A MONTHLY REVIEW OF EXPERT PRACTICE ATTORNEY EDITION NUMBER 2

The Vident Review



The deposition and the courtroom

The same expert, two rooms, two different tests.

THE STANDARD
Four verbs that decide long-term care matters

EXPERT PROFILE
Gary Szatkowski and the plainest warning of Hurricane Sandy

FOR COUNSEL
Five questions before you name an expert for trial



NUMBER 2

In this issue

3 The best engineer we had ever found
Why a deposition and a courtroom test an expert differently

6 Five questions before you name an expert for trial
And why to decide early between consulting and testifying

8 Four verbs decide most long-term care matters
From the Long-Term Care Standards Project

10 He gave out his own cell phone number
Gary Szatkowski, forensic meteorologist

12 A term worth knowing
Demeanor evidence

FROM THE EDITORS

One expert, two rooms

Every expert Vident refers has a CV. Some have stood in front of a jury, and some have not. The difference rarely shows until the day it counts.

This issue is about that difference. The cover story starts with a referral Vident learned from, and lays the two settings side by side. The standards piece shows how a federal test comes down to four verbs. The profile is a meteorologist known for saying it plainly with a storm coming.

The Vident Review is published monthly by Vident Partners, Dallas, Texas, for the attorneys who retain experts and the experts they retain. **Managing Partner** Arie S. George, J.D. videntpartners.com



The best engineer we had ever found

His report was flawless and his deposition went beautifully. Then came his first trial.

Early on, Vident referred one of the finest engineers it knew. At that first trial, what he wore took the jury's attention away from everything he said.

He had done nothing wrong in the conference room. The two settings had tested him on different things, and only the first had been asked about. Vident has asked about the courtroom ever since.

A DEPOSITION IS A RECORD

A deposition usually takes place in a conference room or over video, with attorneys and a court reporter. The questions come from opposing counsel, and the transcript or video can be used later. That last fact governs everything. The expert is speaking to a record that will outlast the day, and opposing counsel is testing what the expert says. Precision and composure carry the room.

Marty Aisenberg, Vident's longtime senior case manager and a former trial lawyer, described what happens to that record: "I impeached parties (and experts) on the witness stand with their conflicting deposition testimony whenever the opportunity presented itself, and so did opposing counsel."

A strong report matters most here. An expert who knows the file, listens to the question and answers only that question gives the record very little to work with.

A COURTROOM IS AN AUDIENCE

Trial testimony takes place in front of the judge and often a jury, who are hearing the subject for the first time. The test widens. The people deciding the case weigh what the expert says and whether they believe the person saying it. Plain words, a steady pace and a calm presence carry the room.

"Every trial tells a story," Aisenberg wrote in 2020. "Very often," he added, "expert testimony is an essential part of the story." The expert who was precise for a transcript now has to be understood by a jury that did not ask to be there. That is a separate skill, and an expert can have the first without the second.

THE CAMERA JOINS THE TWO ROOMS

Video has narrowed the gap between them. Arie George wrote in 2025 that video depositions and trial testimony capture "facial expressions, body language, and tone," context a written transcript lacks, and that this "can influence perceptions of credibility and intent." A recorded deposition can reach a jury, so how an expert comes across on camera counts too.

Testifying over video has its own demands. Introducing and reviewing exhibits takes careful coordination ahead of time, and a stable connection and secure software are part of the job.

WHAT VIDENT ASKS

An expert can be excellent in one room and new to the other. So Vident asks how many of each they have done, and tells the attorney. It asks where they have testified and how it went. It asks how they explain the subject to someone outside the field and how they respond when challenged.

Pace, plain speech and how people listen change from one courthouse to the next. A county seat, a downtown courtroom and a camera are three different settings. The question for any expert is the same: will the people in this room listen to what you are saying?

> "And the winner is usually the side with the more compelling story."
>
> MARTY AISENBERG, "TELLING THE STORY," FEBRUARY 25, 2020





SIDE BY SIDE

A deposition and a trial ask different things

	DEPOSITION	COURTROOM
Who is there	Attorneys, a court reporter, often a videographer	A judge, often a jury, attorneys, the public
Who matters most	Opposing counsel, testing what the expert says	The people deciding the case, hearing it for the first time
What is tested	The expert's statements	The statements, and whether people believe the person
What carries	Precision and composure	Plain words, a steady pace, a calm presence

FROM THE BENCH: THE DRIFT

In *Hill v. Emergency Medicine of Idaho* (Idaho, March 27, 2025), the court ordered a new trial after an expert's trial testimony proved "a dramatic departure from the expected testimony" in the disclosure.

