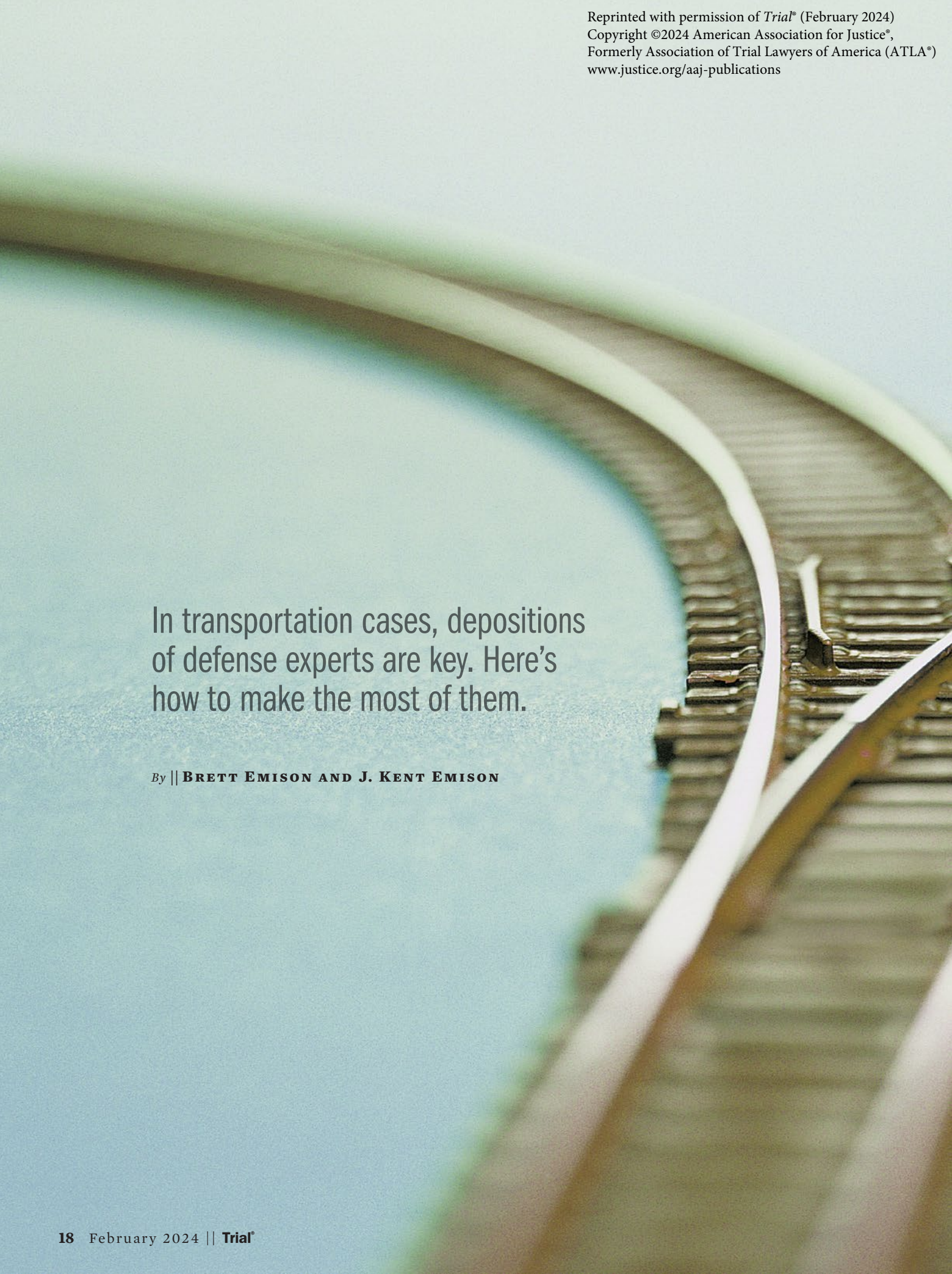
