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IN THIS ISSUE

ABA Recommends Exempting Draft Expert Reports and Certain Attorney-Expert Communications from Discovery

by Diane Sumoski

Are draft expert reports and attorney-expert communications subject to discovery in your federal or state jurisdiction? Should they be? How does discoverability of this information affect your ability to collaborate with your expert witnesses and vice versa? Does discoverability of this type of information further justice? The members of the Federal Practice Task Force of the Section of Litigation ("Task Force") asked themselves, other attorneys, and expert witnesses these very questions. After analyzing the state of the law, the relevant procedural rules, and anecdotal evidence, they concluded that the benefit that may come from allowing discoverability of draft expert reports and certain expert-counsel communications is outweighed by the harm that such discoverability may cause. Accordingly, the Task Force proposed an ABA recommendation that the courts adopt rules that protect from discovery draft expert reports and attorney-expert communications that are an integral part of the collaborative process in preparing an expert's report.

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Should Experts Receive Witness Immunity?[1]

by John P. McCahey

Twenty years ago, professionals retained as expert witnesses in litigation gave little thought that one of the litigants may later sue them. Suits against expert witnesses were rare and it was generally assumed that they, like other witnesses, were shielded from civil liability under the witness immunity doctrine. Since then, there has been an increasing number of lawsuits brought against expert witnesses. These cases have included actions by plaintiffs who were adverse to the party who retained the expert (commonly referred to as suits against "adverse experts"), as well as those brought by the party who retained the expert (commonly referred to as suits against "friendly experts").

Courts to date have agreed that the witness immunity doctrine bars those actions brought against adverse experts. A majority of courts have also concluded that the doctrine does not apply to those actions brought against friendly experts. There still remains, however, a large number of courts that have yet to address the doctrine's applicability to expert witnesses, particularly friendly experts. Undoubtedly, these courts in the future will look to the reasoning of their sister courts in deciding whether or not to afford witness immunity to adverse and friendly experts.

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A Message from the Chairs

Welcome to another great issue of *Expert Alert*! And a belated welcome to Wendy Gerwick Couture, our newest newsletter editor (this is her second edition), who has truly devoted herself to seeking out and finding insightful articles on important topics in our members' professional practices. If you have an idea for a newsletter article, by all means, tell Wendy, Veronica, Jeff, or me about it – we want to publish your thoughts and ideas.

It is not too early to start planning to attend the Section of Litigation's Annual Conference that will be held at the Marriott River Center in San Antonio, Texas, from April 12 – 14, 2007. As a Texan, I can attest to the fact that San Antonio is a great place for adults and children alike – so plan to bring your family if you can. It is also going to be a great place for our committee to showcase some of the work it is doing and issues with which it is concerned. Indeed, we are proud to say that we have had two great programs accepted for the Conference.

The first, which is currently scheduled as the Friday morning plenary program, should be a real blockbuster – *Trying the Corporate Case of the Century: Enron*. Years before the 4 ½ month criminal trial of Ken Lay and Jeff Skilling, the word "Enron" had already become shorthand for "corporate greed." After the collapse of this darling of Wall Street, and well before the first day of jury selection, constituencies from laid off employees, to the press, and to the Congress itself, cried out for "justice" against Enron and the men at the top – Lay and Skilling. How did the lawyers who tried this massively complex case contend with this level of public outrage – the prosecutors who were expected to win "hands down" and the defense attorneys who were facing the challenge of a Houston jury pool that had been bombarded daily for years with the alleged misdeeds of Enron? What were the logistics of sifting through millions upon millions of pages of evidence to shape a case that could be presented to a jury? How did the massive Enron MDL civil securities lawsuit impact the criminal proceeding? Three of the trial lawyers, Daniel Petrocelli, Bruce Collins, and Kathy Ruemmler, and their well-known jury consultants, Reiko Hasuike and Jo-Ellan Dimitrius, in a panel moderated by Section of Litigation Chair Kim Askew will address these issues and more.

Our second program, *Me and My Shadow: Communication Between Experts, Attorneys, and Graphic Artists*, will explore ways to maximize the persuasive potential of expert witness testimony at trial through the use of visual presentation tools. Better yet, the program will illustrate – through live demonstration - how to best bring complex concepts to life at trial in a persuasive and understandable form. The participants, lead by one of our Programs Subcommittee Chairs, Joan Archer, will demonstrate the process of communicating concepts between counsel, experts and graphics artists and show how to maximize both persuasive impact and cost-effectiveness of an expert presentation. In short, this program will not only be interesting and engaging, it promises to teach each of us techniqueswe can use with expert witnesses in our practices.

And – if that were not enough – we are also co-sponsoring with the Construction Litigation Committee a program on E-Discovery that should not be missed. Beyond that, we will continue our new tradition of having a "dutch treat" committee dinner at a local restaurant – a great opportunity to compare notes on expert-related issues across the country and to network with other interesting people in our profession.

We hope to see you at the Alamo!

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A Note from the Editors

We hope you will enjoy this first issue of volume 3 of *Expert Alert*.

We are pleased to present the first article in a new series, *Tips from the Experts*. Each article in the series will present an expert witness's advice to attorneys on how to work effectively with experts. We are currently accepting submissions from expert witnesses for future articles in this series.

This issue also reports on a recent ABA recommendation that draft expert reports be exempt from discovery. This recommendation could signal an important shift in the law, and we will keep you informed on the courts' and commentators' reactions to it.

This newsletter also reprints an article first published in the Commercial & Business Litigation Committee's newsletter analyzing whether experts should receive witness immunity. We review all of the newsletters published by other Section of Litigation committees to look for articles that are relevant to you, and we are pleased that the ABA and the author agreed to make this pertinent article available to the members of the Expert Witnesses Committee.

Finally, this issue contains tips from several prominent practitioners about making the best use of expert witnesses before trial and harnessing the power of your expert's knowledge. If you have practical advice that you would like to share with the members of the Committee, please contact us about writing a short article for a future newsletter.

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VISIT OUR WEBSITE

www.abanet.org/litigation/committees/

For more information about the Committee, please visit the Committee website at www.abanet.org/litigation, where you will find useful information about the committee and its sub-committees, a calendar and information about upcoming events and programs, and links to useful articles and other materials.

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The Task Force Analyzed The Prior Rule Amendment And Its Impact

In a thoughtful report adopted by the Section of Litigation,[1] the Task Force studied the effect of the 1993 amendments to Federal Rule of Civil Procedure 26(a)(2) on expert discovery ("the 1993 Amendment"). The 1993 Amendment created a requirement that parties provide each other with a written report from testifying experts. The new formulation of the rule further specified that the expert's report disclose "the data or information considered by the witness in forming the opinions" given in the report. The prior version of the rule indicated that the report need only disclose "data or facts relied on by the expert in formulating his or her opinion."

Considering the impact of the 1993 Amendment, the Task Force found that a variety of standards exist across the nation regarding discoverability of materials relating to expert witnesses. Most federal courts have held that attorney trial strategy, mental impressions, and other traditional work product, if turned over to a testifying expert, is now required to be produced. The Task Force observed that a minority of federal courts, however, have held that the 1993 Amendment was not intended to eviscerate the work product protections of Rule 26(b)(3). It further noted that a number of states have rejected permitting this type of discovery. Moreover, individual state and federal judges often have differing practices from their colleagues in handling this issue.

