VI. DEPOSITIONS

A. Key Parties to Depose

In order to know who you want to depose, you need to know the claim file, the responses to written discovery, the documents produced by third parties, and the investigation undertaken to date. You also have to know the substantive law, both of Bad Faith in general, and as it applies to specific claims issues present in your case. Knowledge truly is power in this context.

The most obvious deponents are the parties themselves. They are usually deposed first. After that, the lay witnesses are deposed, followed by the experts. It is difficult to make categorical statements as to who a defendant or plaintiff will want to depose in a bad faith case or the order in which one should depose them. Certainly the defendant wants to depose the plaintiff. The defendant will want to consider deposing the witnesses to the underlying claim (if they have not already been deposed in the underlying case) and plaintiff’s witnesses regarding the handling of the claim. The witnesses regarding the underlying claim will be not only those who saw the event or have personal knowledge of the event, but also those who investigated the event.

For example, in a fire loss case, there can be witnesses to the fire itself, how it started, how fast it spread, and where it was located at various times, all of whom will probably need to be deposed. There will be fire department and police department employees who responded to the call. There will likely be local investigators, both with the fire department and the police department, whom one should consider deposing. The State Fire Marshall’s office will likely have sent someone to investigate the fire. In the same arson case, there could be witnesses as to activity at the building before the fire and witnesses as to the insured’s activity before the fire. Finally, there will be witnesses as to the insured’s financial condition. While not all of these witnesses should be deposed in every case, the attorney should give specific consideration as to whether they should be in every case.

The identities of the potential deponents will be revealed in the claim file, the plaintiff’s written discovery responses, the plaintiff’s deposition, the documents produced by the plaintiff, and the documents produced by third parties. There can also be witnesses
as to the plaintiff’s damages that require deposing, such as healthcare providers, accountants, financial advisors, employers, co-workers, repairmen, and others. Further, your own investigation, apart from what the insurance company did before making its claim decision, can reveal deponents (for example someone who has refused to give a statement to you).

From the plaintiff’s perspective, the claims handler(s) will certainly need to be deposed. If there are underwriting issues, you will want to depose the underwriters who became involved with the claim. The supervisors of the claims handlers or underwriters can be deposed if it is believed that their decisions did not comport with company policy. If there is a negligent hiring, supervision, training, or retention claim you will want to depose the representatives knowledgeable about corporate policies on these issues and how those policies were followed with respect to the employees at issue. At times, premium issues can come up requiring the deposition of a corporate representative familiar with those matters. If there is a claims manual, plaintiff may want to depose the corporate representative knowledgeable about its creation, use, application, and enforcement. Further, if there is pattern and practice evidence, plaintiff may want to depose the person knowledgeable about those other claims and policyholders, whether it be statistical evidence or the specific claims files.

A consideration present for the plaintiff, but not usually for the defendant, is the location of the deposition. The general rule is that a 30(b)(5)&(6) deposition must be taken at the location of the corporation. Salter v. Upjohn Co., 593 F.2d 649 (5th Cir.1979). If the individual is being deposed simply as a witness, as opposed to a corporate representative, and that person is not a named party, A.R.C.P. Rule 45(3)(A) will require that it be taken within 100 miles of where the witness lives or works. Thus, plaintiff is going to have to travel and pay to travel to the deposition site. The more deponents plaintiff wants, the more trips likely to be involved.

A lawyer should consider obtaining recorded or signed statements from witnesses instead of a deposition. This was once the primary method of preparing for a witness’s testimony at trial. Depositions are expensive, take a long time to arrange, and provide the information obtained to all parties. Statements, whether recorded or handwritten, on the
other hand, cost only the expense of the investigator, can be taken on a much shorter time frame, and the information obtained may never have to be revealed to anyone else if it is harmful to your case. To pursue this route, you have to have a good investigator. You need an investigator whom you know will ask essentially the same questions that you would.

A downside to taking a statement instead of scheduling the witness’s deposition is that it can give the impression of bias or favoritism by the witness in favor of the party obtaining the statement, if the information provided is helpful. You can also run into the problem of a witness authorizing the other side to obtain a copy of the statement and having to produce it.

