GETTING THE MOST OUT OF EXPERT DISCOVERY

By: Daniel B. Rosenthal, Akerman LLP

Too often, attorneys treat experts as the magical portion of the case, a world beyond. Sometimes, they fear the magic. Alternatively, they fear the brainiac: approaching the expert too close may risk drowning in egghead exploits. These lawyers simply wind their expert up and let him speak to the judge or jury. In taking expert depositions, they simply want to get a sense of how the opposing expert presents, and the gist of the opinion and its basis. If they come out with a few good cross-examination points, they are satisfied.

What a mistake. Experts can be the key to a case. And because the expert is typically selected by counsel, not by the client (or the Court), discrediting an opponent’s expert can undercut the opposing lawyer’s credibility with the court or the jury. An adversary who relies on bunk science, or puts up an unprepared expert, cannot be trusted on other issues in the case. The trier of fact may conclude that his other witnesses cannot be trusted either.

The key function in expert discovery, preparation and cross-examination, at deposition or in trial or arbitration, is twofold: (1) present the most compelling case for your client that is defensible, credible and persuasive; and (2) discredit the other side’s approach by attacking only those portions of the opposing expert’s work that are not credible or persuasive.

The most important thing to remember in taking expert discovery is that it is not “about” the lawyer. Your job is not to be the expert or to look like one. It is to glean the information and, along with your own team, to assess it. Therefore, never be abashed in asking your

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MESSAGE FROM THE CHAIR

Welcome to the latest BLC Newsletter. I hope that you have already seen some of this content through our list serv. We have gotten great feedback from committee members, who have enjoyed the ability to easily forward a single article to clients and referrers.

As most of you know, our goal at the BLC is to be a valuable source of information for our members, as well as a valuable networking opportunity. At our live and telephonic meetings, we always provide participants an opportunity to do a “one minute pitch” to describe themselves and their practices. We try to find creative ways for members to interact, such as through our not-so-secret Santa around the holidays and the BLC’s popular dinners at every TIPS meeting. We know, like you know, that the best person to refer work to is a friend, and the best opportunities arise out of preexisting relationships. Please always consider your fellow BLC members when you have work out-of-state.

To become more engaged, find a way to step up your involvement in the BLC. One of the easiest ways is to join the BLC’s Linked In group, which gives you an easy forum to promote your practice. The BLC is also on Twitter and Facebook. Also, please join us on our monthly calls or at our live meetings. We can always find a way for you to contribute and interact with your fellow BLC members.

I look forward to helping you increase your involvement in the BLC. If you ever have a question, feel free to reach out to me directly at 216-274-2371 or jabrauer@hahnlaw.com.

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DOCUMENT ANALYSIS: A SUMMARY OF POSSIBILITIES

By: Mark Songer, Robson Forensic

In 2010, an intruder broke into the home of an elderly couple living in California. The couple was robbed, beaten, and forced to write checks from their personal account before being murdered. A few days later, police arrested a man trying to cash several of the couple’s checks. The suspect denied having anything to do with the murders. He claimed the checks were payment for landscaping work he had done for the couple two weeks earlier.

While detectives were able to link the suspect to the crime scene using DNA evidence, they still had questions about the checks the suspect attempted to cash. Could one of the victims have written the checks? If so, was it possible to discern if the writer was under duress at the time?

Police contacted a forensic document examiner, also referred to as a handwriting expert. The expert examined several example or “exemplar” checks written by the victims. Those checks were compared with checks the suspect had attempted to cash. The examiner determined that the wife had written those questioned checks. Upon closer inspection, the examiner observed significant differences in the wife’s known writing style compared with that of the questioned checks, which contained a significant amount of tremor, pen lifts, and other features indicative of “unnatural” writing. Taking into consideration that the woman had been found gagged and beaten, the examiner concluded that the checks had probably been written under duress.

After being presented with the overwhelming evidence against him, the suspect confessed to the murders and was given a death sentence.

More than “mere opinion”

The discipline of forensic document examination is typically associated with white-collar crimes such as check fraud or other business transactions. However, forensic document examination can also be useful in a wide variety of other cases including elder abuse, medical malpractice, and — as illustrated in the case of the California couple — even homicide.