The Advisory Committee Notes to the 1993 Amendment recognized that counsel will normally need to assist experts in preparing their reports and should not be precluded from doing so.

The Task Force Concluded That Such Material Should Be Shielded From Discloure

The Advisory Committee Notes to the 1993 Amendment recognized that counsel will normally need to assist experts in preparing their reports and should not be precluded from doing so. That said, the Task Force found that, in practice, the continued work product protection referenced by advisory note has proven illusory and offers no safeguard to attorneys who wish to work closely with their experts and still shield from disclosure such traditional work product as case theories, strategies, and approaches.

The Task Force ultimately concluded that the rule of discoverability should be amended or a new rule adopted to protect draft expert reports and certain attorney-expert communications from disclosure. The Task Force supported its conclusion with seven distinct bases:

1. *The policy underlying the work product doctrine*. Counsel needs to be free to explore different theories with her expert in preparing her case. To the extent the current rule requires disclosure of theories revealed to the expert, it hampers counsel's efforts to strategize, theorize, and develop her client's case.

2. *The expert's hands are tied by the rule*. If the expert knows that his raw and rough musings will be discoverable, he will feel constrained from conducting the thorough analysis that a case deserves. An expert witness should feel free to test different theories and hypotheses to reach his opinion.

3. *No improvement to the quality of justice*. The Task Force was unable to unearth any empirical evidence that showed that the disclosure of draft expert reports and attorney-expert communications would improve the quality of justice. It posited that the expert's veracity would be gauged upon the strength of his opinion and the facts and data upon which he relies–not on the extent to which he worked with counsel in forming those opinions or the mechanics in the preparation of his report.

4. *Elimination of the tendency to avoid creating discoverable drafts and communications*. The Task Force outlined the various machinations that parties and experts have undertaken to avoid creating a paper or electronic trail of discoverable drafts and communications. They reasoned that this effort (generally ineffective in the advent of electronic discovery and with a well-funded and determined opponent) is a waste of time and focus in the litigation process.

5. *Elimination of unnecessary costs and advantages to the well-heeled litigant who can afford two experts*. The Task

Force noted that some parties avoid this rule by hiring two experts–a consulting expert with whom they may fully communicate and a testifying expert who may be spoon-fed the consultant's conclusions. This is expensive and can create satellite litigation that serves no meaningful purpose in most cases.

6. *Counsel are stipulating around the rule anyway*. The Task Force pointed out that a practice has arisen where experienced counsel stipulate that these types of disclosures will not be required. The Task Force proposed that what is happening "in practice" should be made "the rule."

7. *Promotion of consistent practice in both federal and state courts*. The Task Force opined that the uncertainty created by differing rules across the country serves no good purpose and does not advance the truth-finding process. In addition, inconsistent rules generally create unnecessary costs. The "best practices" should be identified and used throughout the American justice system.

The ABA Has Recommended Amendment of the Rules

Based on the Task Force's work, the Section of Litigation presented a report and recommendation to the House of Delegates at the 2006 Annual Meeting of the American Bar Association.[2] The ABA agreed with the Section's recommendation and passed a resolution that recommends that applicable federal, state and territorial rules and statutes governing civil procedure be amended as follows:

> *1. An expert's draft reports should not be required to be produced to an opposing party;*
>
> *2. Communications, including notes reflecting communications, between an expert and the attorney who has retained the expert, should not be discoverable except on a showing of exceptional circumstances;*
>
> *3. Nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinion.*

The ABA also resolved that until such an amendment is adopted by the appropriate bodies, counsel should enter voluntary stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

To learn more, you can read the entire report, recommendation, and resolution by accessing the Expert Witnesses Committee website at www.abanet.org\litigation\expertwitnesses.●

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1. The Task Force's Report can be found at http://www.abanet.org/litigation/standards/home.html#policy.

2. The Section of Litigation's recommendation can be found at http://www.abanet.org/litigation/standards/home.html#policy.

Seven Bases for the Task Force's Recommendation:

1. *The policy underlying the work product doctrine*.

2. *The expert's hands are tied by the rule*.

3. *No improvement to the quality of justice*.

4. *Elimination of the tendency to avoid creating discoverable drafts and communications*.

5. *Elimination of unnecessary costs and advantages to the well-heeled litigant who can afford two experts*.

6. *Counsel are stipulating around the rule anyway*.

7. *Promotion of consistent practice in both federal and state courts*.

Ten Steps to Harness the Power of Your Expert's Knowledge

by Walter R. Lancaster and Damian D. Capozzola

Knowing, as they say, is half the battle.

If only life—and litigation—were that simple. But knowledge often equals power in the courtroom, and with the universe of human knowledge regarding science, technology, economics, and business expanding at a seemingly exponential rate, it is more important than ever for litigators to capitalize on the expert witness resources available to them.

Finding the right expert witness for your particular case is a challenge in itself. Managing the impact an expert witness has on a case can be an even greater one. However, there are a number of steps litigators can take to leverage more effectively and efficiently the knowledge of the experts they work with. Here are the top ten:[1]

1. Master your case.

No expert, no matter what his or her hourly rate, can do your job. The expert's role is not to identify all the critical documents, understand how facts fit legal theories, from them craft creative and compelling legal arguments, and perceive any gaps in your case that might best be filled by another expert. Your client is counting on you, the litigation expert, to roll up your sleeves and master the source material of the case. Do not even think about trying to outsource your own expertise.

2. Retain experts early in the case.

Depending on the jurisdiction or judge, expert disclosure deadlines may not appear on the calendar until late in the case. But this absolutely does not mean that you can or should wait to retain the experts you may need to prepare and try your case. Instead, you should locate and retain your experts as soon as practicable, which can mean before the case is even filed if you are the plaintiff or within days of a suit if you are the defendant.

The right expert can be an asset during all phases of the litigation. For example, he or she can assist you in designing your written discovery and deposition outlines for fact witnesses so as to optimize the information obtained for the benefit of subsequent analyses and expert reports.

Additionally, in a field where there are few experts, the party who delays may later find the pickings slim if the other side has already locked up the top experts in the field.

3. Pick the right experts.

Finding the right expert, or team of experts, is often a time-consuming process that requires counsel to review literature, seek references, attend technical or scientific seminars, conduct interviews, and make informed choices. But this is an important process that should be viewed as an investment. Sometimes, the right expert can save you and your client significant amounts of time and money by helping you identify the critical facts that relate to his or her area of expertise and to avoid chasing theories that lead to a dead end. He or she also may point you toward the liability theory that wins the case or the damages defense that reduces your client's exposure to zero.

4. Master your own expert's material.

Early in your relationship with the expert, he or she should be functioning as a teacher, sharing knowledge with you and making you equally as expert in the field, at least as such expertise pertains to the facts of your case. Among other reasons, this will be important for interviewing your own witnesses when your expert is not present to help you, arguing discovery or in limine motions concerning your expert, and preparing to depose the other side's expert.