FROM THE BENCH: THE AFFIDAVIT

In *Woodward v. Saint Francis Medical Center* (Neb., May 31, 2024), a change between deposition and affidavit by a nonparty expert was held to be a credibility issue for the fact finder.

Five questions before you name an expert for trial

A CV will answer none of these. A twenty-minute conversation will answer all of them.

1 How many depositions, and how many trials?

The two numbers are different facts. Ask for each, and for the date of the last trial.

2 Where have you testified, and how did it go?

Ask about a court like yours: federal or state, Daubert or Frye, a county seat or a downtown courtroom.

3 How would you explain this to someone outside your field?

Have them try it, on the phone, with a term from your case. You will know in two minutes.

4 What was your hardest cross-examination?

Listen for what they did, and whether they stayed steady while they did it.

5 Will the deposition be recorded?

If it may reach a jury, treat it as testimony a jury will see, and prepare the expert for the camera as well as the transcript.

WHAT CHANGES FROM ONE COURT TO THE NEXT

Pace. How quickly the room wants to hear it.

Plain speech. The words and examples that land here.

The court's rules. Federal or state, Daubert or Frye.

The setting. A county seat, a downtown courtroom or a camera.

Consulting or testifying: decide early

Federal Rule of Civil Procedure 26(b) provides for two very different kinds of expert. The choice shapes what the other side can see.

A TESTIFYING EXPERT

Offered to give opinions at trial. A white paper Vident published in 2019 put the risk plainly: engage a testifying expert from the start and most of the expert's file, "the evidence reviewed; emails exchanged; conclusions reached, whether favorable or not," will be subject to discovery.

A CONSULTING EXPERT

Engaged for trial preparation. The same paper describes a consultant who helps develop a plan, gather and analyze the evidence, and vet theories "in a confidential manner," then helps identify the testifying expertise the case needs.

A DESIGNATION CAN CHANGE

Peter George wrote about a case of first impression in Illinois, *Dameron v. Mercy Hospital and Medical Center*, 2020 IL 125219. The court held that "prior to producing the expert report," a party can change a testifying expert to a non-testimonial expert without losing the protections from discovery, "barring exceptional circumstances."

That is Illinois and the Seventh Circuit. Look for the law in your jurisdiction before you rely on it.

Most attorneys who contact Vident are looking for a testifying expert. Ask whether the first call should be for a consultant.

Sources: Flatwater Forensics, "Consulting vs. Testifying Expert: A Pivotal Early Decision Point," published on Vident Insights, March 21, 2019; Peter George, "What's In a Name?", December 1, 2020. The consultation with Vident is complimentary, whichever you need.

THE STANDARD

Four verbs decide most long-term care matters

CMS wrote the test itself. A pressure injury is "avoidable" if the facility failed to do any one of four things.

Evaluate

the resident's clinical condition and risk factors

Define and implement

interventions consistent with resident needs, resident goals and professional standards of practice

Monitor

and evaluate the impact of the interventions

Revise

the interventions as appropriate

CMS defines both words in Appendix PP, the surveyor guidance to 42 C.F.R. Part 483. "Avoidable" means the resident developed a pressure ulcer or injury and the facility did not do one or more of the four things. "Unavoidable" means the resident developed one even though the facility did all four.

The test reaches past skin. Section 483.24(a) uses the identical construction for decline in activities of daily living. Section 483.25(c) uses it for range of motion, and section 483.25(g)(1) uses a parallel clause for nutritional status.

A STAGE DESCRIBES TISSUE

Staging categorizes depth of tissue loss. A stage is a description of tissue at one moment. The regulation says a resident "does not develop pressure ulcers unless the individual's clinical condition demonstrates that they were unavoidable." The question is what the record shows about risk assessment, offloading, moisture, nutrition and reassessment before the stage existed.

A deep tissue pressure injury can declare itself well after the causative insult, which is why the date a wound was first charted and the date it began can be two different things.

A STAR RATING IS NO FINDING ABOUT CARE

A deficiency is a surveyor's determination of noncompliance, cited from a sample at a point in time. The health inspection star rating is a forced distribution: CMS bases it on the relative performance of facilities within a state, so every state has its one-star homes.

