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Expert Witnesses

In This Issue

Considering the Proposed Changes to the Federal Rules of Civil Procedure Regarding Expert Witness Discovery

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I. Introduction

The Judicial Conference recently approved significant changes to Federal Rule of Civil Procedure 26 regarding expert witness discovery. These Amendments will take effect on December 1, 2010, barring any adverse action by the United States Supreme Court or Congress. Among other changes, the Amendments will foreclose discovery into draft expert reports and most attorney-expert communications. Consequently, these changes will affect the way that all federal civil litigators work with their expert witnesses. The Department of Justice supported the changes, concluding that "on balance" the benefits of the proposed amendments outweighed their disadvantages. Letter from U.S. Department of Justice Civil Division, Hon. Michael F. Hertz, Acting Assistant Attorney General, Feb. 17, 2009, at 2 (hereinafter DOJ Letter) (*available at* http://www.uscourts.gov/rules/). The amendments, however, were not without controversy, with a substantial number of academics and some practitioners opposing them. This article will outline the amendments and discuss the arguments both for and against the changes. Understanding the rule changes and the strengths and weakness of underlying reasons for the protection of draft expert reports and attorney-expert communications will help government attorneys prepare for the rule changes and work effectively with their experts under the new rules.

II. A change in expert witness disclosures for non-retained experts

One change to Rule 26 is relatively noncontroversial. An amendment to Rule 26(a)(2) will require attorneys to make more substantive disclosures for witnesses who have not been specifically retained to provide expert testimony in the case (or whose duties as the party's employee do not regularly involve giving expert testimony), but who will be offering expert opinion evidence under Federal Rule of Evidence 702, 703, or 705. For these witnesses (hereinafter "non-retained experts"), the attorney must submit a disclosure that states "the subject matter on which the witness is expected to present [expert opinion] evidence," and "a summary of the facts and opinions to which the witness is expected to testify." Proposed Fed. R. Civ. P. 26(a)(2)(C) (*available at* http://www.uscourts.gov/rules/).

Under the current rule, a party is required to disclose the identity of *any* witness who will be offering expert opinion evidence at trial. *See* Fed. R. Civ. P. 26(a)(2)(A). The current rule, however, only requires a substantive expert disclosure for witnesses who are "retained or specially employed to provide expert testimony in the case or . . . whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). For these experts, the rule requires a comprehensive expert report which must disclose the expert's opinions, the underlying bases and reasons for the opinions, the data and other information that the expert considered, the expert's qualifications, and the expert's past

testimony and articles for certain periods of years. *Id.* Thus, the current rule distinguishes two categories of experts with respect to whether the party must provide a comprehensive expert disclosure. For experts who fall within the language of Rule 26(a)(2)(B), the party must provide the comprehensive disclosure; for those who do not fall within this language, the party need only provide the identity of the witness who will be providing expert evidence.

In practice, the expert report disclosure requirements of Fed. R. Civ. P. 26(a)(2)(B) have been very useful in focusing expert discovery. While not obviating the need to depose the expert in most cases (as the 1993 amendment that first required this report envisioned), they have improved the quality of expert depositions, since the rule requires that the disclosure precede the deposition. *See* Fed. R. Civ. P. 26(b)(4)(A); Advisory Committee's Note to Fed. R. Civ. P. 26(a)(2) (1993 Amendment) (stating "[s]ince depositions of experts required to prepare a written report may be taken only after the report has been served, the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition"). In practice, the extensive report disclosures required of retained experts has been so useful that some courts have required this disclosure for non-retained experts. *See* Report of Civil Rules Advisory Committee, May 8, 2009, at 2 (hereinafter "Committee Report") (*available at* http://www.uscourts.gov/rules/). *See also Fielden v. CSX Transp. Inc.*, 482 F.3d 866, 869-72 (6th Cir. 2007) (discussing situations in which a treating physician has been required to give an expert report though not retained by a party). Because these experts are not being compensated as retained experts, however, it is often difficult or impossible to get these disclosures. Committee Report at 2. For example, a treating physician, who will often offer expert opinion evidence in a personal injury case, will likely not have the time or incentive to provide the information needed for the disclosure.