Also, you should continually pressure-test your expert's developing opinions for relevance and reliability so they will withstand scrutiny when subjected to Daubert or similar tests. Finally, in almost all instances, you will want to supplement the expert's testimony at trial with exhibits that breathe life into his or her opinions. Persuasive exhibits take time to develop, and will require you and your expert to work hand in hand throughout the litigation with the eventual goal of effective trial testimony in mind.

5. When appropriate, have your experts talk with each other.

Many experts believe their specialized area of knowledge often forces them to work alone, and a good number of them simply prefer it that way. If your expert is such a person, do not enable this behavior. Instead, if the needs of the case call for it, politely require the expert to participate in sessions to exchange information and ideas. This can be especially important on large cases

where you have a number of experts from different disciplines and case responsibilities may be allocated among different attorneys.

While one must be mindful of the rules relating to consulting experts versus testifying experts and how the work product doctrine applies in the relevant jurisdiction, the benefits of such an exchange often outweigh the risks inherent in opposing ounsel's attempts to explore (or even distort) such communications.

6. Be sure your expert knows what his or her boundaries are.

Almost as important as your expert actually being an expert in a certain subject matter is your expert knowing what subject matters he or she is not an expert in. Your expert should be willing to defer to another expert on your team who does have that expertise or, if necessary, to simply acknowledge that it is beyond the expert's area of expertise or beyond the scope of what the expert was asked to do in the case. Experts whose egos prevent them from ever saying "I don't know" are prone to making mistakes that may be treated as admissions, which can be very damaging to other parts of your case.

If this happens, at a minimum you have probably bought yourself some significant motion in limine practice and, if that fails, you will have to explain to the members of the jury why they should disregard a highly unfavorable statement from one of the otherwise most valued members of your own team.

7. Review your expert's report for clarity and accuracy.

Some experts are very knowledgeable and skilled in a given subject matter or area, but have limited experience writing the hybrid document known as the expert report: part legal, part factual, part opinion—and all of it subject to unrelenting scrutiny.

Your expert's report will likely be reviewed, one way or another, by opposing counsel, the opposing party's decisionmakers, the judge, and possibly even the jury (if portions are displayed during cross-examination, for example). The clarity and accuracy of the expert's report are therefore critical. If the report is full of spelling errors and poor grammar, it may detract from the persuasive value of your expert's opinion. Furthermore, if the report contains factual inaccuracies, those could be used to discredit the expert's opinion, even if the inaccuracies are immaterial.

However, balanced against your interest in ensuring the clarity and accuracy of the report is the fact that draft expert reports are often discoverable and almost as often the centerpiece exhibits of expert depositions. Opposing counsel will very likely explore changes: who suggested them, when, and why. Recognizing when even clarity and accuracy need to yield to preserving the expert's independence is an art, not a science.

8. Prepare for deposition.

It seems obvious that you should work with your expert to prepare for his or her deposition, but too often this process is cursory—either to save money or because the expert thinks he or she has "seen it all before" and doesn't need to

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Doing Your Homework: Online Tools Can Help

As mentioned several times in this article, thoughtful and thorough research with respect to expert witnesses is a key part of a winning litigation plan. Do not despair—today, research does not always have to equal headache. A plethora of online resources are available to assist you at nearly every stage, ultimately making expert witness research a bit less painful.

Finding and investigating experts is often the first step in such research, and it is the intention of many Web sites to connect you with the experts you seek. Online directories such as FindLaw (www.findlaw.com), Martindale-Hubbell (www.martindale.com), JurisPro (www.jurispro.com) and several others allow you to search for information on experts by name or area of expertise (with sub-categories allowing you to dig deep into niche areas) and narrow your search by geographic location. For example, finding a directory of experts on hazardous materials (specifically, asbestos) in California may take as few as three clicks on one of these sites.

But is that expert the right person for the job? Has he or she testified in similar cases before, and if so, what were the results? Does the expert have a particular bias? Can he or she communicate effectively in a courtroom?

Users of integrated online research systems have an advantage in determining whether a particular expert

SIDEBAR (CONT.)

help or hinder a case. In Westlaw, for example, users with access to the Expert Testimony database (EW-DOCS) can search for profiles of experts by more than 200 areas of expertise, case type, who was represented, or jurisdiction, then link to the full text of relevant selected expert depositions, trial transcripts, affidavits and reports. Links to other court documents and materials written by the expert are also close at hand, making it easy to come up with a detailed profile of the expert in one sitting.

Diligent expert witness research can also benefit a case by helping the attorney understand the expert's area of specialty and develop appropriate lines of questioning. And in challenging the testimony of an opposing attorney's witness, a thorough review of his or her past testimonies is crucial to help spot inconsistencies.

The benefit of accessing biographical information and court documents in one place lies not only in the breadth and depth of the data that can be searched, but also in the efficiency with which that research can be accomplished. Spending less time—and, by extension, less money—on research can help litigators get the most out of their expert witnesses and still have time to focus on other important aspects of the trial.

As for those headaches … well, that is another story.

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waste a lot of time preparing for yet another deposition, or both.

What you should impress upon your expert, however, is that this deposition is unique. It will cover case-specific facts in response to questions asked by this particular opposing counsel in light of the deposition testimony previously given by other fact and expert witnesses who have come together exclusively for this dispute that your client is counting on you to handle now. It is worth the time and money to prepare accordingly before the deposition, as there will not be the chance to do so afterwards.

9. Consider bringing your expert with you when you depose the other side's expert.

Depending upon the needs of the case, the rules in your jurisdiction and your own comfort level, you may want to consider whether it makes sense to bring your expert to the deposition, or at least have the expert readily accessible for telephonic consultation. Some experts love to try to dance out of difficult questions by giving bafflegab answers that are full of industry-specific buzzwords. When the questioning attorney tries to follow up, the expert being deposed will continue to give circular, nonsensical answers that grow more scornful with each go-round, as though you are the only one in the room not understanding the answers.

Ideally, you will be prepared to handle that. However, on some occasions, having your own expert available will help you cut through such nonsense, and may even prevent the other side's expert from trying this tactic in the first place. Given the significant expenses already associated with any expert deposition, the fees for your expert's attendance or consultation during the other side's expert's deposition could be money well-invested.

10. Protect your expert's trial calendar early and often.

Experts, almost by definition, are usually very busy people with many demands on their time, including professional responsibilities and, in some instances, the demands of consulting on a number of cases involving different counsel in different parts of the country. And as we all know, case management schedules frequently move around. You do not want to be in a situation where your expert is flying into town for your trial at the last minute or suddenly not available at all because of previously unforeseen scheduling conflicts. Keep your expert informed of every change in your case management schedule and ask about long-term availability as often as necessary to preserve your priority on your expert's calendar.

Dealing with expert witnesses is often difficult and time-consuming work. However, a thoughtful and well-structured approach can make the process more efficient and yield more effective expert testimony at trial.●

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1. For more detail abut the steps a litigator should take to harness the power of an expert's knowledge, *see Expert Witnesses in Civil Trials: Effective Preparation and Presentation* 2d Ed. (Thompson West 2006).