Incidents of financial exploitation frequently leave an evidentiary paper trail. Signatures, checks, and other documents can be analyzed and compared to determine if they are genuine, counterfeit, or altered. However, many attorneys do not recognize the significance of document evidence, which could provide the “smoking gun” in many cases. Questioned document cases and techniques can be traced back to the 3rd century and have evolved with the advancement of technology, research, and development. The examiner is constantly trying to stay one step ahead of the criminal mind as the latter attempts to create, alter, or manipulate everything from contracts to currency using sophisticated software programs and the sheer power of innovation.

In medical malpractice matters, examinations for the presence of indented writing are conducted by side lighting, photographic techniques, and the use of the Electrostatic Detection Apparatus, most commonly referred to as an ESDA. This powerful piece of equipment can in some cases determine if records or patient notes have been altered. Procedurally nondestructive in nature, this device can detect indentations or impressions several layers below the top sheet, and many years after the indentations were created. Furthermore, computers, facsimile machines, photocopy machines, and (though they are less commonly used these days) typewriters can sometimes be traced to their source.

Although there is an element of subjectivity in the field of forensic document examination, an examiner’s findings reflect more than mere opinion. Findings must be supported by valid scientific investigation. The premise of handwriting identification is based on the principle that no two writers share the same combination of handwriting characteristics. Handwriting is a complex motor skill consisting of sensory, neurological, and physiological impulses. Through practice and repetition, writers inject their own characteristics into their writing. This becomes a pattern of habitual formations that are repeated from one writing to the next. This habitual repetition in writing is referred to as “variations,” which are natural deviations that are repeated in a person’s writing. This is what makes each person’s writing unique and individualized.

In addition, the document examiner takes into consideration a wide variety of individual characteristics including letter construction, proportion, spontaneity, spacing, slant, and the use of punctuation.
The Telephone Consumer Protection Act ("TCPA") was enacted in 1991 to protect consumers from unwanted telemarketing practices, at a time when cellular phones were a new phenomenon and in rare use. As to cellular telephones, the TCPA makes it unlawful for any person to make any call, aside from emergency calls, using a certain kind of automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice, to a cellular phone without prior express consent. It also prohibits calls to any residential telephone line using an artificial or prerecorded voice without the called party’s prior express consent. Congress stated that “individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.” Striking that balance, however, has often proved difficult.

In July 2015, the Federal Communications Commission ("FCC") issued a Declaratory Ruling and Order in response to several petitions filed seeking clarification of the TCPA. The Order was hotly contested, with a three-commissioner majority issuing its findings over the strong dissents of the two other commissioners. The FCC’s Order has been roundly criticized by businesses as interpreting the TCPA too broadly and creating too narrow a path with which to legally place calls. As a result, more than a dozen parties filed a consolidated appeal, titled ACA International v. FCC, No. 15-1211, in the D.C. Circuit.

While the FCC’s Order covers several topics of the TCPA, this article focuses on the FCC’s interpretation of an ATDS and consent, and the issues those interpretations raise for businesses engaging in legal telemarketing. The appellants referenced above challenge the FCC’s overbroad definition of ATDS, the FCC’s overly broad standards for consent, including a new right of “revocation” articulated in the order, and the FCC’s handling of reassigned cellphone numbers. The D.C. Circuit has not yet ruled on the appeal, but oral argument, which lasted more than two hours, was held on October 19, 2016. Thus, much of the FCC’s Order is currently being challenged, and rightfully so. Nevertheless, given that plaintiffs can be expected to rely on the FCC’s Order in the meantime, it is important to know the FCC’s current stance on an ATDS and consent.