If you take a statement of a witness, you want to take it after responding to written discovery so that you will not have to reveal the name of the person as someone from whom you have a statement. You would, of course, have to reveal that person’s name as a witness, even if you learned of her after responding to discovery (because of the duty to supplement). It can be argued, however, that there is no duty to supplement an interrogatory answer as to persons from whom you have a statement. The Alabama Rules of Civil Procedure require supplementation only as to (1) witnesses, (2) trial experts, (3) when it is known that a response was incorrect, either when it was made or when it becomes no longer true, and (4) when ordered by the trial court, agreed to by the parties, or through a new requests for supplementation. A.R.C.P. 26(e)(1)-(3).

You will not be able to take a statement from the plaintiff, though one may have been taken before suit was filed in connection with the claim. You can take an examination under oath from the plaintiff, even after you have deposed the plaintiff. See, *Nationwide v Nilsen*, 745 So.2d 264 (Ala. 1998). A plaintiff who refuses to provide an examination under oath can jeopardize his coverage on that ground alone. *Nationwide v. Nilson*, 745 So2d. 264. The Examination Under Oath option is even available when the insured is facing criminal charges such as a fire loss resulting in arson charges against the insured. The Eleventh Circuit, interpreting Georgia law, has held that an insured cannot refuse to answer questions at an examination under oath even on the grounds of asserting his right not to incriminate himself under the Fifth Amendment. *Pervis v SFF&C*, 901 F.2d 944 (11th Cir. 1990).
B. Determining the Order of Depositions

The fight over the order of the depositions most commonly occurs at the beginning of the case when scheduling the initial depositions of the parties. At times, this dispute can become nearly childish. Plaintiff’s attorneys usually include a deposition notice with the Complaint in order to argue that their asking for the defendant’s deposition first, entitles them to take the defendant’s deposition before the plaintiff is deposed. The Alabama Rules of Civil Procedure permit issuing such a notice, though the defendant’s representative cannot be deposed until thirty (30) days after service of the Summons and Complaint. A.R.C.P. 30(a). The defendant can tactically respond by noticing the plaintiff’s deposition for a date before the date selected for the defendant’s deposition. Unlike the defendant’s deposition, the Alabama Rules of Civil Procedure do not contain a provision requiring that the plaintiff be deposed only after the expiration of a certain period of time. Should the defendant notice the plaintiff’s deposition in this fashion, Rule 30(a) provides that the thirty (30) day restriction is lifted from the plaintiff. Presumably the plaintiff could then renote the defendant’s deposition for an earlier date, and so on and so on. One can see how infantile these disputes are subject to becoming.

The defendant’s argument that regardless of who asked first, it is entitled to depose the plaintiff first has the most merit in the Bad Faith/Fraud context. The resolution of this dispute can vary depending on where the suit is filed. As a general rule, however, it has been the author’s experience that the defendant is entitled to depose the plaintiff first in a Bad Faith/Fraud suit, regardless of who asked first. Often scheduling orders provide for this, particularly in federal court.

The order of depositions is probably an issue on which lawyers place too much emphasis. While it is true that it is helpful to have the testimony of the plaintiff before the deposition of a representative of the defendant, it is also true that one can learn as much, if not more, about the other side’s case from the questions which the lawyer asks as opposed to the testimony of the lawyer’s client. A deposing lawyer may not know of the need to ask, nor the importance of asking, a particular line of questions until she hears those questions asked of her client. Under those circumstances, it is certainly better to have the other side’s
deposition yet to go, rather than already taken.

Once the initial depositions are taken, the order of testimony generally is of little importance or dispute. The depositions are scheduled simply as they are asked for and as calendars permit. By then, you know what the other side is after. This fact in itself exemplifies the importance of hearing the opposing lawyer’s questions.

Order of testimony comes into play again at the expert phase. Most scheduling orders provide that the plaintiff is to identify his experts and their opinions, as well as tender them for deposition, before the defendant has to do so. There are several factors at work. The defendant wants to know who the experts are, to know their opinions, and to explore those opinions at deposition so that the defendant can decide if he is going to name a trial expert and so that defendant’s expert can arrive at all of his opinions in response. The idea that the defendant needs to depose the plaintiff’s expert before deciding whether to hire an expert is probably outdated given the time constraints imposed by today’s scheduling orders. There simply is no longer enough time to depose an expert and then decide whether to hire one to respond. Most experts have already been retained by the time for expert depositions arrives. Under those circumstances, the decision is not whether to hire a particular expert, but whether to designate one already hired as a trial expert. Under either scenario, the considerations dictate that the plaintiff’s experts be identified and deposed first.

