Should Expert Witnesses Be Deposed?

During consideration of several of the recent proposals for amending the Colorado Rules of Civil Procedure, particularly including the original adoption of the Civil Access Pilot Project (CAPP) rules and, more recently, CRCP 26(b)(4)(A), the Colorado Supreme Court and its Civil Rules Committee received significant public input about the desirability of and necessity for deposing expert witnesses. The following discussion attempts to lay out the fundamental contentions, both pro and con, on this issue. Although both authors are members of the Civil Rules Committee, they are not speaking on behalf of that Committee and express only their own personal views and experiences.

The arguments set forth below derive from the authors' experience with the substantial bulk of their cases. The authors acknowledge that there are exceptions to their positions and that extraordinary circumstances might warrant a different approach.

Expert Witness Depositions Are a Valuable Weapon in a Lawyer's Arsenal

by David C. Little

A discovery deposition is an opportunity unique to American jurisprudence that

- enables a party in litigation to learn about elements of an opponent's claim or defenses before a final evidentiary hearing;
- is a shortcut to the substance of an adverse position not otherwise available to a party without considerable cost; and
- provides information that can facilitate a negotiated resolution of disputed claims.

Discovery depositions of experts provide an opportunity to learn and understand the expert's qualities as a witness and the foundations of the expert's evaluation of the opponent's forensic assertions. This valuable information is in addition to that required by court rules.[1]

Continued on page 66.

David C. Little is a partner with Montgomery Little and Soran, PC in Greenwood Village, where he works primarily in the field of civil litigation—(303) 773-8100, dlittle@montgomerylittle.com.

Save Your Ammunition for Trial: Don't Depose

by Richard P. Holme

A few years ago, I was asked to identify my five most memorable trial experiences. The answer, I quickly determined, was five cross-examinations at trial of expert witnesses I had never deposed.[1] All of these events took place before CRCP 26(a)(2)(B)(I) and (II) were amended to limit an expert's direct testimony to "matters disclosed in detail in the report." That recent addition to Rule 26 only strengthens and supports my conclusion.[2]

A Cost-Benefit Analysis

I will not expound much on one of the biggest benefits of not deposing an expert: the cost savings of foregoing to depose opposing experts. All of the following add substantial expense: preparing to take the depositions; paying the opposing expert's (often extrav-

Continued on page 67.

Richard P. Holme is senior of counsel in the Trial Group at Davis Graham & Stubbs LLP—(303) 892-7340, richard.holme@dgslaw.com.

Point/Counterpoint articles provide an open forum for the expression of ideas and address issues that are substantially related to the law, to the practice of law, or to lawyers (not matters of general interest). Any CBA member wishing to submit a Point/Counterpoint article should work with another CBA member to provide a companion article that argues for a significantly different conclusion. For further information and writing guidelines, to discuss topics in advance, or to get help finding someone to write an opposing viewpoint, contact Point/Counterpoint Coordinating Editor Fred Burtzos at fred.burtzos.gdz0@statefarm.com.

Expert Witness Depositions Are a Valuable Weapon in a Lawyer's Arsenal

Procedures for Deposing Expert Witnesses

The Colorado Rules of Civil Procedure (Rules) govern the authorization and procedure for obtaining discovery depositions of disclosed experts. Many of the Rules that pertain to the depositions of disclosed expert witnesses were amended and became effective for cases filed after July 1, 2015.[2] This includes the information required by CRCP 26(a)(1) and information about the experts who would be expected to present trial evidence pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence.[3]

Beyond the requirement to identify the expert, the Rules require a written report that must, among other things, contain a complete statement of all opinions to be expressed and the bases and reasons therefor.[4] The Rules also require a description of the data or other information that the witness considered in forming his opinions and the identification of any exhibits to be used in support of the opinions. The witness's qualifications and lists of the witness's publications and former testimonial experience must also be included. Finally, the Rules require disclosure of the compensation paid and to be paid, and the witness's report or statement must be provided.

Understanding Disclosures

The proponent of the expert testimony is obliged to reveal virtually all information about the expert and the expert's proposed testimony. This includes information about the expert, the expert's qualifications, and the information the expert used to generate her opinion. However, information that may be relevant to the expert's opinions does not have to be disclosed, even though it might have material impact on the disclosed opinions, if the proponent does not plan to use it. The expert, for instance, may have chosen to ignore certain features of the subject matter to arrive at a particular conclusion, or there may be information that, had the expert considered it, might have tempered the opinion. The Rules do not require disclosure of such information, which the expert may have excluded from consideration, and the obligation does not require discussion of information that the expert intentionally ignored or was requested to not consider.

