susceptible to injury, which is perfect because the defendant is still liable for that. Not all doctors understand the significance of that opinion. If they feel cornered, they may see this mistake as a way out.

Once you have all this testimony that the expert cannot say to a reasonable degree of medical probability that X activity specifically caused the need for surgery or treatment, you can use that to make a motion to exclude "alternative causation" as I call it. You can preclude the defense lawyer from arguing anything other than just general "degeneration" caused the injury because it is fundamentally unfair to allow a defense lawyer to say all these things caused the injury with no facts or evidence to support it and no expert testimony to back it up. Once the defense lawyer cannot say work or running or even a prior car crash caused the need for treatment, their degeneration theory lacks a punch and you can crush them in closing for putting forward this dishonest theory with no evidence to back it up.

Go through the C.C.P. section 2034 designation testimony description

During the deposition, show the doctor the section 2034 designation language and ask if they intend to or are qualified to opine on the items described. Ask if they will not be testifying to any of the described areas of testimony. For example, this comes up often in cases with a doctor and a billing expert. Defense lawyers frequently state that the doctor will be testifying to the reasonable value of the medical bills but really the defense has a billing expert. You can explore this topic to see if their numbers differ, but keep an eye towards a motion in limine to prevent the duplicative testimony.

Conclusion

Overall, the more expert depositions you take, the better you will get. Refine your outline, think ahead to making motions in limine and discover the truth about what is going on to find your strong points. Find ways to pit defense experts against each other with contradicting opinions. Get creative and take risks. If anyone ever wants to go over their outline with me or just talk strategy, you know where to find me and I will always make myself available. The truth is on your side, and I truly believe jurors see the truth at the end of the day. Expert depositions should be the most fun part of our job and I hope you all enjoy the thrill of crushing an expert as much as I do.

Dylan Dordick graduated Cum Laude from UC Hastings in San Francisco where he was a member of the school's trial advocacy competition team and the president of Homeless Legal Services earning the Outstanding Achievement in Pro Bono, a distinction awarded to students who completed over 150 hours of pro bono work. After clerking for the Law Office of Chris Dolan, he went on to work at the Simon Law Group where he promptly lost his first trial in spectacular fashion. Since then, he has joined his family's law firm, Dordick Law Corporation. Dylan is a former professional brewer in Santa Barbara and he enjoys spending time with his Dachshund Kiwi and his wife Taylor, who he met in law school.