C. Tips for Preparing for Deposition

You must know your file and the law to be prepared to depose the other side, a witness, or an expert. You need to review the claim file in its entirety, even if you have done that some time before. You need to review the discovery responses of the other side. You need to review the documents produced by non-parties pursuant to subpoenas. You need to review statements and depositions. Certainly one can take a deposition without doing this, but one cannot be assured of covering all of the issues. You are going to forget aspects of the case. Aspects which you once thought were unimportant can become important as the issues develop. Therefore, as pressed as you are for time, you must still review these materials if at all possible.

It is also helpful to have gone to the scene, where applicable, before the deposition.
Take still photographs so that you can use them in the deposition of the other party. You should consider taking your client and your expert to the scene to get their input. Finally, talk to your client and talk to your expert before deposing the other party. Be sure that you understand your side of the case from their perspective.

If the case justifies it, particularly where it is complicated and esoteric, bring your client or expert to the deposition. The rule as to sequestration of witnesses does not prevent your bringing your expert, nor any other witness for that matter. Rule 30(c) of the A.R.C.P. specifically provides that the sequestration rule (Rule 615 of Alabama Rules of Civil Procedure) does not apply to depositions. The same rule exists in federal court by virtue of the case law on this issue. See, *BCI Communication Systems v Bell Atlanticom Systems*, 112 F.R.D. 154 (N.D. Ala. 1986).

Finally, it is important to know the law at this phase in order to know all of the elements you need to cover. This is critical for a discovery deposition as trial preparation. It is also critical in posturing your case for summary judgment. If you do not have the research at your fingertips, nor the ability to have someone research it for you, the Alabama Pattern Jury Instructions can be very helpful in this regard.

**D. Taking the Deposition**

There are a number of preliminary matters to consider related to taking the deposition. First, you should consider whether to videotape it. This can be of particular importance when you think that the witness will not be available at trial, either because he will be beyond the subpoena power of the court or because of physical disability or illness. It may even be that a party’s representative will not be available. This can occur when the plaintiff settles with that party, when the party obtains summary judgment, or when the party simply decides not to bring the out of state witness to trial. Videotape depositions can be helpful to the defense lawyer when there are so many plaintiffs that you will not be able to remember what they looked like, nor what kind of witnesses they will make. Finally, videotaping can be an effective way to handle a difficult, obstructive lawyer. For obvious reasons, difficult lawyers tend to calm down when the proceeding is videotaped.

You also need to consider where to take the deposition. Like the order of depositions,
this consideration probably plays too large of a role with practicing lawyers when it comes to whose office the deposition is to be taken in. It probably is true that a deponent is most comfortable in his own lawyer’s offices. Certainly a less nervous witness is a better witness. It is not as easy on the deposing lawyer to go to the other side’s offices simply because he has to take everything with him. In the end, one should remember that whatever you insist the other party do for his client’s deposition, your client will be subject to the same treatment. This, of course, is not necessarily the case when dealing with a 30(b)(5)&(6) deposition of a corporation. As mentioned above, the general rule is that those depositions must be taken at the location of the corporation. Salter v. Upjohn Co., 593 F.2d 649.

From a practical standpoint, you need the deposition of your client to finish in one sitting, if at all possible. You do not want the day to end with the testimony open, such that the deposing lawyer can look at his notes (or the transcript if the delay is long enough) and prepare additional questions. Although one is less able to accomplish this nowadays, it should still be a goal. Perhaps the lesson to be learned is to start early.

It is often helpful to tell the court reporter when you need the deposition back. Good court reporters are as pressed for time as good lawyers. If you need the transcript back in time to prepare for later depositions or in time to prepare a motion for summary judgment, tell the court reporter. There is nothing more frustrating than to start preparing for another deposition or to start preparing a motion for summary judgment, only to find that the transcript you need is not in the file.

One should consider whether to obtain an electronic version of the deposition. This is particularly the case where there are going to be numerous depositions. Whether there are going to be few or many depositions, an electronic version can be used to generate interesting trial exhibits. Further, you will be providing the transcript to your expert and often experts prefer the electronic version for ease of storage. Finally, if you maintain files on experts you run across, get an electronic version so that you can more easily store his testimony for future use in other cases.

It is difficult to set out a general outline of the subject matter areas to cover in a deposition, particularly when the topic encompasses both plaintiffs and defendants
depositions. At best, the most one can do is provide an outline that forms a framework to use in developing your own outline for each case. Set out below is a very general outline which it is hoped will provide some assistance. Apologies are offered in advance for the likely shortcomings in the outline for the defendant’s deposition. It flows from the limited experience of the author in deposing defendants as opposed to plaintiffs.