The Advisory Committee recognized the benefits of substantive disclosures from these witnesses while acknowledging that many are busy and highly-paid professionals who cannot devote uncompensated time to providing the comprehensive disclosures required by Rule 26(a)(2)(B). *Id.* Requiring a substantive disclosure of the subject matter of the witness's testimony, as well as a summary of the facts and opinions to which the witness will testify, will assist opposing lawyers prepare for deposition and trial without creating too great of a burden on the witness. *See id.* The lawyer may or may not take the un-retained witness's deposition. Significantly, while an opposing lawyer need not compensate an expert for time spent in compiling an expert witness disclosure under Fed. R. Civ. P. 26(a)(2), the lawyer must compensate the expert witness for time spent in a deposition. Fed. R. Civ. P. 26(b)(4)(C). One note to this proposed amendment is worth highlighting, particularly with respect to "hybrid" witnesses who frequently appear in government cases as government employees offering both factual testimony and expert opinion testimony regarding their work. The summary of facts that the proposed amendment requires is only of facts that support expert opinions. Committee Report at 2; Proposed Advisory Committee's Note to Fed. R. Civ. P. 26(a)(2)(C) (Proposed Amendment) (*available at* http://www.uscourts.gov/rules/). The witness need not disclose facts to which the witness will testify that are independent of and unrelated to those opinions. *Id.*

In implementing this rule, courts will need to address at least two issues: (1) when the disclosures are due, and (2) the amount of detail necessary in the disclosures. There is no set time for these new disclosures, other than "at the times and in the sequence that the court orders" under new Fed. R. Civ. P. 26(a)(2)(D). The default will be at least 90 days before the trial or trial-ready date (except for rebuttal witnesses), unless the court orders otherwise. *Id.* Most attorneys will likely assume that the expert disclosures required under Fed. R. Civ. P. 26(a)(2)(B) and 26(a)(2)(C) must be due at the same time but that might not always be the case, particularly if the non-retained expert is used for rebuttal. Also, the rule requires the disclosure for the non-retained expert to include a "summary of the facts and opinions to be offered." Fed. R. Civ. P. 26(a)(2)(C). The attorney may not be able to provide much detail if the witness is uncooperative. In order to avoid exclusion of opinions or underlying facts at trial, under Fed. R.

Civ. P. 37(c)(1), the attorney may need to take the deposition of the non-retained, uncooperative expert. Ultimately, court rulings on motions for exclusion or objections at trial will define the amount of detail that the rule requires.

The Department of Justice supported this amendment with one caveat, namely, recommending that the Rule or Committee Note make clear that the disclosure does not affect the attorney-client privilege and work-product protection for communications between attorneys and non-retained employees. DOJ Letter at 2. This is particularly important for the United States, which often elicits opinion evidence from agency employees. The proposed Rule and Committee Note were not modified in response to the Department's comment but, as discussed in Section III. E. *infra*, the Advisory Committee did not believe that any of these proposed amendments changed the scope of any privilege.

III. Changes protecting draft expert reports and attorney-expert communications from discovery

The other proposed changes to Rule 26 have been more controversial. These changes extend the attorney work-product protection of Rule 26 to draft expert witness reports and to most attorney-expert communications. The only attorney-expert communications that are exempt from protection are those: (1) that relate to expert compensation, (2) that identify facts or data for the expert witness to consider in forming expert opinions, or (3) that identify assumptions that the attorney provided and that the expert relied upon.