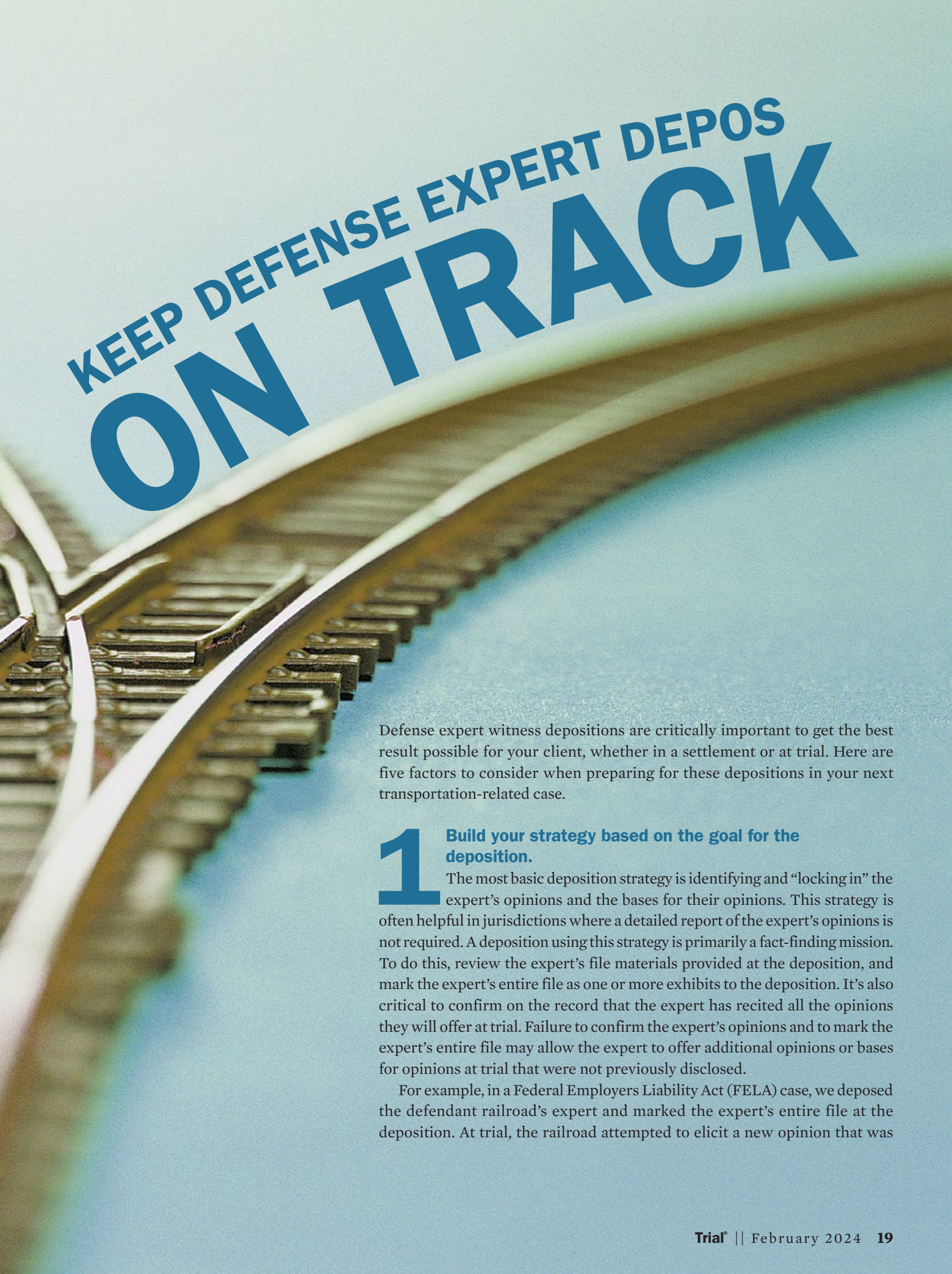


