MUCH HAS BEEN WRITTEN about taking depositions. Little more needs to be written here about taking most depositions. Percipient witnesses are routinely deposed in so-called discovery depositions. Such depositions, when taken, are affirmatively usable at trial only if taken of an opposing party or its managing agents. Otherwise, when the discovery deposition witness appears at trial, the transcript only may be used to impeach the witness by whatever contradictory testimony is found within it. Frequently, this is also the only way discovery

--

Eliot G. Disner is an attorney admitted to practice law in the States of California and Michigan and the District of Columbia. He is a partner in the Los Angeles, California law firm of Manatt, Phelps & Phillips LLP. Mr. Disner is a trial lawyer specializing in complex business matters, including most particularly antitrust and intellectual property law. He is also a frequent lecturer and author on a variety of trial-related subjects. Mr. Disner is author of Antitrust Law For Business Lawyers, published by ALI-ABA. For more information, see http://www.alaaba.org/alsaba/BK30.asp. He may be reached at edisner@manatt.com or e.disner@verizon.net. An earlier version of this article appeared in the February 2004 issue of The Federal Lawyer. © 2004 Eliot G. Disner
depositions of an opposing party or its agent will be used, even though they may be used affirmatively.

The overall goal at a discovery deposition is a simple one: pin the witness down. So, you are free there to ascertain all the witness is likely to know on a particular subject by asking any question you believe reasonable, including some twice. Assuming you backstop any “I don’t remember” answer with a confirmation that there is no evidence available that will refresh the witness’s recollection, the discovery deposition corners the witness, so that you can move in for the kill at trial.

“Evidence” depositions are those depositions that will be affirmatively read into the record at trial in haec verba. An evidence deposition occurs when the witness is not likely to survive to the time of trial or is outside the subpoena range of the trial court. Evidence depositions are like trial in a remote location. Therefore, asking any question to which you do not already know the answer creates a risk just as it would at trial. But there is no particular need then to pin the witness down, i.e., worry about what he might say later; you will never see that witness again. One “take” should be enough—indeed, it is all you will have!

EXPERT DEPOSITIONS—GENERALLY
Expert depositions conceptually fall outside these models. At an expert deposition, you are free to ask what you want without fear that aberrant queries will become hardened into trial evidence, because the deposed expert will necessarily appear at trial. That is precisely why he was hired. So, as in a discovery deposition, the “pin-down” issue matters too, but it is much more difficult to control. Therein lies the challenge addressed here.

The reason experts cannot be easily pinned down at their depositions is because they are not percipient witnesses. What they mainly provide is their opinion—subject to change without notice (unless you insist on notice). It stands to reason, then, that if in your examination of an expert in deposition, you convince him he has erred, he will obligingly correct his opinion. (The hypothetical expert and lawyer in this article are male. But they need not have been. No disrespect is meant to female experts, attorneys, or to females generally) This obliging “correction of opinion” is, in reality, an effort by the expert to scramble to a new position which might take your views into account, but which does not materially change the opinion previously stated. The biggest mistake lawyers make in taking depositions of experts is to wittingly or unwittingly educate them. So, the expert they see at trial is an improved version of the one they saw in deposition. How can such expert opinion enrichment be stopped?

THE SOLUTION: “DUMB AND DUMBER”
- There is a way to avoid making an adverse expert any smarter: Establish a “dumb and dumber” relationship. As the questioner, you are not likely to have the expert’s technical expertise; hence the “dumb.” But the expert probably does not know as much about your case and its facts as you do; hence the “dumber.” To get the best out of an expert deposition then, this is exactly the relationship you should preserve.

How to achieve this objective first requires the questioner to affect a certain style or mood. Specifically, the questioner should seem quite dumb, acting the part of a wide-eyed junior college student interested in learning all there is to know about the expert’s expertise and about the opinions he has been paid to provide. The expert should not be challenged, intimidated, doubted, or put on the defensive in any way.

The Expert’s Background (Background? What Background?)
Regarding the expert witness’s background, it is important to find out if he has any skeletons in his closet. However, you are not likely to elic-
it a useful answer with a question so put. Therefore, a rather painstaking and tedious inquiry into the expert’s licenses, credentials, early employment, reasons for departure from one position or the other, names of persons who know why the witness left one position for another, and all the rest, is a good way to begin. In one case many years ago, in such routine background questioning, I learned that the expert, a CPA, sat for his CPA license exam several times before passing all of it. Somehow, that managed to find its way into the record at trial.

**Prior Writings**

Prior writings (including reports and transcripts provided in other cases) may also prove to be useful evidence. Again, routine questioning with respect to such prior writings, looking for no particular answer, is appropriate. Writings that appear to create positions in conflict with those asserted by the witness in his deposition should be the subject of more focused, but still routine-sounding, inquiry.

**Prior Depositions**

For whatever reason, economic experts tend to become quite fuzzy about the details of their prior depositions or court appearances, probably the most fertile source for impeachment material. Surprisingly, for all their education, experts sometimes forget altogether the names of the cases on which they worked, the names of the attorneys that took their depositions, and sometimes even the attorneys who hired them. It is important, however, to push such witnesses into providing any information at all about their prior testimony, so you can then track down their prior testimony or report later.

In one case many years ago, we suspected that an expert witness’ opinions, to wit, that our client suffered no damages, was opportunistic, based on a fragile theoretical approach he there embraced. Did this expert previously assail that approach in some other case? As it happens, the expert there, from a national accounting firm, testified often. After eliciting the flintiest answers from the witness about where he had provided prior testimony, we were able to track down one transcript that, lo and behold, included a pointed criticism of the very theoretical approach he attempted to employ in our case. While a motion to strike that expert from the defendant’s witness list was pending, the case settled—at the urging of our opponent, who flew in three executives from Japan to do so!

It is also helpful to find out just how the expert came to be retained. Did he perform any prior services for the client or for the attorney who hired him? You may not have to go very far to obtain a record of conflicting prior testimony if he did.

**Publications**

With respect to publications, too often those of an expert are not readily available outside his own cache of reprints. Therefore, you should politely ask the expert directly at the deposition to produce copies of all his pertinent writings or permit you to copy them. (You might have requested them to be produced at the deposition, but they often are overlooked or too “bulky” to produce.) If you wait until after the deposition ends, then put your request in a letter to your opposing counsel, you are not likely to obtain the same cooperation the expert will give you directly, who is likely to agree then and there to do so. Experts seldom refuse to provide copies of their written materials if the request is put to them directly and deferentially in their deposition. Perhaps this is because experts like to create the illusion of distance between themselves and the attorneys who hire them, so promote a sort of camaraderie with the enemy, unimportant as it may seem. Nevertheless, a courtesy to provide such (potentially impeaching) material, if extended, should be graciously accepted.