A. Discovery of draft expert reports and attorney-expert communications as a result of the 1993 amendments to Rule 26

The Advisory Committee stated that these changes – as with the amendment requiring a disclosure for non-retained experts – are a consequence of the 1993 amendments to Rule 26. Committee Report at 2. The 1993 amendments created greater transparency for expert witness opinions, at least with respect to retained experts. Prior to 1993, the federal civil rules did not require experts to submit reports of their opinions and did not provide any right to take the deposition of an expert witness. *See* Advisory Committee's Notes to Fed. R. Civ. P. 26(a)(2); 26(b) (1993 Amendment). *See also Sullivan v. Glock*, 175 F.R.D. 497, 499 (D. Md. 1997) (stating that "[p]rior to the 1993 amendments to the Rules, there was no right to take the deposition of an expert retained to testify at trial, without leave of the court" and that expert "opinions were to be discovered through interrogatories – a practice which proved to be almost useless in terms of obtaining meaningful disclosure of opinions and supporting factual bases"). The 1993 Amendments provided for expert witness depositions, *see* Fed. R. Civ. P. 26(b)(4)(A), and, as discussed above, required witnesses who were "retained or specially employed to provide expert testimony" to disclose their opinions and several other categories of information, including "the data or other information considered by the witness in forming" the expert opinions. Fed. R. Civ. P. 26(a)(2). According to the Advisory Committee Notes, the purpose of adding the disclosure requirements to Rule 26 was to provide information "sufficiently in advance of trial [so] that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Advisory Committee's Note to Fed. R. Civ. P. 26(a)(2) (1993 Amendment).

Subsequently, most courts broadly interpreted the phrase "data or other information considered" to include practically anything that an expert took into account as part of the case, often noting that the Rules committee rejected a narrower requirement that the expert only disclose the data or other information that the expert *relied upon* in forming the expert's opinions. *See*, *e.g.*, *Schwab v. Phillip Morris USA, Inc.*, No. 04-CV-1945, 2006 WL 721368, at *2 (E.D.N.Y. Mar. 20, 2006); *Synthes Spine Co., L.P. v. Walden*, 232 F.R.D. 460, 462-63 (E.D. Pa. 2005). *See also Preliminary Draft of Proposed*

Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 89 (1991). In interpreting this language in Rule 26, the "overwhelming majority" of courts have held that an expert must disclose information that the expert has considered *that may be privileged or otherwise protected*. *See Regional Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006) (quoting *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 29 (W.D.N.Y. 2002)). In fact, the Advisory Committee Note to the 1993 amendments specifically stated that given a retained expert's obligation to disclose all information "considered . . . litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Advisory Committee's Note to Fed. R. Civ. P. 26(a)(2) (1993 Amendment).

Consequently, courts typically found that draft expert reports and attorney-expert communications were discoverable, notwithstanding the fact that they may contain attorney-client material or reflect attorney work product. *See*, *e.g.*, *Varga v. Stanwood-Camano School Dist.*, No. C06-0178P, 2007 WL 1847201, at *1 (W.D. Wash. June 26, 2007) (finding e-mail communications between an attorney and expert discoverable and not protected by the attorney work-product doctrine); *Bitler Inv. Venture II, LLC v. Marathon Ashland Petroleum LLC*, No. 1:04-CV-477, 2007 WL 465444, at *1-7 (N.D. Ind. Feb. 7, 2007) (finding attorney-expert e-mails discoverable and not protected by the attorney-client privilege or the attorney work-product protection); *W.R. Grace & Co.-Conn. v. Zotos Int'l Inc.*, No. 98-CV-838S(F), 2000 WL 1843258, at *2-5 (W.D.N.Y. Nov. 2, 2000) (finding draft expert report discoverable notwithstanding attorney work-product protection). In recommending the present changes to Rule 26 the Advisory Committee noted, "Whatever may have been intended, [the 1993 amendments to Rule 26] influenced development of a widespread practice permitting discovery of all communications between attorney and expert witness, and of all drafts of the [Rule 26(a)(2)(B)] report." Committee Report at 3.