Other matters that are not required to be disclosed are tested scientific theories that the expert chose not to consider; opinions that may disagree with the expert's analysis; factual background not evaluated; and the expert's rejection, in whole or in part, of the body of knowledge involved in the expert rendering.[5]

The Importance of Observation

The deposition of a party or other witness, expert or otherwise, is also an opportunity to evaluate the witness's demeanor, mannerisms, and knowledge of the subject of the testimony. Demeanor and manner of testifying are qualities to be considered by a fact finder in evaluating the credibility of all witnesses, including experts.[6] Expert witnesses are subject to the same scrutiny, and their testimony should be judged the same way as the testimony of any other witness.[7]

The only real opportunity a party has to evaluate an expert witness before trial with respect to the expert's manner, demeanor, and style is through a deposition. The expert's report or statement sheds little, if any, light on the personality and demeanor the expert will bring to the trial testimony. Though the expert's report must contain all opinions that the expert intends to offer and the basis for the opinions, the data considered by the witness, and certain background and qualifications of the witness,[8] the disclosures typically reveal nothing about the expert's personality, vulnerability, thoroughness, or demeanor.

Visual observation of the expert during testimony is necessary to sufficiently analyze and evaluate an expert and the expert's testimony. The circumstance of testifying under the controls of the pretrial deposition can substantially impact the expert's mannerisms and testimonial personality.

In a deposition, there is an opportunity to control the atmosphere and circumstances of the testimony, to shape the nuance of questions and answers, and to control context. None of this is inherent in a disclosed report, whether the report is written by the expert or the attorney, or whether it is in the form of a statement authored by the attorney. The opportunity to depose an expert and to assess the expert's qualities as a witness is an indispensable opportunity in the party's litigation arsenal and is not addressed in any reports or statements.

Continued on page 68.

Save Your Ammunition for Trial: Don't Depose

agant) hourly rates for preparing for and attending the deposition; hiring court reporters; and videotaping the deposition (normally a very expensive and useless activity, given how rarely those videos are introduced at trial). Additionally, scheduling problems related to deposing multiple experts can significantly delay a trial.

Before considering whether to assume the high costs of deposing an opposing expert, counsel should take advantage of the numerous free sources of information that are potentially available for reviewing and understanding the expert and the expert's subject matter. Internet searches of the expert are likely to reveal basic information, such as the expert's education, training, and alleged expertise. Review of relevant treatises and publications can provide significant information on the merits that are the subject of the opposing expert's report.

Counsel's own expert witness (even if only a "consulting expert") can and should be used extensively to attain information about the opposing expert, and especially for a critical review, analysis, and dissection of the opposing expert's written report and opinions. Counsel's own expert can usually point out omissions or at least weaknesses in the opposing expert's report and approach. The more problems that counsel's own expert uncovers, the less necessary and desirable a deposition becomes. And note that these preliminary steps are necessary even if counsel plans to depose the opposing witness.

It is often contended that lawyers shouldn't examine an expert until they have gathered everything there is to know about her factual and thought processes. However, if the expert is truly an expert, odds are relatively remote that counsel will ever become as familiar as the expert with the subject of the expert's report and the foundations of her opinions. Thus, the likelihood of destroying an expert during a deposition is also remote.

Handing Over the Keys to the Kingdom

One downside of deposing the opposing expert is that, in preparing for the deposition, the expert will spend time examining his report more objectively and intensely than when it was first prepared. The expert is then likely to uncover mistakes, sloppy analysis, or omissions that he will make every effort to cure during the deposition; and if the opportunity to cure does not come during counsel's questioning, opposing counsel who hired the expert can ask the necessary questions to improve the report during her cross-examination of her expert at the deposition. (Rule 26(e) allows expert reports to be supplemented to include new testimony elicited at a deposition.) It will be much more difficult for the opposing expert or opposing party to fix or supplement the expert's report and testimony when the mistakes are discovered during trial preparation, a few days before trial.

The argument that a lawyer should observe the expert's comfort level, style, and demeanor under questioning before trial overlooks the fact that a deposition is a two-way street that gives the expert an advance look at counsel's skill, knowledge of the case, and overall comfort level.

Most skilled trial lawyers will admit that, in reality, deposing an expert results in the expert being much better prepared at trial. Experienced experts (and their counsel) will take all the weaknesses the deposing attorney uncovered and create plausible sounding explanations, will uncover new "facts," or will develop revised theories or opinions to cover the weaknesses exposed in the deposition. Further, taking the deposition almost inevitably discloses the theories, approaches, and lines of inquiry that counsel plans to use at trial to attack the expert's opinions. All of these revelations allow the expert to be more prepared and polished at trial.