**ATDS**

Under the TCPA, an ATDS is defined as equipment that “has the capacity—to store or produce telephone numbers to be called, using a random or sequential number generator” and “to dial such numbers.” The FCC interpreted the term “capacity” broadly in the Order. It left the door open to arguments that equipment with the hypothetical “capability” to fit this definition would qualify as an ATDS, even if it was not presently used for that purpose. It stated that an ATDS is not limited to its current configuration, but includes its potential functionalities. It implied that dialing systems may be modified remotely, thereby giving it the capabilities of an ATDS. And the FCC confirmed that predictive dialers—equipment that dials numbers and then, through additional software, predicts when a salesperson will be available to take the dialed call—fall into the category of ATDS. The FCC stretched “capability” to its outer bounds—declaring that so long as the equipment had the potential to randomly/sequentially dial and store numbers, then it should be considered an ATDS, even if the functions that make it an ATDS as defined by the statute were not even in use.
The FCC did note, however, that there must be more than “a theoretical potential that the equipment could be modified...”¹⁰ Yet, as the dissenting commissioners pointed out, the FCC’s definition potentially encompasses any modern-day telephone, potentially making any calling subject to the TCPA.¹¹ The FCC interpreted ATDS broadly and tipped the scales in favor of what it saw to be consumer protection at the expense of legitimate businesses, thousands of which are being sued under the TCPA for calls to cellular phones that are not being randomly or sequentially dialed. While the FCC’s broad interpretation of what could constitute an ATDS subject to TCPA liability is currently being appealed, it is important for business to know and understand the dialing systems they and their marketing partners use, as plaintiffs will rely on the FCC’s Order to support claims of a violation.

Consent

Under the TCPA, there is no violation for placing prerecorded or ATDS-placed calls if the recipient of the call provided express consent.¹² But if a question arises as to whether consent was provided, the FCC has placed the burden on the caller to show the requisite consent.¹³ The FCC stated that when prior consent is given to call a landline number and that landline number is transferred to a wireless number for the same individual, the consent travels with that number for the types of calls previously consented to.¹⁴ But the FCC held that when the call is made to a cellular telephone number that was reassigned to a new individual, any previous express consent to call that cellular telephone number vanishes. The FCC based this distinction on its interpretation that the TCPA requires express consent from the subscriber at the time of the call, not the intended recipient of the call.¹⁵ This creates problems where businesses may call a customer-provided number with no knowledge that the number was abandoned by their customer, and now belongs to a new person.

The FCC granted callers one call to the reassigned number to gain actual or constructive knowledge of the reassignment (a knowledge businesses protest they generally cannot obtain in the process of placing a single call). But regardless of the information gleaned from that first call, if any, going forward the caller is presumed to have constructive knowledge of the reassignment.¹⁶ Therefore, even if the consumer does not answer and there is no indication that the number has changed, the caller is presumed to know that the phone number has been reassigned. Again the FCC put the burden on the caller to attempt to determine if and when a cellular telephone number has been reassigned, but only gave the caller one chance to do so. The FCC’s discussion of this “one call” exemption was only in the context of reassigned numbers. Thus, it is unclear whether the FCC’s reasoning applies when the phone number was wrongly provided by the customer at the start (i.e., by transposing a digit, or providing a family member’s phone number).

The FCC stated that an individual can revoke prior consent at any time and through any reasonable means, rejecting the position that once express consent is given, it cannot be taken back.¹⁷ The FCC also rejected the argument that the caller can designate the exclusive means by which individuals can revoke consent.¹⁸ Thus, the FCC took the position that an individual can revoke consent, using any reasonable means, including orally or in writing, but also by means businesses may not be able to track (such as a consumer walking into a storefront of that business and asking an employee there to stop calls). Moreover, although a caller cannot designate the exclusive means by which consent may be revoked, the caller must provide the recipient of certain types of calls with some way to revoke consent—a direct opt-out mechanism.¹⁹ This could be a toll-free number to call back when the recipient receives a voicemail or a reply of “STOP” for text messages received. Because of the tremendous onus the FCC’s position puts on legitimate businesses to track any kind of “reasonable” revocation (when “reasonable” is subject to interpretation), the FCC’s position is currently being challenged.

In all, the FCC, through its Order, placed a great burden on businesses to comply with the TCPA—one that currently must be considered by any company reaching out to its own customers or attempting to find new customers via outbound calling. ²₀
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GETTING THE MOST OUT…

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own expert or the adverse party – in interrogatories or at deposition – questions outside your realm of comfort.