B. Proposed changes to Rule 26 to protect draft expert reports and most attorney-expert communications from disclosure

In order to provide work-product protection to draft expert reports and most attorney-expert communications, the Advisory Committee proposed several changes to Rule 26. The proposed changes occur in the first two subsections of the rule regarding "Required Disclosures" in subsection (a) and "Discovery Scope and Limits" in subsection (b). Initially, with respect to the disclosure required of retained experts in Rule 26(a)(2)(B), the Advisory Committee proposed requiring the expert to disclose only the "facts or data" that the witness considered in forming opinions. Proposed Fed. R. Civ. P. 26(a)(2)(B)(ii). The rule presently requires the witness to disclose "the data *or other information considered* by the witness," in forming opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii) (emphasis added). The Advisory Committee proposed deleting the reference to "other information," which courts found supported a broad interpretation of the rule to include draft reports and attorney-expert communications. *See* Committee Report at 3. The proposed Committee Note states "[t]he refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." Proposed Advisory Committee's Note to Fed. R. Civ. P. 26(a)(2)(B) (Proposed Amendment). "At the same time the intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients." *Id.*

Additionally, in subsection (b) of Rule 26 regarding limitations on discovery, the Advisory Committee proposed specifically extending the work-product protections of Rule 26 (Rules 26(b)(3)(A) and (B)) to draft expert reports and attorney-expert communications. With respect to draft reports, a proposed Rule 26(b)(4)(B) provides: "*Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2),

regardless of the form in which the draft is recorded." Proposed Fed. R. Civ. P. 26(b)(4)(B). This work-product protection for drafts applies to all witnesses identified as experts under Rule 26(a)(2)(A). Consequently, drafts of the comprehensive Rule 26(a)(2)(B) reports for retained experts are covered as are drafts of the new substantive disclosures required for non-retained experts under proposed Rule 26(a)(2)(C). *See* Proposed Advisory Committee's Note to Fed. R. Civ. P. 26(b)(4) (Proposed Amendment). The proposed Advisory Committee's Note also shows that in protecting the draft "regardless of form," the rule intends to cover drafts that are recorded in "written" form, "electronic" form, or "otherwise." *Id.* The protection also extends to drafts of any supplementation of the expert disclosure under Rule 26(e). *Id.*

In addition to the protection for draft disclosures, the proposed amendments also specifically extend the Rule 26 work-product protection to attorney-expert communications. The proposed Rule 26(b)(4)(C) states:

> *Trial Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witnesses required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:
>
> > (i) relate to compensation for the expert's study or testimony;
> >
> > (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> >
> > (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Proposed Fed. R. Civ. P. 26(b)(4)(C). The proposed Committee Note shows that the rule is intended to protect all communications, regardless of whether those communications are oral, written, electronic, or in some other form. *See* Proposed Advisory Committee's Note to Fed. R. Civ. P. 26(b)(4) (Proposed Amendment). Significantly, this protection only extends to communications with experts who must produce a comprehensive expert report under Rule 26(a)(2)(B). *Id.* There is no work-product protection for communications between attorneys and non-retained experts who are covered by Rule 26(a)(2)(C). *Id.* Thus, attorneys may inquire into communications between a testifying treating physician and the opposing attorney. With respect to communications between a party's attorney and a party employee who is serving as a non-retained expert, the attorney-client privilege may apply but there is no work-product protection under the rule. *Id.* On the other hand, the Committee Note states that the rule's protection covers communications between the party's attorney and assistants of the covered expert witness. *Id.* Finally, the Note suggests a "realistic" and "pragmatic application" of the rule, so that the "party's attorney" concept covers in-house counsel, even though they are not attorneys of record in a case, and the exception can cover communications between a party's attorneys and the expert regarding other similar cases, provided that the expert has been employed by the party in those similar suits. *Id.*