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Witness Immunity Doctrine

Witness immunity, sometimes referred to as a privilege, is a common law doctrine.[2] Its original purpose was to provide a witness with freedom from defamation liability for testimony given at trial.[3] Over time, the immunity's scope has been expanded by most courts to include other theories of tort liability against witnesses. It does not, however, shield a witness from criminal prosecution for perjurious testimony. In federal courts, witnesses are provided an absolute immunity from subsequent damages liability for their role as a witness.[4] Many state courts have likewise provided a blanket immunity from civil liability to witnesses.[5] Witness immunity typically extends beyond those statements and opinions given by the witness at trial to include those rendered during the pre-trial stages of litigation, including at depositions, in affidavits and in reports.[6]

Immunity for witnesses is considered sound public policy.[7] It promotes full and frank testimony by witnesses, which is deemed essential to the truth-finding function of courts and juries. If witnesses had to fear that their testimony could subject them to civil liability to one of the parties, they may be reluctant to testify or, if they do testify, shade their testimony to avoid such liability. Granting civil immunity to witnesses is not perceived as detracting from the truthfulness and reliability of their testimony, which is otherwise insured by the oath, rigorous cross-examination and the threat of criminal prosecution of perjury.

Adverse Experts

Courts appear to be in agreement that civil suits against adverse experts are barred by the witness immunity doctrine. The doctrine has been applied to dismiss claims against an adverse expert alleged under various theories, including defamation, fraud and negligence.[8] It has been found to preclude not only those claims based on the adverse expert's trial testimony, but those premised upon his or her pre-trial preparation.[9]

Courts appear to be in agreement that civil suits against adverse experts are barred by the witness immunity doctrine.

Extending witness immunity to adverse experts has been justified on at least two grounds. First, adverse experts typically owe no professional duties to the opposing party in a litigation and therefore no basis exists for that party to later assert a claim against an adverse expert based upon a breach of those duties.[10] Second, the rationale for witness immunity – promoting full and frank testimony – is considered particularly applicable to adverse experts. If they were not granted immunity from retaliatory suits by an adverse party, the fear of subsequent civil suits may make them hesitant or unwilling to testify.[11]

While courts agree that adverse experts are entitled to witness immunity, such immunity may not bar a claim against such an expert that arose separate from his or her role as witness. In two cases, the court dismissed certain witness-related claims against an adverse expert based on witness immunity, but refused to dismiss other claims that arose outside of the expert's role as a witness.[12]

Friendly Experts

While only a handful of courts have yet to address the application of witness immunity to friendly experts, the majority of them have concluded that friendly experts are not entitled to immunity.[13] The plaintiff in all of these cases alleged claims of negligence or malpractice against an expert it retained in an earlier litigation. The emerging majority view is that the policy considerations underlying the witness immunity doctrine are not served by immunizing a friendly expert from liability for his or her negligence or malpractice.

The Washington Supreme Court was one of the first courts faced with the issue of witness immunity for friendly experts.[14] In a 5-4 decision, the Court adopted the now minority view that friendly experts are entitled to witness immunity. The plaintiff in that case had retained the expert to testify at trial as to the cost of property repairs that plaintiffs were claiming as damages. Plaintiffs were awarded the amount calculated by their expert, but the actual repair work when done cost twice that calculation. Plaintiffs' subsequent action against the expert for negligence was found to be barred by witness immunity.

The Court's plurality opinion concluded that witness immunity for experts was essential to insure their objective testimony. It was immaterial in their view that the expert had been retained and compensated by plaintiffs because the underlying rationale of witness immunity extended to all witnesses, including

friendly and adverse experts. Imposing civil liability upon expert witnesses was

deemed "too blunt an instrument" to achieve more reliability or professional diligence in expert testimony, and instead

> ***While only a handful of courts have yet to address the application of witness immunity to friendly experts, the majority of them have concluded that friendly experts are not entitled to immunity.*** [13]

may motivate experts to take extreme positions favorable to their clients to avoid a later lawsuit. Moreover, the potential of personal liability and the need for liability insurance may deter all but the expert who is a professional witness from accepting an engagement as an expert witness. The Court thus concluded that denying immunity to experts would only serve to deprive the courts of the benefit of candid and unbiased expert testimony.[15]

All appellate courts (as well all but one trial court) following the Washington Supreme Court decision have rejected both its reasoning and conclusion as to friendly experts. While not disputing that adverse experts may be entitled to witness immunity, these courts draw a distinction between friendly and adverse experts. They typically focus on the commercial relationship between a friendly expert and the plaintiff (i.e., the friendly expert's client) and the friendly expert's role as a compensated advocate.[16] Friendly experts voluntarily undertake to provide professional services to their clients for a fee, and it is therefore inappropriate to shield them from civil liability for their failure to provide those services with "care, skill and proficiency" expected of professionals.[17]

The courts taking this majority view also conclude that immunizing friendly experts from civil liability for their negligence or malpractice will not enhance the judicial process, and therefore cannot be justified as a matter of public policy.[18] To the contrary, the absence of immunity for friendly experts is viewed as benefiting the judicial process both by encouraging experts to exercise more care in that role and ridding the courts of incompetent experts.[19] At least one court has pointed out that permitting a client to bring a malpractice action against its expert is analogous to a client bringing a malpractice action against its attorney.[20]

Notwithstanding that they conclude that friendly experts are not entitled to witness immunity for their negligence, some courts suggest that friendly experts may be entitled to immunity from other claims. The Pennsylvania Supreme Court has stressed that it is imperative that an expert witness not be subject to litigation because the party who retained the expert is dissatisfied with the substance of the expert's opinion.[21] The Court cited with approval to an earlier lower court decision which extended witness immunity to dismiss a negligence claim against a friendly expert who changed her opinion at trial because she realized it was unsupportable.[22] Distinguishing claims based on the "substance" of an expert's opinion from those based on the expert's "negligence" in formulating that opinion, however, may prove difficult for courts in the future.[23]

Conclusion

Granting witness immunity to adverse experts is not only consistent with the rationale underlying the doctrine, but recognizes that such suits are typically retaliatory and frivolous in nature. Conversely, the majority view that the doctrine cannot be invoked to protect friendly experts from their negligence or malpractice appears sound. What remains to be clarified in the future are the circumstances, if any, when a friendly expert may be entitled to witness immunity.●

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1. "Should Experts Receive Witness Immunity?" by John P. McCahey, was first published in Committee on Commercial & Business Litigation Newsletter, Volume 8, No. 1, Fall 2006.
2. *See Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1982).
3. *See Murphy v. A.A. Matthews*, 841 S.W. 2d 671, 674 (Mo. 1992) *(en banc)*.
4. *See Briscoe*, 460 U.S. at 334-35.
5. *See Marrogi v. Howard*, 805 So. 2d 1118, 1126 (La. 2002); *Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc.*, 776 P.2d 666, 670-71 (Wash. 1989); *but see Murphy*, 841 S.W.2d at 675-76 (noting that Missouri and some other states have not extended immunity beyond defamation claims unless doctrine's underlying policies require extension).
6. *See Kahn v. Burman*, 673 F. Supp. 210, 212 (E.D. Mich. 1987), *aff'd w/o op.*, 878 F.2d 1436 (6th Cir. 1989); *Dalton v. Miller*, 984 P.2d 666,668-69

(Colo. App. 1999); *Panitz v. Behrend*, 632 A.2d 562, 565 (Pa. Super. 1993).