This article will not address the frequently-discussed Daubert case, or its progeny. Instead, it addresses the much more typical scenario, in which the retained experts have an expertise in a given subject matter area; the area of expertise is germane to the issues warranting resolution in the lawsuit; and the opposing expert has reviewed documents, spoken with his client, performed analyses and presented opinions. It provides practice pointers for engaging in expert discovery to provide maximal benefit for your case and client. To allay any confusion, I refer in this article to the opposing expert in the masculine, to my expert in the feminine.

1. Qualifications

In most cases, the opposing expert will be qualified to provide an opinion. Nonetheless, his qualifications may reveal information showing either that the expert lacks the particularized information that would be most helpful to the finder of fact or, to the contrary, that the expert has personal background and information that might be very helpful to you in undermining his opinions. For example, it is not enough to inquire at deposition if an opposing party’s real estate valuation expert is qualified to offer real estate valuation testimony. Attention also must be given to questions such as these: Does the valuation expert have experience in the real estate in question (such as a hotel); during the relevant time period; and in the relevant city or portion of the city? Has the expert valued mid-range hotels or only luxury properties? Hotels or motels? Properties managed by a nationally-known and recognized hotel management company, or by an independent hotel or chain? What if the opposing expert is not only a consultant but also invests in similar real estate himself from time to time? In that case, in which properties has he invested, and when? Are any of those properties in competition with the property at issue? And what did the opposing expert do when evaluating his own investment in similar properties? These issues can be explored either through expert interrogatories or at deposition. But there is no substitute for independent work as well:

1. Vet opposing experts with your colleagues.
2. Review the opposing expert’s resume. It might show that he is not familiar with the precise subject matter at issue. Or perhaps the opposing expert has some experience (such as in investments) that will become favorable to you.
3. Search for the expert on Google.
4. Run searches on the relevant secretary of state websites to identify any companies with which the opposing expert has an affiliation.
5. Run background searches on cases in which the opposing expert has offered expert testimony. If you are practicing in a state jurisdiction where this information is not required to be disclosed by your adversary, expert interrogatories should be served to elicit that information.
6. Determine if the opposing expert has been referred to by name in any reported decisions, and if so, review those opinions and obtain the pleadings in those cases and any motions filed in those cases that pertained to the expert.

I have found these questions relevant to my own work. On one case, my expert was a seasoned real estate professional in a large metropolitan area. When I interviewed him, I identified the real estate in question. “Oh, I know that building,” he told me. “What do you know about it?” I asked. “My information is quite dated, but I appraised that very building about 25 years ago,” he said, whereupon he went into a file room and emerged with the appraisal. The appraisal was irrelevant to the case. But had it been done more recently, or had its conclusions been relevant to the case, it is something I would have wanted to explore in detail. You’d be surprised how frequently your adversary will not have asked his own expert the same questions.

More recently, a well-regarded adverse expert testified concerning a commercial property. There was no debate that he was qualified to give opinions. But we elicited information that he had never done work within 50 miles of the property at issue; and for the immediate past several years, had spent most of his energies as a real estate investor.

The bottom line: Just because the opposing expert is recognized and respected in his field does not mean that you should omit focusing on his qualifications.

2. Expert Interrogatories

One valuable tool in exploring background and qualifications is through interrogatories. Expert interrogatories are helpful as well to obtain specific, pointed information on what the expert has done in the
case at hand. The most substantive questions, though, should await the deposition.

A. General Professional Background

At a minimum, interrogatories should explore the expert’s prior engagements by the adverse party and by the adverse counsel, any prior disqualifications, and all discoverable retentions relating to the same subject matter, product, property or investment. Discover the expert’s work on professional committees, organizations, task forces, and publications. Experts who have been around the block may well have published on professional practices, standards and methodologies that are immediately relevant to your lawsuit. In jurisdictions where the expert does not provide a resume and list of publications and prior testimony, obtain this information through interrogatories prior to the expert deposition.