The exceptions to the work-product coverage for attorney-expert communications carve out three specific areas of permissible inquiry. The first exception is intended to permit a "full inquiry" into witness compensation as a potential source of bias, including "any communications about additional benefits to the expert, such as further work in the event of a successful result," and communications regarding "compensation for work done by a person or organization associated with the expert." *Id.* The second exception is limited to communications "identifying" the facts or data provided by counsel. *Id.* The work-product protection would still apply to communications discussing the potential relevance of certain facts or data. *Id.* The third exception allows for discovery of communications identifying assumptions that the

expert relies upon. *Id.* However, "general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception." *Id.*

Finally, because the protection extended to draft expert disclosures and attorney-expert communications is the work-product protection of Rule 26, the protection from discovery is not absolute. A party may make a showing under Rule 26(b)(3)(A)(ii) that it has substantial need for discovery and cannot obtain substantially equivalent information without undue hardship. *See* Fed. R. Civ. P. 26(b)(3)(A)(ii). The proposed Committee Note states that "[i]t will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony." Proposed Advisory Committee's Note to Fed. R. Civ. P. 26(b)(4) (Proposed Amendment).

C. The Advisory Committee's case for amendments prohibiting discovery of draft expert reports and attorney-expert communications

In support of the proposed changes to Rule 26, the Advisory Committee has made a strong case for adoption of the amendments. Initially, in August 2006, the American Bar Association (ABA) House of Delegates adopted a resolution recommending that federal and state civil procedure rules be "amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert relating to an expert's report." *See* American Bar Association, Resolution 120A, Discoverability of Expert Reports, Adopted by the House of Delegates, Aug. 7-8, 2006 (*available at* http://www.abanet.org/litigation/standards/archive.html). The specific provisions of the ABA resolution have largely been adopted in the proposed amendments, which protect draft expert reports and attorney-expert communications but allow for discovery of "facts or data" that the expert considered. *See id.* In addition to support from the ABA, the proposed amendments have received support from a number of other bar groups, including the American Association for Justice, the American College of Trial Lawyers Federal Rules Committee, the American Institute of Certified Public Accountants, the Defense Research Institute, the Federal Magistrates' Association, and the United States Department of Justice. Committee Report at 3-4.

The Advisory Committee stated that the reasons for protecting draft expert reports and attorney-expert communications from disclosure are "profoundly practical." *Id.* at 3. The Committee elaborated that "[t]he proposals rest not on high theory but on the realities of actual experience with present discovery practices." *Id.* First, the Advisory Committee noted that there is a "shared experience" that discovery regarding draft expert reports and attorney expert communications "almost never reveals useful information about the development of the expert's opinion." *Id.* Why not? Because "[d]raft reports somehow do not exist," and attorney-expert communications "are conducted in ways that do not yield discoverable events." *Id.* "Practitioners report that lawyers today avoid communications with their testifying experts and discourage draft reports." Standing Committee on Rules of Practice and Procedure, Draft Minutes of the Report of the Advisory Committee on Civil Rules, Jan. 2009, at 16 (hereinafter "Standing Committee Minutes") (*available at* http://www.uscourts.gov/rules/).

Second, by allowing this discovery (which does not yield useful information), the present rule has encouraged attorneys to waste time, "reducing the time available for more useful discovery inquiries." Committee Report at 3. The Advisory Committee stated that many experienced attorneys recognize these costs and "stipulate at the outset that they will not engage in such discovery." *Id.* Because the protection for attorney-expert communications contains exceptions that allow discovery of communications disclosing facts and data that the expert considered or assumptions that the expert relied upon, the amendments "will not deprive adversaries of critical information bearing on the merits of their case." Standing Committee Minutes at 15.