7. *See Briscoe*, 460 U.S. at 332-33; *Pollock v. Panjabi*, 781 A.2d 518, 524-28 (Conn. 2000).

8. *See Gilbert v. Sperbeck*, 126 P.3d 1057 (Alaska. 2005) (dismissing claims of fraud and misrepresentation against adverse expert in earlier arbitration); *Wilson v. Bernet*, 625 S.E. 2d 706 (W.Va. 2005) (dismissing claim of tortious interference); *Kahn*, 673 F. Supp 210 (dismissing claims of negligence, fraudulent and innocent misrepresentation, defamation and intentional infliction of emotional distress); *Moity v. Busch*, 368 So. 2d 1134 (La. App. 1979) (dismissing claims of defamation and malicious prosecution).

9. *See Provencher v. Buzzell-Plourde Associates*, 711 A.2d 251 (N.H. 1998) (immunity extended to pre-litigation communications); *Kahn*, 673 F. Supp. 210 (immunity extended both to adverse witness' deposition testimony and reports); *Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n.*, 172 A.2d 22 (N.J. Super. Ct. App. Div. 1961) (immunity extended to report).

10. *See Murphy*, 841 S.W. 2d at 675 n.11.

11. *See Wilson*, 625 S.E. 2d at 712 (citation omitted).

12. *See James v. Brown*, 637 S.W.2d 914 (Tex. 1982) (expert immune from defamation claim but not claim for medical malpractice); *Darragh v. Superior Court*, 900 P. 2d 1215 (Ariz. App. 1995) (immunity barred all claims except RICO claim).

13. *See Marrogi*, 805 So. 2d at 1118; *Pollock*, 781 A.2d at 518; *LLMD of Mich., Inc. v. Jackson-Cross Co.*, 740 A.2d 186 (Pa. 1996); *Murphy*, 841 S.W. 2d at 671; *Mattco Forge, Inc. v. Arthur Young & Co.*, 6 Cal Rptr 2d 781 (Cal. Ct. App. 1992); *Boyes-Bogie v. Horvitz*, 14 Mass. L. Rep. 208 (Mass. Super. 2001); *but see Bruce*, 776 P.2d at 666; *Panitz*, 632 A.2d at 562 (providing immunity to friendly experts).

14. *See Bruce*, 776 P.2d at 666.

15. *See id.* at 667-73.

16. *See Murphy*, 841 S.W.2d at 681.

17. *See LLMD of Mich.*, 740 A.2d at 191.

18. *See Pollock*, 781 A.2d at 525-27.

19. *See Marrogi*, 805 So.2d at 1131-33.

20. *See Mattco Forge*, 6 Cal Rptr. 2d at 789-90.

21. *See LLMD of Mich.*, 740 A.2d at 191; *see also Murphy*, 841 S.W. 2d at 680 n.7 (limiting denial of immunity to pre-trial activities and not reaching issue whether immunity would extend to friendly expert's trial testimony).

22. *See Panitz*, 632 A.2d at 562.

23. *See LLMD of Mich.*, 740 A.2d at 192 (dissenting opinion).

Utilizing Experts in an Expert Way - Part I: Making the Best Use of Expert Witnesses Before Trial

by Kelli Hinson and Tesa Hinkley

Expert witnesses play an increasingly common and crucial role in litigation today. In a complex litigation matter, each side often employs several different expert witnesses–different experts for different claims, and sometimes even different experts for different elements of a single claim. In a case involving the breach of a professional duty, for example, it is quite common for a party to retain experts on the separate elements of standard of care, causation, damages, and also perhaps on the particular industry at issue. In today's legal environment, even the simplest case likely will have some need for expert testimony.

It is not enough, however, simply to find and retain the best available expert for your client's case (although that can be a challenge in itself). You also will want to maximize the benefit you receive from the expert's special knowledge and skills and make the most of the fee you or your client will pay the expert. Reaching this objective requires substantial forethought and preparation, beginning the moment you retain the expert.

USING AND EXAMINING AN EXPERT AT THE PRE-TRIAL STAGE

Once an expert is retained, you should provide the expert the information she needs to help develop a litigation strategy. Before you send the expert the first piece of paper, or sit down to go over the case, however, you must think about what information you want to share. Pursuant to Federal Rule of Evidence 703, an expert's opinion should be based upon facts or data perceived by or made known to her at or before the testimony is offered. The expert may rely on any facts or data that are reasonably relied upon by experts in her particular field in forming opinions, even if the facts or data are not admissible in evidence. While the expert may testify without prior disclosure of the underlying facts or data relied upon, a court may require the expert to disclose this information and opposing counsel may request this information and, based on the information, attempt to discredit the expert's conclusion on cross-examination. With this in mind, under the current rules, you should provide the expert as much relevant and non-privileged information as possible so that she will be well-prepared to form and defend her expert conclusions without jeopardizing the confidentiality of privileged or work-product information.

Also keep in mind that expert witnesses' hourly rates can rival or even exceed those of the lawyer, so costs can easily get out of control. Because it is often difficult for an expert to know exactly how much time a project will take, it can be difficult for an expert to estimate her fees accurately. To assist your client's retained expert in this regard, consider breaking large projects into smaller pieces and having the expert report back to you as each piece is completed. This can result in better cost control, less time wasted doing unwanted or unnecessary work, better adherence to and development of reasonable deadlines, and the ability to assess the merits of the case and the quality of the work early on. Ultimately, this will save your client both time and money. These goals need to be weighed, however, against the risk that the lawyer

will appear to be overly "managing" the expert's work product. It is critical for your expert witness to maintain the reality and appearance of an unbiased opinion.

A. Work with Your Expert to Write a Report.

Under the Federal Rules, a retained testifying expert must submit a written report, although under some states' rules, a written expert report may be optional. If you find yourself in a situation where reports are optional, you must decide whether to have your expert prepare a written report. Some factors to consider include:

• If a party does not produce a report, it may be required to tender its expert for deposition before the other side's expert is designated.

• A written report gives the other side a roadmap to your expert's opinions and may provide fertile ground for cross-examination.

• Preparing a written report helps your expert think through and distill her opinions, which may result in a better and more efficient deposition.

• A written report may help to keep your expert's deposition "on topic," and it also ensures that all of the expert's relevant opinions are adequately disclosed.

If you elect to have your expert prepare a written report, be sure to discuss what type of report you are expecting. Depending on the nature of the case, the expert report could be a one page synopsis or a lengthy piece. It should include a concise statement of the expert's findings, set out the facts and data that form the basis of the expert's conclusions, and fully set out the process and methodology the expert used to reach his conclusions.

In working with the testifying expert to create this report, you must be careful in your communications: remember that under the current rules such discussions may be subject to discovery. Make sure the expert understands this–especially if she does not have a lot of experience as an expert witness.