B. Case-Specific Background And Work

It is best to use expert interrogatories to obtain quantitative information that the opposing expert might not have at his fingertips at deposition. Examples are the hourly rates he and his staff are charging, and how many hours were worked as of the time of the responses to the interrogatories. Ask the opposing expert to state each opinion that has been reached, the basis for each opinion, and the documents, conversations or other information that substantiate each and every opinion. At deposition, the expert might hedge, telling you that he cannot recall each document he reviewed. So give him a month to provide the answer in writing. Similarly, inquire of each and every document that the opposing expert reviewed in reaching his opinions (regardless of whether the expert has relied on the document to substantiate his opinions); all independent information obtained by the expert in the course of his work on the case (such as from industry sources or the expert’s own private library); communications the expert has had with anyone whatsoever about the engagement; and any other materials or information upon which the expert is relying in proffering his opinions. By asking for this information in advance, you can better organize the deposition questions, and can better understand how the adverse expert sees the case. As an example, whether the expert ran numerous financial analyses or scientific experiments of his own, or instead relied on literature in the field might reflect on whether he sees the expert analysis as a case of first impression or a standard industry inquiry. Also, his list of materials consulted might conspicuously omit a leading study or article, which is something you will want to address with your own consultant.

Other quantitative information should include a list of who else worked on the engagement, when it commenced, and whether a letter of engagement was signed.

Interrogatories also can focus on any ongoing work that the expert is performing or work that the expert intends to perform but has not yet commenced.

C. Review The Responses

The responses may give you additional ideas about third parties who should be deposed or who need to be subpoenaed; treatises that should be consulted, and questions that should be framed for deposition. It is important to send the responses to your own expert for her review and analysis as well. Something may jump off the page to your expert that is not immediately apparent to you, such as treatises that were not reviewed, experiments that were deficient, or an approach that the opposing expert has taken that is inconsistent with industry practice or which is designed from inception to yield an output that is favorable to your adversary. Arrange a time to speak with your expert once she has had a chance to review the interrogatory responses. Keep in mind that you should use the interrogatory responses to challenge your own expert and reconsider her opinions in the case as well. Step back and evaluate whether the interrogatory responses you have received should cause you to reconsider your position, the strength of your case, or the work of your own expert. Finally, share the interrogatory responses with your own client and with the entire team. Dividing a litigation team or trial team into those handling “factual” matters and those handling “expert” matters is not optimal.

3. The Expert Report

The expert report migrates the practitioner past issues of background, qualifications and general case-specific work and into the guts of expert discovery.

Depending upon the jurisdiction and venue of your dispute, expert reports may or may not be required. Where you have been presented with an opposing expert report, review it thoroughly. This includes reviewing the schedules with mind-numbing figures and terms. The key to the battle of the experts resides here, because while your opposing counsel may have had a hand in crafting the report, the schedules typically are unadulterated, and sometimes, unreviewed. Do
not attempt to replicate the expert’s analysis. Instead, understand what was done, what each chart or line or analysis represents – and what it does not. Ask yourself whether the expert performed the correct analysis under the relevant operative documents; whether the environmental conditions in the opposing expert’s work were reasonable; and whether the modeling -- scientific, financial or other modeling – took all of the various parameters and considerations into account. As an example, if the issue is performance of a certain material upon exposure to particular environmental conditions, see whether the testing was done under the relevant conditions. If a financial model must account for the time value of money, see whether the opposing expert used an inflation index, the consumer price index, or some other index, and ask yourself whether his choice of index was purposeful, evasive or proper. If the issue is a membership interest in a limited liability company, see whether the expert’s analysis determined this value or mistakenly determined the value of the factory that the LLC owned.

Next, share the report with your own expert and ask for her brain dump as to each and every particular of the report. If your expert is doing her job, she will notice more than you. If she does not catch what you have caught, you should ask yourself whether you have indeed selected the right expert.

Frequently, clients are hesitant to shoulder the cost of having both the lawyer and the expert pore over the adverse report. It is absolutely critical for both to review it in detail, which leads to optimal results.

