

# Going Toe-To-Toe With Your Opposing Expert

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Experts oftentimes make or break cases. As knowledge and science have grown, so has the range of experts that parties call upon to advocate their cause. Not only must a party always look to bolster one's own expert case, a party must simultaneously be mindful of the need to undercut your adversary's expert. As the client, you want to ensure that your assigned counsel appreciates the following practical ways for tackling the opposing expert during the discovery process:

## 1. Talk-The-Talk and Walk-The-Walk:

- Your counsel must become not only familiar with the subject matter, but must also become a "temporary expert" on the precise issues your case turns on in order to effectively develop your expert case and to squelch your adverse expert's opinions.

## 2. Courage:

- You and your counsel must have the courage to enter "uncharted territory," and to take-on your opposing expert with tenacity.

## 3. Preparation Equals Power:

- Power comes from knowledge. Only by being thoroughly prepared and armed with focused knowledge, can you skillfully seek to destroy your opposing expert.

## 4. Hire The Best-Suited Experts Available:

- Invest the time to hire "real experts."
- Consult your insured/client as to who they consider to be an expert.
- Ensure that your expert has real-life, practical and hands-on experience with the issues at-hand.
- Ensure that your expert is an effective communicator.

- Consider the strategic value in retaining a non-testifying consultant to give your side the edge, on a free-wheeling basis to collaborate on the pros and cons of each side's case.

- If your case is "big," ensure your expert is worthy of the "big contest" that will likely play out.

- Inspire your expert to take ownership over his opinions and work-product, and ensure that the expert believes what he or she espouses.

- Ensure your expert's bills are paid timely. Nobody likes to wait a long time to be paid.

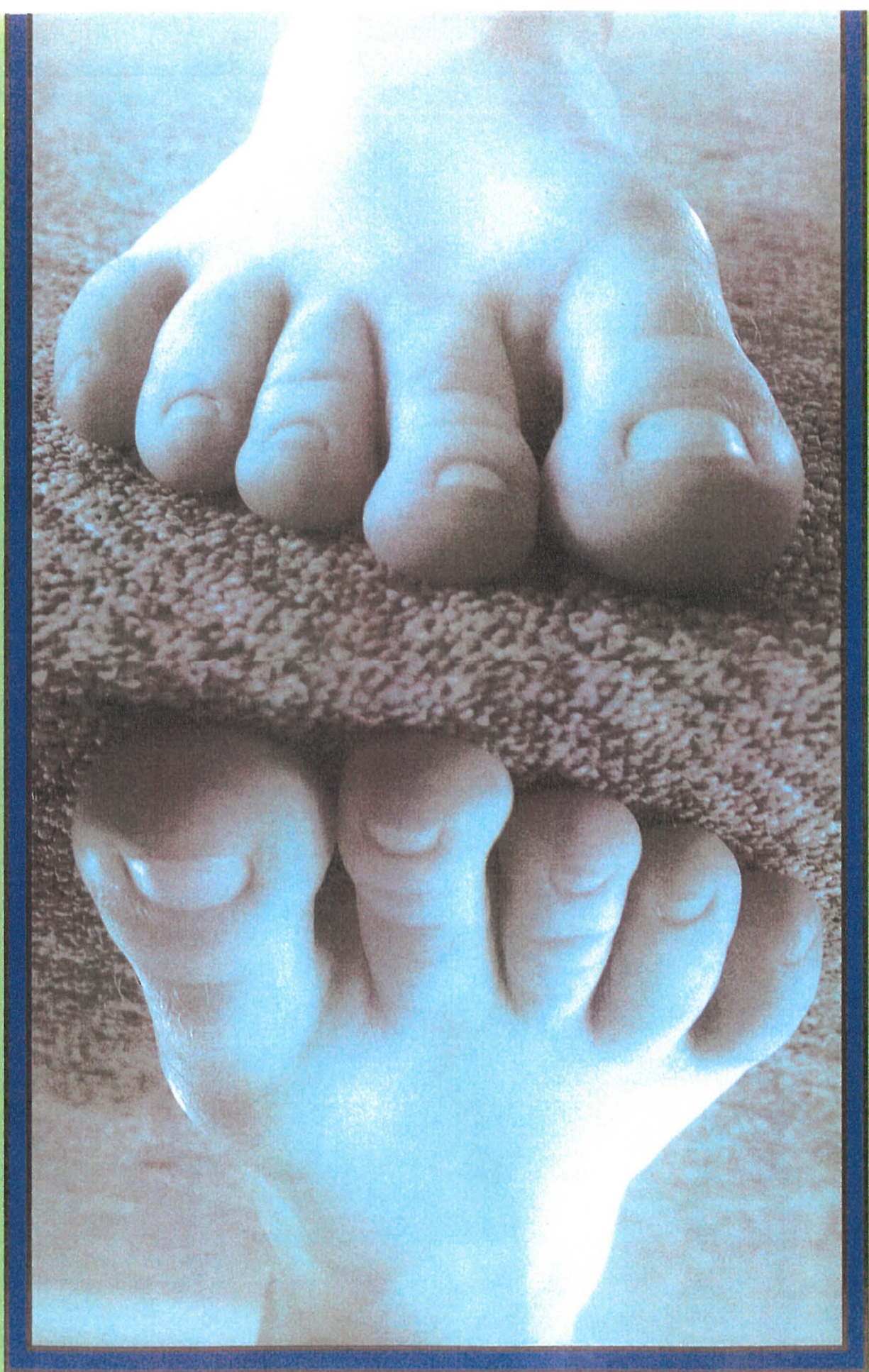
## 5. Your "Secret Weapon" - Use of a Consulting Expert:

- The big plus is that the consulting expert's communications and work product are generally treated as confidential and not discoverable. The non-testifying consultant provides the ability to freely and candidly explore the "good, bad and ugly" aspects of your and your adversary's case.

## 6. Immerse Yourself in Your Opposing Expert's Files and Background:

- Get your opposing expert's entire file materials. If necessary, issue a subpoena.
- Study the billing records.
- Track down the expert's prior testimony, trial exhibits, publications, industry speeches and memberships, job history, and licensure qualifications.
- Identify authoritative or peer-review publications that may challenge your opposing expert's approach, methodology or opinions.







- Investigate who did the underlying work. Is the opposing expert the real author, or a mere messenger? Identify the persons who performed the calculations, experiments, writing and analysis.

## 7. Develop a Strategic Game Plan For Deposition:

- “Pick and Choose Your Battles” – selectively choose those areas where destructive cross-examination will have the biggest impact. Do not waste the energy, time or focus on issues that are of no consequence.

- Look to obtain the adverse expert’s admissions on areas where both sides agree, and should not be in question.

- Attempt to get the adverse expert to agree with your expert’s methodology or approach as valid and acceptable.

- Show that the adverse expert did not perform an adequate investigation to support his or her opinions. Let the expert blame others (his counsel/client) for not providing him with all the facts or evidence, sufficient budget, or opportunities to perform tasks, meet with witnesses, visit the site, inspect evidence, etc.

- Are the proffered opinions supported by: peer review, literature, consistent with a reliable methodology, acceptable and reliable data, tests or replication?

- When engaging in a confrontational cross-examination, the deposing attorney must “control the witness.”

- Break the confrontational examination into small points.

- Show bias, lack of objectivity and reliability, and “over-the-top” thinking by your opposing expert.

## 8. The Skeletons In The Closet:

- Most experts have a skeleton or two in the closet – deposition, lecture, or publication – that is contrary to their current positions. There are a myriad of ways to locate such information in order to diminish the effectiveness and/or credibility of your opposing expert, such as: trade/industry publication articles; prior

depositions; prior opinion reports; trade/industry books; or research articles. If you find a prior position that is now contradicted by his or her current opinions, confront the expert at deposition and seek to get him or her to discount the strength of the current position and opinions or if tactically helpful, disavow the prior work.

## 9. Two Heads Are Better Than One:

- Consider having your expert attend the deposition of your adverse expert. Your expert can provide real-time, rifle-shot questions and commentary during the deposition.

## 10. Landmines In Your Case’s Theory - Identify Weaknesses In Your Case and Confront Adverse Expert To Remove The Issue:

- Prior to deposing your adverse expert, meet in person with your expert to review your case theory, based upon depositions, discovery, and pleadings. Identify all potential landmines in your technical theories and underlying support. Once you and your expert identify the potential shortfalls in your expert case, develop a winning strategy to deal with these issues. Consider confronting the adverse expert on these potential issues and seek to get the adverse expert to agree that the “issue” is not material or can be placed in appropriate context, such that it is “not a big deal”—this then helps remove potential problems in your case.

## 11. There is No “I” in Team:

- Appreciate the importance and critical role that your experts play in developing a winning case.

- Collaborate with your experts on the legal theories being asserted. Are they consistent with the technical opinions likely to be asserted and the underlying evidence?

- The more technical the case, the greater the need for working closely with your expert on the case theories, discovery, expert investigation and simplifying the complex issues into basic points for the court, jury and mediation.

- “Don’t sweat the small stuff” – keep your eyes on the big picture. That said, still watch the details so that the “T”s are crossed and “I”s are dotted.

- Maintain a good working rapport with your experts, and enjoy the journey!

Taking on one’s opposing expert calls for energy, focus and strategic thinking. The winning side is frequently determined by whether the adverse expert holds up in the line of fire. The rewards of effectively destroying or undercutting the adverse expert’s opinions inspire the necessary hard-work and thoughtfulness required. By following the above strategies, you and your counsel will be well-positioned to meet the challenge. ■

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