B. Prepare for the Deposition of Your Client's Testifying Expert.

The deposition of your client's testifying expert can be a critical point in the case. Depending on the performance of the expert, your client's position may be significantly strengthened or weakened. Moreover, some courts might allow his deposition testimony to be used against your client, whether you decide to call the expert at trial or not. For example, in Collins v. Wayne Corp., the Fifth Circuit allowed an expert's deposition testimony to be used against the bus manufacturer that hired him as an adverse party admission under Federal Rule of Evidence 801(d)(2)(C). According to the court, because the manufacturer hired him to investigate and analyze a bus accident, the expert was an agent of the manufacturer for that purpose; and because the expert's report and deposition were part of the investigation for which he was hired, they were admissions by the manufacturer. This case seems to suggest that an expert would almost always be the agent of the party who hired him for purposes of the rule on party admissions. A similar case in the Federal Claims Court held that if an expert testifies at trial, his prior deposition testimony in that case is an admission of the party that retained him, unless that expert is withdrawn before trial. The Third Circuit, however, refused to apply a blanket approach in Kirk v. Raymark Indus., Inc., holding that an expert's testimony cannot be used as an admission against the party who hired him without the court first finding the expert is an agent of the party – i.e., that he was authorized to speak on behalf of the party and that he agreed to be subject to the party's control. The Court of Appeals in Houston, Texas recently held that, because expert witnesses are hired to testify about their own expert opinions and such opinions are theoretically supposed to be impartial, there is no control by the retaining party and, thus, an expert's statements are not party admissions.

In any event, you should be mindful of this issue when you are preparing for the deposition of your client's expert. To help ensure that this deposition goes smoothly and serves only to strengthen your client's position, you should prepare the expert for the substantive portion of his deposition and also provide general advice regarding the procedural aspects of a deposition and tips on how the expert can best perform.

1. Prepare Your Client's Testifying Expert for the Substantive Portion of His Deposition.

Your client's expert should be well-versed regarding all the relevant facts of the case and knowledgeable regarding all aspects of his conclusions. Although you likely will have communicated often with the expert regarding the facts and the expert's conclusions, meet again shortly before the deposition. Be sure to discuss any sticking points with the expert and make sure that he can address any potential weak spots in your client's case both comfortably and credibly.

Also make sure that your expert has–and can articulate–an adequate and reliable basis for his opinion. No matter how educated and otherwise qualified your witness is, he must provide a reasoned basis for his opinions. "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." The court will exclude an expert's conclusion if it finds "there is simply too great an analytical gap between the data and the opinion proffered."

You must also address the expert's previous record. Discuss any cases in which the expert has testified previously and the outcomes of those cases. Ensure that the expert remembers what he has testified to in the past, and if there is some arguable conflict between any prior testimony and his expected testimony in the current case, make sure that the expert can articulate the factual differences that led him to reach differing conclusions. Few things are more embarrassing than having your expert witness confronted with prior testimony that seems to support your adversary's case.

2. Prepare Your Client's Testifying Expert for the Non-Substantive Portion of His Deposition.

Although it is likely that your client's retained expert will have testified in a deposition before, you cannot rely on an expert's previous litigation experience. Instead, you should ensure that the expert understands your approach to litigation and is prepared by you for an upcoming deposition. You should prepare the expert for the procedural aspects of the deposition and provide pointers on how to be a strong witness. To do this, review the deposition's format and discuss generalities such as where each person will sit and how the questions will be asked.

You also will want to provide a few tips for the expert to help her improve her performance. For example:

• Remind the expert to always tell the truth; she will be testifying under oath and her credibility is key to persuading the jury.

• Encourage the expert to be well-rested and alert the day of the deposition. Remind her to ask for breaks if needed so that she will remain alert throughout the entire deposition.

• Remind the expert to pay close attention to every part of a question. Opposing counsel may try to trick the expert by beginning a question with an introductory clause that assumes a fact is true, even if the expert does not know the fact to be true. The expert should not agree with the body of a question if she does not agree with every part.

• If the expert believes that a question is inconsistent with the facts, advise the expert to make this point clearly on the record. For example, if opposing counsel asks a question regarding a hypothetical situation, the expert should consider whether her answer assumes facts that were not present in the hypothetical. The expert should ask opposing counsel whether she is to assume that additional facts are present before answering.

• Remind the expert to limit her opinions to her designated area of expertise. She should resist the temptation to express opinions on other topics. If she is asked about aspects of the case about which you have not asked her to form an opinion, she should simply state that she has not developed any opinion on that subject. This is especially important in cases in which multiple experts are retained and each is asked to form an opinion in a particular area. You should be careful to make sure that the opinions of the various experts hold together as one consistent theory and do not fundamentally contradict one another.

• Advise the expert to answer questions whenever possible using layman's terms rather than technical jargon. While opposing counsel may be familiar with relevant technical terms, the judge and jury who ultimately will resolve the issues will not likely be familiar with such terms. Work with the expert prior to the deposition to point out phrases or words that may be unfamiliar to a jury. This advance preparation will help the expert convey her message clearly and in a way that is readily understood by a judge and jury.

• Advise the expert to be aware of opposing counsel's attempts to characterize or re-characterize the expert's answers. The expert should use care in answering questions that begin with phrases such as "So, you are telling me that . . ." or that end with phrases such as ". . . Isn't that correct?" Let the expert know that she does not have to accept opposing counsel's characterization of her opinions or of the facts. Instead, she can simply restate her answer.

• Opposing counsel may attempt to ask the expert to agree that a particular work is an authoritative source. Advise the expert not to agree that any particular work is authoritative unless the expert has had a chance to review the work recently.

C. Deposing the Other Side's Expert

You can obtain information about or from another party's retained testifying expert by using various discovery procedures, such as: (1) required disclosures; (2) an oral deposition; (3) a request for production with an oral deposition; and (4) a deposition upon written questions. While you should utilize these other discovery methods, this article focuses on the examination of an opposing testifying expert through deposition.

1. Decide Whether to Depose the Expert Witness.

While many lawyers take it as a given that they must depose the other side's experts, there may be situations when that is not the best strategy. If the expert's opinion is fully set out in an expert report and you feel confident that the judge will limit the expert to the opinions and conclusions disclosed in the report, you should at least consider not taking the expert's deposition. Cross-examining the expert allows the expert to have a "dry run" at responding to your questions and to be better prepared at trial. A deposition also allows the expert to add to the opinions set out in his report. Because the additional opinions have now been "made known" to you, those new opinions likely will be admissible at trial, when they otherwise may not have been.

2. Set a Goal for the Deposition and Prepare Accordingly.

Taking the deposition of an opposing expert allows you to accomplish several different goals, but it may not be possible to reach every goal in every deposition. Thus, it is important for you to identify (with your client's input) the goal for a particular deposition and then make that a priority. For example, if your client hopes to settle a case before trial, you might use the deposition of an opposing expert to point out the weaknesses in the opponent's case and bolster your client's settlement position. Or, if your client believes the case will proceed to trial, you might use the deposition primarily as a means to conduct discovery and to prepare for trial, but you might save some of your best cross-examination points for trial. Once you have determined your goal for the deposition, you can formulate your strategy.