In transportation cases, depositions of defense experts are key. Here's how to make the most of them.

By || **Brett Emison and J. Kent Emison**



KEEP DEFENSE EXPERT DEPOS ON TRACK

Defense expert witness depositions are critically important to get the best result possible for your client, whether in a settlement or at trial. Here are five factors to consider when preparing for these depositions in your next transportation-related case.

1 Build your strategy based on the goal for the deposition.

The most basic deposition strategy is identifying and "locking in" the expert's opinions and the bases for their opinions. This strategy is often helpful in jurisdictions where a detailed report of the expert's opinions is not required. A deposition using this strategy is primarily a fact-finding mission. To do this, review the expert's file materials provided at the deposition, and mark the expert's entire file as one or more exhibits to the deposition. It's also critical to confirm on the record that the expert has recited all the opinions they will offer at trial. Failure to confirm the expert's opinions and to mark the expert's entire file may allow the expert to offer additional opinions or bases for opinions at trial that were not previously disclosed.

For example, in a Federal Employers Liability Act (FELA) case, we deposed the defendant railroad's expert and marked the expert's entire file at the deposition. At trial, the railroad attempted to elicit a new opinion that was

not disclosed at the deposition because it claimed the opinion was supported by material in the expert's file. Because we had marked the expert's entire file at deposition, we could show that the material was not included, and the new opinion was excluded.

Focus on cross-examination. Another strategy is to set up the defense expert for cross-examination at trial. For example, you can establish "rules" for your case that you can later use at trial. We use focus groups to determine the rules for the case that the defense expert must agree with—and if they do not agree, it will undermine their credibility. In transportation cases, these rules might include the following:

- A driver must operate their vehicle carefully at all times.
- A driver must do everything they can to prevent striking a pedestrian or another vehicle.
- A commercial driver must keep accurate driving records.
- A railroad engineer must always take the safe course of action.

Also plan for areas of testimony that you can use for targeted cross-examination. We frequently use this strategy for defense medical experts. In the FELA case, we represented an injured railroad engineer whom the defendant's medical expert examined before the expert's deposition. Rather than debate the physician on the medicine, we focused on how the physician evaluated our client's injuries. At the deposition, we confirmed the defense expert did not physically examine our client. We also verified what medical records the expert reviewed and how long it took to review them.

Then, on cross-examination at trial, we used the deposition to undermine the expert's credibility. He was forced to admit that physical examinations were critical in his private medical practice when evaluating his patients for treatment. Yet, he conceded that he had never seen our client in person before entering the courtroom.

We also forced the expert to concede that his medical record review was insufficient—he had allotted himself an average of five seconds of review per page of medical records. Ultimately, the expert admitted that he skimmed many of the medical records. Through this cross-examination, we effectively undercut the railroad's position that our client had exaggerated his injuries.

Limit or exclude opinions. A third deposition strategy is to establish the foundation for limiting or excluding the opposing expert's opinions. Federal Rule of Evidence 702, which governs expert opinions, "has three major requirements: (1) the proffered witness must be an expert; (2) the expert must testify about matters requiring scientific, technical or specialized knowledge; and (3) the expert's testimony must assist the trier of fact."[1] In assessing the second factor, the expert's testimony is admissible only if "the process or technique the expert used in formulating the opinion is reliable."[2]

In Illinois, for example, expert opinion as to vehicle speed is generally inadmissible if eyewitnesses are available to testify to this because such testimony would not aid the jury in determining the vehicle's speed.[3] Or in crashworthiness cases, an expert's testimony may be limited or excluded if the plaintiff's attorney can show the expert used inadequate or inappropriate testing.

Keep in mind that these strategies are not mutually exclusive. You can and should combine these strategies and always lock in the expert's opinions in every expert deposition.

2 Prepare, prepare, prepare.

Any effective deposition begins with thorough preparation, which should include the following actions.

Research the opposing expert. When preparing to depose an expert for the first time, we engage an expert witness "profile" service to provide complete background information about the expert.[4] These services also can provide a snapshot of an expert's testimonial history— when the expert's name is found in pleadings, orders, opinions, transcripts, and more. They also supply information on when and where an expert has been challenged under *Daubert* or their testimony has been challenged, limited, or stricken by a court. Expert profile reports typically cost about $500—order one as soon as you designate an expert.

The expert's report and file materials. In federal court and in some states, the expert is required to submit a detailed report that includes "a complete statement of all opinions the witness will express and the basis and reasons for them" along with "the facts or data considered by the witness" in forming their opinions and "any exhibits that will be used to summarize or support them."[5]

But always check your jurisdiction's rules, because in some states, these detailed reports are not required. In Missouri, for example, "a party may discover by deposition the facts and opinions to which the expert is expected to testify."[6] However, except for basic information such as the expert's name, curriculum vitae, and a brief description of "the general nature of the subject matter on which the expert is expected to testify,"[7] no written report is required before the expert is deposed.

If a thorough expert report is provided, review it carefully as soon as you receive

it. In most states, the expert's report locks in the expert's testimony.[8] If the report can be viewed as favorable to your client, you may decide against deposing the expert to prevent the expert from attempting to walk back important concessions against your opponent or admissions favorable to your client.

Discovery should always include a request for the expert's entire file materials. Some jurisdictions limit the discovery of the expert's file to those materials the expert relied on in formulating their opinions. Federal Rule of Civil Procedure (FRCP) 26(b)(4)(C), for example, now expressly protects draft expert reports and communications between experts and attorneys as work product.