If you notice what appear to be arithmetic or other perfunctory errors in the adverse expert’s report, bring those up at deposition. The trier of fact will not appreciate playing “gotcha” at trial. Also, if what you perceive to be an error is in fact not so, it may be you who will be enlightened at deposition, not the opposing party. There is an exception to this advice, where the opposing expert’s error actually changes his entire analysis and/or conclusion. In that case, you may not want to alert your adversary of the error until trial. In a recent case, the opposing expert mistakenly performed a financial analysis under an inapplicable provision in a deal document. We reran his analysis ourselves using the correct provision, and the analysis proved our case. On cross-examination at trial, he retracted his opinion.

The devil is in the details. The details frequently are in the schedules.

4. The Expert Deposition

Once you have dissected many aspects of the opposing expert’s work through an examination and analysis of the expert report, the next step is the expert deposition. Frequently, counsel approaches the opposing expert deposition the way someone would approach an encounter with a wizard: “Thanks for the audience, but I find you odd and incomprehensible. Let me ask what I think I need to ask and get back to my office where I can speak with real humans.” And so follows a stream of questions about prior engagements with the adverse counsel or before the same judge; the fine points of the expert’s engagement and pay; queries as to who drafted the report, on what computer and with whose assistance; and similar questions on topics of ready facility for the lawyer. And then only perfunctory queries as to each opinion that has been reached and the basis for each. “Oh strange wizard, I don’t need to know each minute detail of how you made your brew, but if you give me the basic ingredients, I’ll be on my way and not seem like a bumbling idiot to you.” In other words, the lawyer allows the expert to manage the process and does his client little good.

This, of course, is a huge mistake. The expert deposition is your chance to meet a real live wizard (or determine that the guy is no wizard at all); morph from lawyer to student, and receive a “brain dump.” Unlike trial, there is no bad question at deposition, except one that might reveal your knowledge that the opposing expert has committed a significant error or failed to consider something that your own expert is refining. Do not be concerned that the deposition will take more than a few hours (it likely will). Do not be concerned that you will look uninformed to the opposing expert or his counsel (you will). You obviously are expected to know practically no water chemistry as compared with the PhD in water chemistry; practically no polymer science as compared with the polymer scientist; practically nothing about actuarial science as compared with the actuary; practically nothing about tensile strength compared with the mechanical engineer. Not only that, but you will find that asking straightforward, fair and simple questions occasionally has side benefits. Experts generally want to tell you how smart they are and everything they have done. They like to teach.

Give them the opportunity to do so. The more they say, the more you discover. Which, of course, is the point of the whole exercise. The best way to do that is to come at the deposition as part lawyer, part student.
Your time at deposition will be well spent for the client. If done correctly, it also can provide a nearly verbatim cross-examination for trial.

One good approach to expert depositions is to elicit from the opposing expert the entirety of his knowledge about the case. Do not try to coax him into providing sound bites. Interject with follow-up questions, exploring each line. Make sure that there is no stone left unturned. This approach requires asking the expert not only what he did, but why he did it, whether he considered any other alternatives, what those were, and why he did not consider various other steps that you think may have been relevant or important. It is not merely enough to understand what discount rate a valuation expert used, but why other rates were not used; or whether the same expert used different discount rates in connection with other valuations of similar assets or businesses during the same relevant time period.

The careful practitioner should pay attention to detail. As an example, the same publications may provide for national, regional and local economic data, and the opposing expert may have selected his data set improperly. Your opposing expert may have selected the consumer price index in lieu of the rate of inflation for purely mercenary reasons. Your opposing expert may have selected the soil quality at a particular soil depth for reasons that only the opposing expert has chosen, perhaps unreasonably. The same is true for various other types of analyses.

Always ask, “please tell me what you did next.” Once the opposing expert tells you, explore each thing he did not do. “So, what I understand from your testimony is that in providing your opinions about the policy exclusions, you reviewed the policy itself and the case law around interpretation and application of the pollution exclusion, right?” “Yes.” “Did you also consult with any insurance brokers? Did you review any insurance industry materials? Did you speak with any business-people who own businesses similar to the one at issue in this case? Did you see any correspondence between your client and the broker about the scope of coverage? Did you do anything other than review the policy and what you determined to be applicable legal precedent?” If your own expert in fact took these other steps, her work and testimony may resonate more with the trier of fact than the testimony of your adversary’s expert.