If you determine that you wish to use the deposition as a way to further your client's settlement position, you should plan to cross-examine the expert aggressively. This will enable you to get the exact admissions that you seek, but it will also reveal your attack and thus will allow the expert and opposing counsel to formulate better responses before trial. Conversely, if you seek to use the deposition primarily as a means to prepare for trial, you can simply ask for the expert's opinions and the basis for his opinions. This will enable you to understand the opposing viewpoint and limit the scope of the expert's testimony at trial, but because you have not revealed your own position, the opponent is more likely to remain unaware of its vulnerability.

In either case, this is another opportunity to use your own expert in an expert way: you should use her to assist you in preparing for the deposition of the other side's expert. Of course, your client's expert can familiarize you with the opposing expert's methodology and conclusions. In addition, your client's expert should be able to provide you with a simple framework for asking questions of the adverse expert. Ask her to identify the key points of disagreement with the opposing expert and then formulate questions to highlight these disagreements.

3. Use the Deposition to Learn about the Opponent's Case.

Deposing an opposing expert provides you with a valuable opportunity to learn more about the opponent's case and thus to better prepare to meet any challenges or expose any weaknesses. You can best gather information from the expert by asking open-ended questions, such as those that start with "who," "what," "when," "where," "why," or "how." By asking open-ended questions, you will force the expert to explain what was done and the rationale for his conclusions. You can then follow-up on these questions by asking other open-ended questions such as: "How do you know that?" or "Why is that true?"

When you switch from information gathering to cross-examination, however, you should use more leading questions. Leading questions are helpful to establish the answers to questions about which you already know the expert's answer. Leading questions also can be used to maneuver the opposing expert into a corner when his analysis is flawed.

4. Ask Questions That Will Demonstrate the Flaws in the Expert's Work.

The expert's deposition provides an opportunity for you to point out the weaknesses in the opponent's case. Specifically, deposing an expert will allow you to expose any flaws in his theories or procedures (or learn why you are incorrect in your analysis of the expert's opinion). If you have effectively pointed

out a flaw or an error in the expert's work, you may be able to get him to admit that his analysis is not correct or that a certain assumption is not fair to your client.

Hypothetical questions provide yet another avenue to expose weaknesses in your opponent's case. You can use hypothetical questions to test the limits of how far the expert will go to support his conclusion. Doing so often will discredit an expert who takes such an extreme position that he appears narrow-minded. There is a risk, however, that you will push the expert to take an extreme position, and the jury will still believe him, so be careful with this strategy.

5. Consider Eliminating Questions About the Expert's Résumé.

Attorneys often spend a significant amount of time at the beginning of an expert deposition covering the facts on the expert's résumé. But unless the expert is truly inexperienced, asking a lot of background questions only enhances the credibility of the witness, wastes time, and gives the expert some time to ease into the deposition process. You may be better served if you launch right into the meat of the expert's opinion and analysis.

On the other hand, some circumstances may lead you to decide that questions about an expert's résumé are necessary or helpful. For example, if your research into the items listed on the expert's résumé has exposed information that could lead to a conclusion that the expert "padded" his résumé, you should ask questions designed to expose this and thus weaken the expert's credibility. Also, when the expert is more relaxed and is talking about his prior experiences, you may be more likely to get him to concede certain general points that are helpful to your case.

CONCLUSION

This article provides an overview of issues to consider to best utilize a testifying exert and to cross-examine an expert retained by an opposing party in the pre-trial phase. In the next issue of Expert Alert, we will provide some additional tips on using and examining testifying experts at trial. Hopefully, with the suggestions in these articles, you will be able to increase your expertise in handling expert witnesses. ●

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1. Part II, Making the Best Use of Expert Witnesses At Trial, will appear in the next edition of Expert Alert.
2. FED. R. EVID. 703.
3. *Id*.
4. FED. R. EVID. 705.
5. FED. R. CIV. P. 26(a)(2)(B).
6. For example, New York and Georgia's rules regarding the scope of expert discovery do not specifically require an expert report; the allowed discovery includes the identity of the expert, a description of the subject matter of the testimony, the substance of the facts and opinions on which the testimony is based, and a summary of the grounds for each opinion. N.Y. C.P.L.R. § 3101(d) (McKinney 2004); GA. CODE ANN. § 9-11-26(b)(4) (2006). Similarly, Texas allows a party seeking affirmative relief to choose not to furnish an expert report when the expert is designated. TEX. R. CIV. P. 195.3(a)(1).
7. See, e.g., TEX. R. CIV. P. 195.3(a)(1).
8. *Collins v. Wayne Corp*., 621 F.2d 777, 782 (5th Cir. 1980).
9. *Id*.
10. *Glendale Fed. Bank, F.S.B. v. United States*, 39 Fed. Cl. 422, 425 (Fed. Cl. 1997).
11. *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 163-64 (3d Cir. 1995); *see also Koch v. Koch Indus., Inc.*, 37 F. Supp. 2d 1231, 1245 (D. Kan. 1998), *aff'd in part, rev'd in part, Koch v. Koch Indus., Inc.*, 203 F.3d 1202 (10th Cir. 2000) (following Third Circuit's rejection of blanket rule that expert witness is agent of the party who hires him for purposes of Federal Rule of Evidence 801(d)(2)(C)).
12. *McCluskey v. Randall's Food Markets, Inc.*, No. 14-03-01087-CV, 2004 WL 2340278 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *but see, Yarbrough's Dirt Pit, Inc. v. Turner*, 65 S.W.3d 210 (Tex. App.—Beaumont 2001, no pet.).
13. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
14. *Id.*
15. FED. R. CIV. P. 26(a)(2)(A)-(B), (b)(4)(A); 30(a)(1), (b)(1); 31(a)(1).
16. FED. R. CIV. P. 26(e)(1).

Tips From The Experts: How to Be Effective and Efficient

by Ashley Brand, Georgina Lee, and Chase Perry

I. What Do Expert Witnesses Really Do?

In litigation, attorneys utilize different types of expert witnesses–legal, "numbers," and technical, to name a few. Legal experts may give an opinion on whether the behavior of a party measured up to some legal standard. "Numbers" experts often apply accounting, economic, and financial concepts to estimate damages. Technical experts can apply specialized knowledge to explain or differentiate devices and methods. Some expert witnesses are professors who work alone, while others lead teams within professional services firms. In areas where many experts practice, it may be rather inexpensive to secure an expert opinion. When the expert is among the top in his or her field, hourly rates may be substantial.

However, regardless of what type of expert is involved, whether one practices in federal or state court, the standard for admitting expert testimony in court is relatively consistent throughout the United States (i.e., the famous Daubert case and its progeny). Stated in practical (rather than legal) terms, an expert witness utilizes specialized knowledge to assist the trier of fact by:

1) Conducting an adequate investigation of the facts;

2) Utilizing an accepted methodology; and

3) Properly applying the facts to this methodology to reach an opinion.

This is simple in theory, but complex in application. Given this framework, counsel should consider the following suggestions from the experts themselves.

II. Start (or Continue) Doing This!

A. Engaging the Expert Early

The extent to which an expert is able to produce a thorough analysis is related to the amount of time he or she has to conduct that analysis. Contrary to intuition, a shorter amount of lead time does not necessarily translate into lower fees. Early engagement allows the expert to create an organized work plan, to staff his or her best team and resources on the case, and to be proactive with counsel and the ultimate client rather than reactive. A more efficient expert has time to add value beyond the opinion, for example by assisting counsel in streamlining the expert opinion and legal strategies to work hand-in-hand.