Other jurisdictions, such as Missouri, allow for the discovery of any materials provided to an expert by the attorney once they have been disclosed as a testifying expert.[9] The Missouri rule allows for the discovery of materials whether or not the expert relied on that material in forming their opinion. Attorneys should try to obtain an agreement from opposing counsel to produce the expert's file materials with sufficient time before the deposition (such as one week) to allow for an adequate review.

These materials are a critical piece of the puzzle. For example, if the expert is offered to testify as to the design of a product, you need to know what materials—including design documents, failure mode analysis, testing, and others—the expert reviewed. Did the defendant provide *all* available documents to the expert, or did the defendant cherry-pick only the best documents?

You also should closely review every third-party study the opposing expert relied on. First, determine whether the study identified in the expert's report is peer reviewed. Studies that are not peer reviewed are less reliable than those that are.[10] Second, determine whether the study's conclusions are statistically significant.[11] Findings that are not statistically significant are less reliable than those that are.

Third, determine whether the studies the opposing expert relied on contain information beneficial to the defendant or that may undermine the opposing expert's reliance on the study. A study may identify other studies that obtained opposite results, include language describing the study's limitations, or include a conflict-of-interest statement showing the study was funded by the defendant.

Prior reports and testimony. The opposing expert's prior reports can provide a wealth of information, including a preview of the expert's conclusions and analysis, and may expose the expert's strengths and weaknesses.[12] Compare and contrast them with those provided in the current case and look for inconsistencies in the expert's opinion testimony in similar cases.

Next, decide how best to use the prior testimony. For example, do you use the testimony to impeach the witness in the deposition, or should you hold the prior testimony for use at trial? The answer will depend on the circumstances of your case and the witness being deposed. You could choose not to use the prior testimony at the deposition but ask questions that can be used as a foundation to cross-examine or impeach the witness at trial. If the prior testimony may be outcome-determinative in your case, however, use it during the deposition to help get a favorable resolution.

For example, our firm represented the family of a driver who was killed when a freight train crashed into his vehicle at a railroad crossing. Before the collision, the railroad engineer turned off the train's horn because the railroad contended the crossing was private rather than public. The issue was

DISCOVERY SHOULD ALWAYS INCLUDE A REQUEST FOR THE EXPERT'S ENTIRE FILE MATERIALS.

whether the engineer was negligent in turning off the train's horn even though federal regulations may have allowed him to do so. We had deposed the railroad's expert witness in a previous case, when they testified that "the number one thing an engineer needs to do is warn the public because he does not have the ability to stop quickly." We used the expert's prior testimony to lock in the fact that the engineer violated the "number one" rule to provide a warning to approaching motorists.

When using prior testimony at a deposition, you must prepare to show it to the expert. The use of prior testimony will vary depending on the requirements of your jurisdiction. In federal court, and in states that mirror the federal rules, FRCP 32 addresses the admissibility of prior testimony. While there are foundation requirements for using prior sworn testimony, generally, such testimony always may be used "to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the . . . rules of evidence."[13] When impeaching a witness, most courts require that the witness be presented with the prior testimony before asking the witness about their previous testimony.[14]

Daubert *challenges and rulings.* If there have been previous limitations or exclusions of the expert's opinions, you may try to accomplish the same in your client's case. Prior *Daubert* challenges and rulings can provide a road map for how to do so at the deposition. If the expert submitted a report, that will describe the expert's methodology, which may provide a basis to challenge the expert's reliability under *Daubert* or another applicable expert witness standard.

Alternatively, you may discover that *Daubert* challenges like those brought in the current litigation have not been successful. In that circumstance, you may opt for a different strategy focused on finding ways to undermine the expert's credibility with the jury.

Consult with your experts. Preparation for deposing an opposing expert should always include consulting with your own expert witnesses. They will have reviewed necessary factual and scientific evidence involving the claim and likely will have completed their own report already. Your expert should be able to identify potential weaknesses in your client's case as well as in the defendant's case. They can identify deficiencies in the opposing expert's methodology or the evidence they have relied on, and they may be able to craft questions to use during the opposing expert's deposition.

List the points you want to make. Have a short list summarizing the points you want to make that you can refer to during the deposition. While a thorough deposition outline is essential, you will invariably need to go "off script" and ask questions when you have the best chance to get a favorable answer. The timing of when to make a point with the expert is subjective and a matter of knowing your case and the flow of the deposition.