THE FOUR STAGES

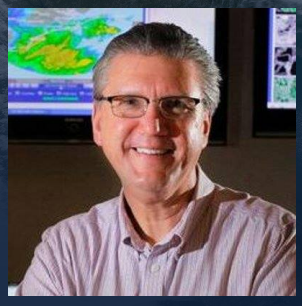
Stage 1	Intact skin with non-blanchable redness
Stage 2	Partial-thickness loss: a shallow open ulcer or serum-filled blister
Stage 3	Full-thickness loss. Fat visible; fascia, muscle and bone are not
Stage 4	Deep loss with exposed or palpable muscle, tendon, ligament or bone



THE ANCHOR

Nicholas A. Alfonso, M.D., a fellowship-trained orthopedic trauma surgeon at the University of Colorado Anschutz School of Medicine, answers the half of these cases a nursing opinion is least equipped to reach: injury mechanism and orthopedic consequence.

SOURCES As published in the Long-Term Care Standards Project, videntpartners.com/network/long-term-care-standards-project, read November 5, 2026: 42 C.F.R. §§ 483.24, 483.25; CMS, State Operations Manual, Appendix PP (F686); NCBI Bookshelf, StatPearls, Pressure Injury.



He gave out his own cell phone number

"I will be very happy that you are alive & well, no matter how much you yell at me."

Gary Szatkowski, to coastal residents ahead of Hurricane Sandy, 2012

Gary Szatkowski spent 38 years with the National Weather Service, 19 of them as Meteorologist-in-Charge of the Mount Holly, New Jersey forecast office, responsible for forecasts and warnings for about 12 million people across New Jersey, Delaware, eastern Pennsylvania and northeast Maryland.

He gained national attention during Hurricane Sandy, when he broke from standard Weather Service language to issue a personal plea urging coastal residents to evacuate and shared his own cell phone number. His direct, plain-language communication was widely credited with influencing evacuation decisions.

That is the skill a courtroom asks for. He retired from the Weather Service in May 2016, taught as a training instructor for COMET/UCAR, worked as a senior forecaster at The Weather Company and now runs OurWeather US LLC, consulting on forensic meteorology for legal proceedings.

WHAT A FORENSIC METEOROLOGIST DOES

In his own article for Vident Insights, Szatkowski describes "a scientist who can turn raw weather data into clear, defensible evidence about what the weather was, or most likely was, when an incident occurred." The work draws on weather stations, radar, satellite imagery, lightning and storm reports, and model output, each weighed for how well it represents the place at issue, because weather "can vary dramatically over short distances and time intervals."

He also explains what weather information and warnings were available at the time, which bears on foreseeability and the reasonableness of preparations.

QUESTIONS HE ANSWERS

- When did freezing conditions begin and end at the site?
- What were the wind speeds at the property when the damage occurred?
- Did rainfall intensity or visibility meet a threshold relevant to duty or notice?

CALLED ON FOR

- Slip-and-fall on snow and ice
- Crashes in fog, rain or sun glare
- Hail, wind and tornado property claims
- Coastal flooding
- Construction delays
- Government response adequacy

He spent a career making sure people understood the forecast in time to act on it.

Full profile: videntpartners.com/experts/featured/gary-szatkowski. Article: "What is a forensic meteorologist?", May 19, 2026. Satellite image: NASA MODIS, October 28, 2012.

A TERM WORTH KNOWING

Demeanor evidence

What a witness shows apart from the words: facial expressions, body language and tone. Video depositions and trial testimony record it, and it can influence how a jury perceives credibility.

FURTHER READING ON INSIGHTS

The impact of video conference technology on depositions and trials

Arie S. George, August 12, 2025

Telling the story

Marty Aisenberg, February 25, 2020

The future of Zoom court

Marty Aisenberg, April 27, 2021

What are you working on?

Reply to the email this review came with and it reaches Arie George.

NEXT MONTH

How to choose an expert

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PHOTOGRAPHS Cover: courtroom, Federal Building and U.S. Courthouse, Providence, Rhode Island, Carol M. Highsmith Archive, Library of Congress. Page 2: courtroom, Federal Building, Anchorage, Alaska, Highsmith Archive. Page 3: Lee County Courthouse, Historic American Buildings Survey, Library of Congress. Page 4: Harris & Ewing Collection, Library of Congress. Page 5: courtroom, Peoria, Illinois, Highsmith Archive. Page 10: NASA.

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