Where possible, ask your own expert to consult with you in preparation for the opposing expert deposition. Doing so benefits your case in multiple ways. One is that it can reduce your preparation time and the resulting cost to your client. It will not increase your expert costs significantly, because your expert, if properly prepared, will have to consider these same questions herself in confronting the opinions of her opposite number. A second benefit is that you will glean a different approach to the same material (that of the professional) than you otherwise would have (that of attorney). Arguments or points which would seem secondary to you may be a big deal to your expert.

Speaking with your own expert can also save your client money. In a case involving water chemistry, I shared my expert deposition outline with our consulting experts. “Why are you asking the other guy whether he did any work to determine the water quality near the mobile home parks?,” they asked. “Because a bunch of their clients are claiming damage to mobile homes, and the water quality near the mobile home parks is therefore relevant,” I responded. “Statistically, it isn’t,” replied my statistician. “Mobile homes are mobile. Unless people deliberately relocate from one mobile home park to another based on local water chemistry, the water chemistry at the places they have lived for the past three months is practically irrelevant. Drop the questions.” So I did.

Sometimes, your expert will have you ask for information he needs, without having to wait for interrogatory responses, such as: “Ask what this particular code means on the general ledger,” or “ask whether they know the specific make and model of the repair in the failed tire, because we have no information on that.”

If your own expert can attend the opposing expert’s deposition, consider asking her to do so. She can advise you on follow-on questions. And her mere presence can also keep the adverse expert from trying to bamboozle you with expert-speak.

Do not end the deposition before asking whether you have covered every opinion that the expert has, the support for each opinion offered, and everything that the opposing expert has done to arrive at his opinions. Finally, ask whether the opposing expert has completed his work, or has any plans to do any further work in the case or to revise his opinions.

**Conclusion**

There is no magic. Don’t fear your own lack of knowledge or information. Become the student, learn the details, and use them to benefit your case.
spelling, and grammar. A writer’s identity cannot be established through a single individual feature; rather, it is established through a combination of significant and unique identifying features absent any significant differences. Examiners also analyze the source of paper which may contain handwriting, markings, printing, or graphics. Tests are conducted on color, thickness, weight, the presence of watermarks, weave patterns, and fiber. Ink can also be analyzed as well to determine its source or in some cases the sequence of intersecting pen strokes.

According to Skip Palenik, President and Senior Research Microscopist at Microtrace Laboratories, inks often play a crucial role in the solution of document examination problems. In many instances it is possible to compare inks from different documents or different pages of the same document by purely optical methods, using a variety of wavelengths of light combined with appropriate filters. Most document examiners possess instruments that can be used to perform and document such examinations. If two inks cannot be distinguished by purely optical methods and suspicion still exists that they are not the same, chemical methods of analysis come into play.

Chemical analysis of inks formerly required that liquid reagents be applied to the ink line by fine pipettes or that punches through the paper carrying an ink line from a suspicious entry be removed and tested. Analytical methods now have been developed for removing single paper fibers under a microscope and then testing the ink on it using physio-chemical instruments such as infrared micro-spectrophotometry, x-ray spectroscopy and Raman micro-spectroscopy. Such methods are virtually non-destructive and provide a variety of chemical and elemental data that can be used to characterize or identify the components of dried ink for comparative or dating purposes.

The accuracy and precision of ink dating depends primarily on the interval involved. Old ink formulations are well documented and high quality chemical analysis has shown to be of great value in helping to unmask, for example, fraudulent signed sports memorabilia. Absolute dating of modern inks, however, has proven to be one of the great quests of modern document examination. It is rare to be able to assign an absolute date to an ink line, but it is possible in certain cases because of specific circumstances. Relative ink dating is most commonly employed in document examinations when the dates of entry are in question, though the various methods used to conduct such examinations all have intrinsic problems or require that certain assumptions be accepted, which usually leaves the results open to justifiable criticism.

Another area involving scientific analysis of inks is in the determination of the order of ink entries. This problem has been studied by document examiners for over a hundred years. While there is no general solution to the problem, it is possible in almost every instance to provide a good analysis if both sides permit the micro-analyst to remove the requisite specimens and subject them to the appropriate test methods.