The first hour, or the time before the first break, is what we refer to as the "golden hour." Some of the best testimony comes before the first break, so maximize this time. The purpose of the defense expert's testimony is to help the defense win the case. Even with effective pretrial preparation, defense experts may provide candid answers during the first hour of deposition before there is any opportunity for the defense lawyer to coach or unfairly prejudice the expert (also referred to as "woodshedding"), which makes it more challenging to get honest or straightforward answers to your questions.

IF THE EXPERT'S PRIOR TESTIMONY MAY BE OUTCOME-DETERMINATIVE, USE IT DURING THE DEPOSITION RATHER THAN WAITING FOR TRIAL.

JOHN KNILL/GETTY IMAGES

3 When should you depose the opposing expert?

Depositions of opposing experts should be conducted after all necessary fact discovery is complete, corporate representative depositions have been taken, and you have produced your experts. Fact witnesses and corporate testimony can provide critical insight for deposing opposing experts.

For example, in a case involving a fuel-fed vehicle fire, we deposed multiple on-scene fact witnesses, including the fire chief, who testified that gasoline fed the vehicle fire and that the fire's characteristics were consistent with a gasoline-fed fire. The defendant's fire cause and origin expert opined that the fire was fed by a source other than gasoline.

After locking in the expert's opinions at deposition, we were able to effectively cross-examine him at trial. We created a chart of the eyewitness testimony identifying the vehicle fire as gasoline-fed. We then forced the expert to disagree with every eyewitness regarding the cause and origin of the fire and admit that he was the only witness who disagreed that the fire was gasoline-fed and the only witness who was not present at the scene.

4 Should the deposition be conducted remotely or in person?

Opinions vary widely on whether to do depositions in person or remotely. If you have not done a deposition remotely, don't start with a critical witness. Remote depositions are effective for expert depositions when the expert has completed a report, and questioning experts with exhibits is efficient and easy if you have someone trained to help you display and work with exhibits.

You must have the expert report and complete file well in advance of a remote deposition, and you must identify the expert's entire file. One way to do this is to take a screenshot of the expert's electronic file and mark it as an exhibit to confirm you have the complete file.

Occasionally, new material (file material or new opinions) will be presented at a remote deposition. One option is to have a stipulation that if new material is produced at the deposition, you will have an opportunity to depose the expert at a later date on that material, and then make a record of the need for another deposition.

If you depose remotely, be wary of the defense lawyer being in the same room as the witness if there is no camera on the lawyer. Get a stipulation that the lawyer will be in a different room from the witness, and have a camera on the defense lawyer to ensure no communication is happening.

5 Make exhibits stand out.

If the expert's report and file materials are provided in advance, review them for potential deposition exhibits as soon as possible. Also review factual evidence relevant to the expert's opinion, such as the crash report and medical records.

If witness testimony is critical to the expert's opinion, it may be beneficial to use the video of the witness's deposition testimony rather than the transcript when questioning the expert. When using video deposition testimony with an expert, mark a copy of the entire deposition and identify the page and line number of the testimony.

Make sure to send any exhibits you plan to use to the court reporter before the deposition so that a hard copy will be available for the witness. This will eliminate objections that the witness did not have an adequate opportunity to review the entire exhibit. There is no requirement (absent a stipulation) to provide the exhibits to the defense lawyer or witness before or when the deposition begins.

Whether the deposition is in person or remote, be prepared to focus the attention of the witness and the jury at trial on the part of the exhibit you want to emphasize. For example, with a document such as an incident report, highlight the portion of the report you want the expert to reference, and create a demonstrative version of the exhibit with a "pop-out" where the highlighted language is easy to find. This makes it easy to focus the expert's attention on the important portion of the document and to focus the jury's attention on that portion of the exhibit at trial.

With effective preparation of digital exhibits, you also can have an assistant highlight and call out relevant information in an exhibit in real time. While this might slow the pace of the deposition, it can capture the jury's attention if the deposition video is played at trial.

Deposing an opposing expert witness can be a turning point toward a favorable resolution for your client. Thorough preparation and a focused strategy allow trial lawyers to maximize the effectiveness of the defense expert deposition.

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Notes

1. *Kannankeril v. Terminix Intern., Inc.*, 128 F.3d 802, 806 (3d Cir. 1997).
2. *Id.* (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)). Keep in mind that the requirements for the admissibility of expert testimony vary by jurisdiction.