In addition, more lead time allows for a comprehensive understanding of case issues. An expert who has dealt with the issues of the case for an extended period of time will likely internalize and understand them better than the expert who is hired a month before the expert report is due. A longer timeframe decreases the potential for errors and increases the quality of the work product produced by the expert. Providing ample time decreases the likelihood of last-minute problems, and increases the chances that the expert report will be filed on time.

B. Involving the Expert in the Discovery Process

It is also important to communicate effectively with the expert about the nature and content of information requests. Involving the expert in the discovery process creates a number of advantages. First, the expert can identify the information necessary from the opposing party from the outset, reducing the need for supplemental production requests later on, and minimizing the delays involved in waiting for additional information. Further, involvement of the expert in the discovery process often leads to the identification of missing or incomplete information.

To assist further in the discovery process, invite the expert or someone on his or her team to attend opposing depositions where possible. This will increase his or her understanding of the mechanics of the case and will pave the way for additional information requests to shore up gaps. Also, involving the expert in the discovery process can help you limit the amount of your client's information that is produced to the opposing party. You can make a better argument that certain information requested by the other side is beyond the scope of discovery if the expert does not need the information for his or her own analysis.

> ***To alleviate the risk of uncontrollable expert fees, engage the expert early so he or she can create a work plan tailored to your needs, using the best resources for the job.***

Finally, ensure that you provide the expert access to all information and facts. This does not necessarily require the expense of allowing the expert to review the entire production. A better way to accomplish the same result is by providing the expert with an index or summary of all information produced, and then allowing the expert to obtain a copy of all information he or she deems pertinent to the analysis. Be sure to be detailed and precise in your description of documents to avoid miscommunication about what information is available.

C. Managing Risk

As a litigator, it is important to recognize the various risks you face when using an expert and the need to work together to guard against the pitfalls. Although prudence in expert selection limits the risk of flawed analysis, there is always the potential for problems. Remember that an uninformed expert poses a threat. Be sure to have periodic status meetings with the expert in which you can communicate new developments and additional supporting evidence, so that you both are working on the same page. Further, consider pursuing a claim methodology that is conservative. This will minimize mistakes, producing a simpler and more accurate work product that is more easily understood by judge and jury.

To alleviate the risk of uncontrollable expert fees, engage the expert early so he or she can create a work plan tailored to your needs, using the best resources for the job. Moreover, discuss the possibility of dividing the work into phases, as this can be an effective way to manage both budget and progress. Stay on top of the status by requesting periodic fee updates and estimates, both from the testifying expert and his team of staff. This will minimize the risk that fees will escalate beyond expectations. Remember that an expert who must testify when there are past due bills outstanding is at risk of cross-examination for bias by opposing counsel. The inference can be planted with the judge or jury that the expert is testifying favorably for the client in the hope of securing payment.

III. Stop (or Keep from) Doing This!

A. "Buying" the Expert

Resist the temptation to push the expert towards a particular idea, methodology, or opinion. Remember that your client's view of the facts and circumstances of the case is inherently biased, and that you would not be litigating the case if that view were unassailable. While you might have your own idea of the state of the case, it is ultimately the expert's job to provide an opinion. You have hired the expert because he or she is equipped with the combination of specialized knowledge, skill, and experience which allows him or her to determine the most effective analyses to use, and provides the foundation on which to present an unbiased opinion.

By inhibiting the expert's opinion you lose some of the inherent benefits the expert provides. The expert's independent analysis of the facts can often highlight weaknesses in a case which would otherwise go unnoticed, and ultimately enhances the litigator's understanding of the case. It is disastrous to a case for an expert to be deemed a "hired gun" at trial. Limiting the expert's independence by pushing him or her into a particular argument increases the chance that he or she will be seen as a face for the litigator's own view. If so, the integrity of the entire opinion may be called into question. In the end, independent experts always make better witnesses.

While you might have your own idea of the state of the case, it is ultimately the expert's job to provide an opinion. You have hired the expert because he or she is equipped with the combination of specialized knowledge, skill, and experience which allows him or her to determine the most effective analyses to use, and provides the foundation on which to present an unbiased opinion.

B. Failing to Exploit the Expert's Knowledge

An expert can provide assistance in many other areas besides his or her final analysis and opinion. As a litigator, it is

important to take advantage of the expert's knowledge, experience, and education at all points of the dispute continuum. Ultimately, the more involved the expert is throughout the case, the more valuable his or her input and final opinion will be.

During the pre-trial phase, the expert can assist in the preparation of the complaint. In addition, his or her specialized knowledge can aid in the identification of defense strategies to take against a lawsuit. An expert can also be invaluable during settlement and mediation processes, as his or her unique skills and experience can provide insight on tactics to consider as well as the potential liability in front of you.

Throughout the discovery phase, input from the expert can be crucial in building an effective case and obtaining the correct information. Do not forget to seek guidance when preparing to depose the opposing expert and key witnesses. In fact, in many cases the expert's attendance at depositions assists in pertinent questions being asked and relevant information being obtained. Experts are also an excellent resource in document identification and management, and can provide useful insight in preparing initial and supplemental document requests. The expert can also be used in trial preparation, through assistance with trial exhibit identification and cross-examination support.

C. Failing to Prepare the Expert

A sound opinion provided in an excellent report is ultimately meaningless to a case if followed by ineffective testimony. It is therefore imperative that you prepare the expert thoroughly, both for deposition and trial testimony, in order to provide a foundation for a clear and effective presentation of the opinions. It is risky to assume that because someone is a seasoned expert, they are therefore ready to handle a particular set of circumstances posed by a particular opposing attorney. For example, it is helpful to determine whether the opposing attorney is more likely to attack the expert's theory or his or her application of the facts and then prepare the expert accordingly.

The process of preparing an expert also helps a litigator's own preparation for trial. Practicing direct testimony and potential areas for cross-examination through role play helps the litigator to recognize what information needs to be highlighted, which exhibits to use, and how to use them. Preparation also ensures both litigator and expert have a clear and uniform understanding of the facts, analyses, and conclusions, which allows for more effective testimony. Additionally, complex details will be identified, which expert and litigator can then decide how to effectively summarize for the trier of fact. Experts can also provide valuable input in the trial exhibit preparation process, by working to find the most effective method to present the material. Thus, taking the time to prepare the expert will help your own preparation, and will provide you with a more credible and valuable witness, leading to an enhanced presentation of your case.

IV. Conclusion

In sum, to satisfy the standards for admissibility of expert witness opinions at trial, litigators should involve experts early and throughout the litigation process, provide them the information and latitude to reach an informed and independent analysis, and prepare them thoroughly for deposition and trial testimony. Litigators can also increase efficiency by keeping the expert informed of case developments and checking in often regarding progress and fees. The use of an expert in litigation is an investment, and it must be treated accordingly. The suggestions above have been gleaned from years of experience in many situations, and from many sources. These tips are easy to implement and will lead to dividends in the form of more effective testimony on behalf of your clients.●

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