**General Topics for Plaintiff’s Deposition**

1. **Personal Information**
   - Name(s)
   - Addresses
   - Family Members
   - Educational Background
   - Other Claims
   - Other Insurance
   - Other Lawsuits
   - Bankruptcy
   - Crimes
   - Employment History
   - Ability to Read and Write the English Language

2. **Sale of the Insurance Policy**
   - How Came to Contact Agent
   - What Occurred with Each Visit to Agent’s Office
   - Content of Communications
   - What Documents Prepared
   - Plaintiff’s Opportunity to Read Application
   - When Made First Payment
   - Confirm Signature

3. **Receipt of Policy**
   - When Received
   - Extent to Which Read
• Where Stored
• Follow Up Contact with Insurer or Agent
• Provisions on Which Decision Made

4. Claim
• Full Details of Event Giving Rise to Claim
• Initial Contact with Insurer or Agent
• Investigation by Insurer
• Verbal and Written Communications with Insurer or Adjuster
• Understanding of Reason for Claim Decision
• Additional Information Supplied to Insurer

5. Lawsuit
• Date First Contacted Lawyer
• Whether is an Arguable Basis
• Whether Further Investigation Should Have Been Conducted
• Why Claims Insurance Company’s Decision Wrong

6. Damages
• Out of Pocket Expenses
• Medical Treatment and Bills
• Lost Income, Wages, Earnings
• Affect on Business
• Damage to Property
• Mental Anguish/Emotional Distress
• Knowledge of Other Similar Claims

General Outline for Defendant’s Deposition

1. Personal Information
• Education
• Employment History
• Crimes
• Lawsuits
• Other Depositions

2. Insurance
• Insurance Training and Experience
• Tenure with Company
• Jobs Held with Company
• Demotions, Disciplinary Actions, Other Adverse Job Consequences
• Chain of Command
• Manuals
• Other Similar Claims - companywide and this representative
• Contents of Personnel File

3. Plaintiff’s Claim
• Who Involved
• Events, Investigation, Communications Revealed in Claim File
• When Decision Made
• Basis for Decision
• Compliance of Decision with Claims Manual Provisions

When conducting the deposition and covering these areas, as well as those you develop, you must ask all of the questions you can think of. Do not withhold a question because of a concern that the answer will be harmful. If the answer is harmful, you need to hear it first at the deposition and not at trial. There may be specific instances where you would not ask a question because you did not want a harmful answer, such as where there is a pending motion for summary judgment or where the witness may not be present at trial, but these instances will be rare. You are going to hear the testimony at trial, so get it out in the open and deal with it.

E. Specific Issues to Address When Deposing the Expert

Investigate the expert before you depose him. There are services available for this purpose. Use them. You want to know if he has testified or written reports on the same
subject matter before. These services can help you find these depositions or reports. You do not want to confront him with the testimony or report in the deposition, unless you are posturing the case for settlement instead of trial. You want to be able to ask him questions which give him the opportunity to contradict the earlier testimony or writing.

A dispute occasionally arises as to who is to pay for the expert’s deposition. Occasionally, each side simply agrees to pay for its own expert’s deposition. This is feasible when everyone has the same number of experts. More often, however, you will pay for the other side’s expert’s deposition and they will pay for your expert’s deposition. This means that if you conduct a lengthy deposition, you must pay for it. A similar issue is whether you must pay for the deposition preparation time of the opposing expert. Different judges approach this issue from different ways. It is suggested that the better practice is for the hiring attorney to pay for preparation and travel time rather than the deposing attorney. This places the cost of the activity in the hands of the lawyer able to control it.

You should consider bringing your client to the expert’s deposition, particularly if it is a technical case. You can also consider bringing your expert. Doing either enhances your ability to cover all relevant topics and your ability at trial to expose the expert’s flaws. As mentioned above, under Rule 30(c) of the A.R.C.P. and federal case law, BCI Communication Systems v Bell Atlanticom Systems, 112 F.R.D. 154 (N.D. Ala. 1986), the rule as to the exclusion of witnesses does not apply to depositions. Therefore, you are entitled to bring either or both, if you believe the case warrants it. The drawback to bringing your expert is that it reveals him to the opposition potentially before you have decided to designate him for trial.