With respect to electronic documents, Matt Peterson, a forensic computer examiner with Seattle-based Robson Forensic, explains: “Not all devices and applications scan and process files the same way. Many leave telltale artifacts either on the scanned image (watermarks, for example) and/or embedded in the metadata of the file.” Metadata is information that describes specific attributes of a file, and may contain information describing the specific device or application that processed the file. Metadata also includes the date and time the file was created. When validating digital scans, it is important to look not only at what is present but also at what is not present. For this reason alone, it is imperative that the digital file of a scanned document be preserved correctly so that the metadata is unaltered. The proper handling and preservation of any evidence should be discussed with your expert prior to shipment or delivery.

Standards and reliability

Document examiners go through rigorous training to learn how to scientifically analyze documents to determine authenticity. Most government-trained examiners as well as private examiners, complete a two-year, full-time training program or apprenticeship. Peer group interaction is available through various organizations which encourages on-going training and education.

The American Society for Testing and Materials (ASTM), a global leader in the development and delivery of voluntary consensus standards, publishes standards for methods and procedures used by forensic

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1 Almost any type of ink can be examined, depending on circumstance, including pen inks of all types and ages, commercial printing, ink jet, laser and other modern printers. The type of ink (based on chemical composition) can generally be determined and inks can be compared to each other.

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document examiners. In addition, the National Institute of Standards and Technology (NIST) created the Organization of Scientific Area Committees (OSAC) for Forensic Science, which is composed of both government and private examiners selected based on their expertise, contributions and competency in the field. The purpose of this committee is to develop guidelines and standards which are consensus-based and supported by sound scientific principles.

Document examiners must also meet the criterion of reliability as outlined in the Supreme Court decision *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). These factors include the following:

- General acceptance within the scientific community;
- Use of standards to test the theory or technique;
- Peer review and publication of the technique; and
- Known or potential error rates.

Numerous papers and research studies have been published in peer-reviewed publications on the individuality of handwriting and other issues related to the examination of documents. Some of these articles and studies can be found in the Journal of the American Society of Questioned Document Examiners, the Canadian Society of Forensic Science Journal, and the American Academy of Forensic Science. Like many other scientific disciplines, peer-reviewed research is continuous and rapidly evolving in this field of study.

Mark Songer is a former FBI Special Agent and FBI Forensic Examiner. He is currently an Associate with the firm Robson Forensic, Inc. Mark has been qualified as an expert in the field of forensic document examinations in both federal and state courts. He has developed and implemented Forensic and Criminal Justice programs at several institutions both domestically and internationally, and is the Founder of the Songer Institute. In addition, Mark served honorably in both the U.S. Marine Corps and U.S. Army (ROTC). He is a life member of the VFW and dedicates his time helping veterans and their families.

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June 2017
14 The Surety’s Application to Compel the Deposit of Collateral Under the General Indemnity Agreement Webinar
Contact: Ninah F. Moore – 312/988-5498

August 2017
10-13 ABA Annual Meeting Grand Hyatt Hotel
Contact: Felisha A. Stewart – 312/988-5672 New York, NY
Speaker Contact: Donald Quarles – 312/988-5708

October 2017
11-15 TIPS Fall Leadership Meeting Ritz-Carlton Key Biscayne
Contact: Felisha A. Stewart – 312/988-5672 Key Biscayne, FL
19-20 Aviation Litigation Committee Meeting Ritz-Carlton
Contact: Donald Quarles – 312/988-5708 Washington, DC

November 2017
8-10 FSLC & FLA Fall Meeting Sheraton Boston Hotel
Contact: Donald Quarles – 312/988-5708 Boston, MA

January 2018
24-26 Fidelity & Surety Committee Midwinter Meeting JW Marriott
Contact: Felisha A. Stewart – 312/988-5672 Washington, DC
31-2/6 ABA Midyear Meeting
Contact: Felisha A. Stewart – 312/988-5672 Vancouver British Columbia

February 2018
22-24 Insurance Coverage Litigation Midyear Mtg Arizona Biltmore
Contact: Donald Quarles – 312/988-5708 Phoenix, AZ