Third, a consequence of the fear of discovery of attorney-expert communications is the inhibition of "robust communications between [the] attorney and expert trial witness, jeopardizing the quality of the

expert's opinion." Committee Report at 3. The "committee concluded that it is vital to the legal process for lawyers to be able to interact freely with their experts without fear of having to disclose all their conversations and drafts to their adversaries." Standing Committee Minutes at 16. Under the current rule, a party who can afford it will often hire consultants who will not be called as trial experts and with whom the party's attorneys can freely communicate because the communications will be protected from discovery. Committee Report at 3. This places a party who cannot afford a consultant at a disadvantage. *Id.*

Finally, the Advisory Committee concluded that there is little sacrifice to the "truth seeking" process, which theoretically benefits from discovery of draft expert reports and attorney-expert communications because such discovery allows the fact finder to learn of "the extent to which the expert's opinions have been shaped to accommodate the lawyer's influence." Committee Report at 3. Practitioners report that "juries clearly understand that experts are paid by the parties," and are "advocates for the parties" but will only believe the expert "if the expert is convincing on the stand." Standing Committee Minutes at 16, 17. One lawyer supporting the amendments maintained that the best way "to challenge experts is by good cross-examination." *Id.* at 18. The experience of practitioners in the New Jersey state court system, which currently provides protections from discovery for draft reports and attorney expert communications, has been positive. Letter from the Association of the Federal Bar of New Jersey (Dennis J. Drasco), Jan. 21, 2009 at 1-2 (*available at* http://www.uscourts.gov/rules/).

The Department of Justice submitted a letter supporting the amendments to Rule 26, finding "on balance" the benefits of the amendments outweigh the disadvantages. DOJ Letter at 2. The letter stated:

> The Department understands and appreciates the concerns of some commentators who believe that the proposed amendments will enable attorneys to have undue influence over the expert's report and opinions. The Department, however, concludes that the discovery explicitly permitted under the proposed Rule 26(b)(4)(C)(ii) and (iii), *i.e.*, what facts or data the attorney provided to the expert and that the expert considered in forming his or her opinions, and what assumptions the party's attorneys provided and that the expert relied upon in forming his or her opinions, ordinarily should be sufficient to enable the attorney to determine if an expert's opinions have been improperly influenced by the attorney.

DOJ Letter at 2. In September 2009, the Judicial Conference approved the amendments and transmitted them to the Supreme Court for consideration with a recommendation that the amendments "be adopted by the Court and transmitted to Congress in accordance with the law." Report of the Judicial Conference, Committee on Rules of Practice and Procedure, Sept. 2009, at 19 (*available at* http://www.uscourts.gov/rules/). In approving the amendments, the Judicial Conference adopted the reasoning of the Advisory Committee. *See id.* at 10-14. The Judicial Conference noted:

> After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The advisory committee was satisfied that discovery into draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

Id. at 13.

D. The case for continuing to allow discovery of draft expert reports and attorney-expert communications

The case for continuing to allow discovery of draft expert reports and attorney-expert communications rests on the conviction that parties need to be able to reveal expert witness bias as a result of undue attorney influence. While practically all judges and juries likely realize that most experts are paid and would not be offered by a party to testify unless the testimony favored the party's position, the potential bias of the expert witnesses is much deeper than that. For example, Judge Posner has remarked upon the "old problem" that experts are all too often "the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face that cannot now be proved by some so-called 'experts.' " *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 382 (7th Cir. 1986) (quoting *Keegan v. Minneapolis & St. Louis R.R.*, 76 Minn. 90, 95, 78 N.W. 965, 966 (1899) (additional citations omitted). Another judge stated, "the impact of expert witnesses on modern-day litigation cannot be overstated; yet, to some, they are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired." *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (citing John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985)). Thirty-seven law professors who wrote in opposition to the proposed amendments noted that "[t]he partisan relationship between retaining lawyer and retained expert that the amendment would tend to mask has long been recognized as the prime source of the pathologies of expert testimony." Letter from Law Professors (John Leubsdorf & William H. Simon), Nov. 30, 2008, at 1 (hereinafter "Professor Letter") (*available at* http://www.uscourts.gov/rules/).

