Trial Practice: Does It Really Make Sense to Take the Deposition of Your Opponent's Expert Witness?

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For most trial lawyers, it is a knee-jerk reaction to schedule and take the deposition of the opposing expert witnesses. Indeed, it is rare for trial lawyers to go to trial without first having taken the depositions of the other side's experts. Too often there is little or no consideration of whether or not it really makes sense to take the expert's deposition. Such consideration should be made in every case. If the trial lawyer engages in such a critical examination, it is suggested that more times than not he or she will conclude that it is not advantageous to take the expert's deposition.

In both state and federal courts in Virginia, full disclosure of an expert's opinions and supporting reasons thereof is required by the discovery rules. Indeed, failure to properly disclose an opinion will result in the expert being excluded from giving such testimony at trial. See e.g., John Crane, Inc. v. Jones, 274 Va. 581, 650 S.E. 2nd 851 (2007). Consequently, it often is much easier at trial to limit the opposing expert's permissible testimony to within the four corners of his or her expert designation than it is to do so with a several hundred page deposition in which the expert likely dodged or hedged his or her responses to most questions.

In so many cases, the opposing experts are known commodities, whose testimonies have been recorded in numerous prior cases. Gaining access to such prior transcripts is relatively easy thanks to the numerous expert witness databases and practitioner listserves. Such transcripts typically contain fodder for effective cross-examination at trial.

There are considerable reasons not to take the expert's deposition:

1. The costs of expert depositions are often ridiculously high, with some experts charging thousands of dollars per hour for the privilege of evading questions at such deposition.

2. The deposition provides opposing counsel the opportunity to prepare the expert, which only makes the expert better equipped to testify at trial.

3. The element of surprise at trial is often eliminated or dissipated once the expert experiences questioning by the opposing lawyer at the deposition.

4. The resources saved from foregoing the deposition may be much better utilized, such as by conducting a focus group or developing trial exhibits.

While there are certainly situations in which taking the deposition of the opposing expert is necessary, most notably to set up a motion to exclude, in many cases it may be advisable to refrain from taking the deposition. In every case, the trial lawyer should ask himself or herself: "Does it really make sense to take the deposition of my opponent's expert?" It is suggested that the answer to this question more times than not will be "No".

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