During the deposition, fully develop all of his opinions and the bases for them. Do not leave a stone unturned. Be sure to request the expert’s entire file and go through it in detail. This should be your primary goal. If you do this, you have gotten a good result. Your secondary goal is to try to elicit testimony helpful to some aspects of the case. This is cannot always be achieved, depending on the expert and the subject matter. If you try and fail, the deposition should not be considered a failure. You just have to look for other avenues of cross examination.
Generally, you want to learn the expert’s qualifications. You do not want to explore this in any detail if you believe he may not be called live at trial. If you do not qualify him, and his retaining attorney does not qualify him, the deposition cannot be read at trial (assuming the witness lives out of state). The expert’s qualifications are another subject matter for cross examination. In asking about his qualifications, you want to know of his experience with similar claims and the results in those claims. You also want to learn about his testifying experience, in general and in similar cases. Be sure to ask what percentage of his time and work is devoted to litigation as opposed to any other income generating activity. Finally, find out what his charges are and the amount of time he has spent to date on the file. If he has prepared a bill, review that with him. His description of work contained in the bill can lead to fruitful areas.

If you are in federal court, you need to determine if the expert qualifies to testify under the *Daubert* line of cases. When deposing an expert witness in a bad faith case, counsel for plaintiff or defendant should have a firm understanding of the standard for admission of expert testimony in order to lay the groundwork during the deposition for a potential motion to preclude all of part of the expert’s testimony.

Federal courts employ the standard articulated in *Daubert v. Merrell Dow Parms., Inc.*, 509 U.S. 579, 587 (1993), in evaluating the admissibility of expert testimony. *Daubert* requires federal judges to act as “gatekeepers” in determining both the relevance and the reliability of expert testimony and excluding any testimony that would not be helpful to the jury or that lacks a reliable foundation. *See Daubert*, 509 U.S. at 589.

Federal Rule of Evidence 702 provides that

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FRE 702. The *Daubert* decision laid out several factors to aid federal judges in evaluating
expert testimony and making the determination of whether a particular scientific study or theory is reliable: (1) its empirical testability; (2) whether it has been published or subjected to peer review; (3) whether the known or potential rate of error is acceptable; and (4) whether it is generally accepted in the scientific community. See Daubert, 509 U.S. at 592-94. These factors do not form a definitive test, but rather are suggestions intended to help guide the trial judge’s analysis. See id. at 150-52. The Supreme Court stressed that the trial judge has “considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” Id. at 152.

The burden is on the party seeking to admit expert testimony to establish by a preponderance of the evidence that the admissibility requirements of FRE 702 have been met. See, e.g., Allstate Ins. Co. v. Hugh Cole Builder, Inc., 137 F.Supp.2d 1283, 1286 (M.D.Ala. 2001). Counsel for the opposing party attempting to exclude an expert under FRE 702 can attack any one of the three requirements under the rule. For example, in Agrawal v. Paul Revere Life Ins. Co., 182 F.Supp.2d 788 (N.D.Iowa 2001), the trial court held that a putative expert’s opinion that coverage existed for plaintiff’s injury and that the insurer acted in bad faith in cutting off disability benefits were inadmissible because expert’s views on coverage were not based upon specialized training and expertise and were conclusory.

Alabama courts have not adopted the Daubert standard for evaluating expert testimony and instead continue to rely on the standard laid out in Frye v. U.S., 293 F. 1013 (D.C.Cir. 1923). Under the Frye standard, an expert offering an opinion must prove that he relied upon scientific principles, methods, or procedures that have gained general acceptance in the expert’s field. See, e.g., Slay v. Keller Industries, Inc., 823 So.2d 623, 626 (Ala. 2001). This Frye doctrine stands for the proposition that novel scientific principles and techniques may not serve as the basis for expert testimony unless the proponent of the testimony can demonstrate that the principle or technique is generally accepted in the relevant scientific community. See Frye, 293 F. 1013.

Unfortunately, the question of whether or not a theory is generally accepted can be difficult to ascertain. As the court explained in Frye,

Just when a scientific principle or discovery crosses the line between the
experimental and the demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. 1013 at 1014. As such, the Frye “general-acceptance” standard is considered more flexible and easier for the proponent offering expert testimony to meet than the Daubert “scientifically reliable” standard. Frye is typically favored by plaintiffs, while defendants in Alabama cases often urge the courts to abandon Frye and adopt the Daubert test. Regardless of whether Frye or Daubert is applicable, a putative expert’s mere statements of belief, unsupported by research, experiments, or testing, do not qualify as proper expert testimony and should be precluded. See Slay, 823 So.2d at 626.