3. *See, e.g.*, *Coffey v. Hancock*, 461 N.E.2d 64, 69 (Ill. App. Ct. 1984).
4. One such service is Expert Witness Profiler, https://expertwitnessprofiler.com/.
5. Fed. R. Civ. P. 26(a)(2)(B)(i–iii). *See, e.g.*, Ill. Sup. Ct. R. 213(f)(3); 16 Ariz. R. Civ. P. 26.1(d)(4); Cal. Bus. & Prof. Code §2334(a); Minn. R. Civ. P. 26.01(b)(2).
6. Mo. R. Civ. P. 56.01(b)(6)(B).
7. Mo. R. Civ. P. 56.01(b)(6)(A).
8. *See, e.g.*, *Jansen v. Visotsky*, 2020 WL 2097275, at *11 (Ill. App. Ct. Apr. 30, 2020) ("Rule 213(g) limits expert opinions at trial to '[t]he information disclosed in answer to a Rule 213(f) interrogatory, or in a discovery deposition.'") (citing Ill. S. Ct. R. 213(g) and *Foley v. Fletcher*, 836 N.E.2d 667, 674 (Ill. App. Ct. 2005)); *Arreguin-Leon v. Hadco Constr., LLC*, 438 P.3d 25, 33–34 (Utah Ct. App. 2018); *Brodowski v. Ryave*, 885 A.2d 1045, 1065–66 (Pa. Super. Ct. 2005) (expert opinion excluded at trial when it went "beyond fair scope" of expert reports); *Maurio v. Mereck Constr. Co., Inc.*, 394 A.2d 110, 111 (N.J. Super. Ct. 1978).
9. *McLendon v. Collins*, 372 P.3d 492, 493–94 (Nev. 2016); *Hernandez v. Super. Ct.*, 112 Cal. App. 4th 285, 298 (Cal. Ct. App. 2003); *State ex rel. Tracy v. Danderand*, 30 S.W.3d 831, 834 (Mo. 2000); *Cnty. of Los Angeles v. Super. Ct.*, 224 Cal. App. 3d. 1446, 1458 (Cal. Ct. App. 1990).
10. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) ([T]he "most persuasive" basis for testing the reliability of an opinion is "legitimate, preexisting research unrelated to the litigation."); *Knight v. Kirby Inland Marine, Inc.*, 363 F. Supp. 2d 859, 866 (N.D. Miss. 2005); *Minnesota Mining & Mfg. Co. v. Atterbury*, 978 S.W.2d 183, 201 (Tex. App. 1988); *Smith v. Ortho Pharm. Corp.*, 770 F. Supp. 1561, 1579 (N.D. Ga. 1991) ("A scientific study not subject to peer review has little probative value.").
11. *See Allen v. Penn. Eng'g Corp.*, 102 F.3d 194, 195–96 (5th Cir. 1996); *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 605 n.27 (D.N.J. 2002) ("It is notable that many courts confronted with determining the reliability of expert testimony look at whether or not the studies relied upon by the expert are statistically significant.") (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 145–46 (1997) and *In re TMI Litig.*, 193 F.3d 613, 711 (3d Cir. 1999)); *Glastetter v. Novartis Pharm. Corp.*, 107 F. Supp. 2d 1015, 1030 (E.D. Mo. 2000); *Lennon v. Norfolk & W. Ry. Co.*, 123 F. Supp. 2d 1143, 1152–53 (N.D. Ind. 2000). Statistical significance is a measure of the probability that the null hypothesis is true compared to the acceptable level of uncertainty regarding the true answer. Steven Tenny & Ibrahim Abdelgawad, *Statistical Significance*, Nat'l Inst. of Health, Nov. 21, 2022, https://www.ncbi.nlm.nih.gov/books/NBK459346/. The significance level is expressed as the "p-value." *Id.* Generally, a p-value of 0.05 or less is considered statistically significant. *Id.*
12. AAJ's Litigation Groups are an excellent resource for seeking and sharing expert reports and testimony. Other trial lawyer organizations such as the Attorneys Information Exchange Group (AIEG) or your state trial lawyer association are also useful resources. In addition, expert profiling services may be able to provide you with previous testimony.
13. Fed. R. Civ. P. 32(a)(2).
14. For more, see Amy Collignon Gunn, *Witness Impeachment 101*, Trial, May 2023, at 52.