One of counsel's greatest assets at trial is an opposing expert's ignorance concerning which elements of her report are going to be subject to focused and critical examination and which documents counsel is going to highlight and focus on. In the pressure cooker of trial, it is much harder to dream up creative evasions to the implications of a line of cross-examination than it is during the two or three months between a deposition and trial.

Counsel who foregoes deposing the opposing expert might be unable or unwilling to risk asking certain questions that might have been raised during a deposition. Counsel should recognize that this situation is highly unlikely to be fatal. Most cross-examinations of experts at trial drag on too long anyway. Often counsel will benefit more by asking questions emphasizing the areas where the opposing expert's report agrees with the positions of counsel's clients and expert (and normally there will be quite a few) than by arguing with the opposing expert or nitpicking his report.

A Rebuttal

My worthy adversary and longtime friend, David Little, provides a substantial list of important factors that expert reports rarely address and that, without depositions, cannot be probed before trial. What he does not acknowledge is that many of these issues can be addressed outside the context of deposing an opposing expert. For example, if a party believes that the expert's report is subject to rejection under *Shreck*,[3] it is likely that the party's own expert will have pointed out a list of the fatal flaws and weaknesses. Likewise, omissions of significant adverse facts or opposing theories are normally known even before the expert's deposition. (It is unlikely that a deposition question such as "What facts did you omit?" will reveal much additional useful information.) Thus, challenges on that basis are still available at trial even without a deposition.

Mr. Little also argues that taking expert depositions is important to evaluating the witness's demeanor, style, mannerisms, and testimonial personality before trial. Having seen the costs for expert witness fees and deposition expenses, I must suggest that the real expense of these depositions—both out-of-pocket and factoring in counsel's hourly fees—be carefully evaluated before deciding that seeing the witness's testimonial personality before trial is really worth it. This is especially important in light of the negative effects created by taking such depositions.

Conclusion

I contend that the best course of action is almost always not to depose opposing experts. Save your good questions and ammunition for trial.

Continued on page 68.

Expert Witness Depositions Are a Valuable Weapon in a Lawyer's Arsenal

Evaluating the Acceptability of Expert Testimony

The report issued in connection with the disclosures is designed to present positive information concerning the expert's testimony. It seldom, if ever, suggests arguments or evidence against the testimony to the extent that vigorous cross-examination does. The expert's report seldom defends the expert's opinions from the standpoint of reliability, reasonableness, general acceptability, or contradictory information.

As outlined in *People v. Shreck*, characteristics such as reasonableness, reliability, testing and acceptability in the relevant scientific community, peer review, and relationship to more established modes and other judicial applications are all matters relevant to the qualifications and acceptability of the expert testimony.[9] Such characteristics, however, are almost never addressed in an expert report. Consequently, without an opportunity for pretrial discovery deposition, the opportunity for a *Shreck* challenge is considerably reduced, and the overall objective assessment of the expert's opinion is relegated to unsupported guesswork and speculation.

Conclusion

The ability to depose expert witnesses is a valuable tool in pretrial preparation that can and should be available and used. At the very least, it can serve to identify information that is not disclosed but may be important to the case.

Notes

1. *See, e.g.*, CRCP 26(a)(2).
2. CRCP 26(b)(4)(A).
3. *See* CRCP 26(a)(2)(A).
4. CRCP 26(a)(2)(B)(I).
5. *See generally* CRCP 26(a).
6. CJI-Civ. 3:16 (Expert Witnesses) and CJI 3:17 (Determining Credibility of Witnesses).
7. CJI-Civ. 3:16.
8. CRCP 26(a)(2)(B)(I).
9. *People v. Shreck*, 22 P.3d 68, 77–79 (Colo. 2001). ■

Save Your Ammunition for Trial: Don't Depose

Notes

1. These experiences included: two expert accountants whose math and assumptions were significantly incorrect; a psychiatrist who admitted that a study he had not read severely undercut the credibility of the study he primarily relied on; a pollster whose polling did not comply with what he had been employed to study; and a doctor whose lengthy report on medical causation was more than 90% plagiarized, although deleting critical adverse information from the original source.

2. CRCP 26(a)(2)(B) requires experts to submit very detailed reports (summaries are no longer permitted), and the experts' background information. It also limits their direct testimony at trial to "matters disclosed in detail" in their reports. CRCP 26(b)(4) bars discovery of drafts of reports and communications between lawyers and their expert witnesses. These limitations dramatically limit the necessity for and scope of expert depositions.

3. *People v. Shreck*, 22 P.3d 68 (Colo. 2001). ■