Because of the great impact that expert witnesses can have on civil litigation, the more recent trend has been toward greater, not less, scrutiny of expert opinions. In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-90 (1993), the Supreme Court emphasized that federal trial judges have an independent obligation to make sure that expert testimony is sufficiently reliable to be presented to the trier of fact. Inquiries under *Daubert* typically focus on the reliability of the expert's methodology and the application of that methodology to the facts of the case; such inquiries do not usually involve analysis of the extent of attorney influence. A late addition to the proposed Committee Note states that the amendments "do not affect the gatekeeping functions called for by [*Daubert*], and related cases." Proposed Advisory Committee's Note to Fed. R. Civ. P. 26(b)(4) (Proposed Amendment). Nevertheless, the law professors suggest that *Daubert* and its progeny "clearly reflect the view" that "additional, not fewer, safeguards [are needed] to protect the reliability and integrity of expert evidence." Professor Letter at 2. Additionally, Federal Rule of Evidence 702, which sought to incorporate *Daubert* and its progeny, contains certain requirements for admissibility of expert opinions, including that the opinion be "based upon sufficient facts or data," and that the witness "applied the principles and methods reliably to the facts of the case." Evidence of undue attorney influence could affect those inquiries, and, as shown below, courts have excluded expert opinions that were the result of improper attorney influence.

While several practitioners who commented for the Advisory Committee believed that juries know enough about an expert's advocacy without access to draft expert reports and attorney expert communications, many courts and commentators have held a much different view. *See, e.g., Elm Grove Coal Co. v. Dir., Office of Worker's Comp. Programs*, 480 F.3d 278, 301 (4th Cir. 2007) (stating that expert could not "be properly and fully cross-examined in the absence of the draft reports and attorney-expert communications"); *Mfg. Admin. and Mgmt. Sys., Inc. v. ICT Group, Inc.*, 212 F.R.D. 110, 116 (E.D.N.Y. 2002) (stating that "[t]he modern attorney-expert relationship provides fertile ground for improper influence, and mandatory disclosure cleanses any canker of corruption that might infect expert opinions"); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 289 (E.D. Va. 2001) (stating "[d]rafts of expert opinions . . . would be highly useful to test both the substance of the testifying experts' opinions

and the independence of each testifying expert in arriving at his opinion"); *Musselman v. Phillips*, 176 F.R.D. 194, 200 (D. Md. 1997) (finding it "essential" to discover the manner in which experts arrived at opinions and whether "done as a result of an objective consideration of the facts, or directed by an attorney advocating a particular position"); *Boring v. Keller*, 97 F.R.D. 404, 407-08 (D. Colo. 1983) (stating that discovery of work-product information provided to experts is necessary as "critical information" that "will affect the credibility of the witnesses"); Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 793 n.89 (1994) (stating that a "showing that counsel manipulated the expert's analysis and ultimate findings pushes the expert's testimony from the realm of sloppy science into that of biased science").

The Advisory Committee concluded that discovery of attorney-expert communications and draft expert reports "almost never reveals useful information about the development of the expert's opinion." Committee Report at 3. This statement is belied, however, by several decisions which have commented on improper attorney influence as the result of the disclosure of draft expert reports or attorney-expert communications. For example, in *EEOC v. United Parcel Servs.*, 149 F. Supp. 2d 1115, 1139 (N.D. Cal. 2000), *aff'd in part, rev'd in part on other grounds*, 306 F.3d 794 (9th Cir. 2002), the late production of a draft expert report for the defendant United Parcel Service (UPS) revealed "that substantial changes had been made from the draft to the final and that the changes were all made at the suggestion of counsel." The court found that the "changes were much more extensive than [the expert] had remembered at his first deposition (when no draft was available to test his memory) and changed the substance of the report in ten material ways." *Id.* After noting some of the changes and how they had been influenced by counsel, the court stated that "[i]n context, it seems clear that [the expert] lost his independence and objectivity. He simply became part of the UPS advocacy team." *Id.* This led the court to evaluate the expert's opinions "critically in light of his strong prejudice in favor of UPS." *Id.* at 1140.

In the *Trigon* case mentioned earlier, after a document request, it was discovered the government's testifying experts had deleted many e-mails and draft reports that should have been preserved. 204 F.R.D. at 281. The court ordered the United States to hire an independent forensics expert to determine whether it could retrieve the apparently deleted documents from the computers of the testifying experts and the consulting firm. *Id.* While the forensics firm was able to recover "[h]undreds of communications and many draft reports," it was unable to recover all of the electronic files. *Id.* at 281, 290. The court found that fragments of e-mails that the forensics firm recovered revealed that the United States consultant had been extensively involved in drafting the report of at least one of the testifying experts. *Id.* at 290. The court stated that this raised "serious doubts" regarding whether the opinions of the testifying expert were actually his own. *Id.* The court found that, based upon the evidence at trial, it may be appropriate "to draw adverse inferences respecting the substantive testimony and credibility of the experts." *Id.* at 291.

Other courts have also discounted expert testimony when evidence suggested that attorneys had unduly influenced the experts or the experts were merely expressing the opinions of the lawyers who hired them. *See, e.g., In re TMI Litigation*, 193 F.3d 613, 683-84, 698 (3d Cir.1999) (finding expert testimony unreliable where based upon summaries of medical histories prepared by employees "aligned with counsel for one of the litigants"); *Sommerfield v. City of Chicago*, 254 F.R.D. 317, 319-28 (N.D. Ill. 2008) (excluding expert report in a discrimination case because the report relied upon the attorney's 26 page summary of nearly 2,700 pages of deposition testimony instead of an independent review); *Crowley v. Chait*, 322 F. Supp. 2d 530, 545-47 (D.N.J. 2004) (excluding expert opinions to the extent opinions based upon attorney summaries of 8 out of 150 depositions); *Baxter Int'l. Inc. v. McGaw, Inc.*, No. 95 C 2723, 1996 WL 145778, at *4 (N.D. Ill. Mar. 27, 1996), *aff'd in part and rev'd in part on other grounds*, 149 F.3d 1321 (Fed. Cir. 1998) (disregarding expert testimony where the expert did not independently

prepare his report but allowed himself to be the "mouthpiece" of plaintiffs' attorneys); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1365 (N.D. Cal. 1995) (finding that the expert's testimony lacked "objectivity and credibility" where it appeared to have been "crafted by" attorneys).

The Advisory Committee found that "[d]raft reports somehow do not exist," and attorney-expert communications "are conducted in ways that do not yield discoverable events." Committee Report at 3. Indeed, under the current Rule 26, good lawyers will limit the amount of discoverable evidence that they produce in working with their experts as part of zealous representation of the client's interest. *See* Adam Bain, *Working with Expert Witnesses in the Age of Electronic Discovery,* U.S. ATTORNEYS' BULLETIN 35 (May 2008). This is particularly important when so much information is created and communicated electronically. *Id.* However, when lawyers unduly influence their experts, there will likely be electronic traces of that influence in the draft reports and attorney-expert communications. Without access to that material it will be difficult, if not impossible, to uncover that influence and resulting bias. As cases such as *Trigon* illustrate, it is not so easy to control electronic information, which is often widely disseminated and not readily deleted. Draft expert reports may not "disappear" no matter how hard experts try to scrub them, particularly if they have been transmitted to attorneys or others. Moreover, so long as draft reports and attorney-expert communications are discoverable evidence, any failure to retain them presents serious legal and ethical problems. *See* Fed. R. Civ. P. 37(a)(3) and 37(c)(1) (providing that court may exclude evidence or impose other sanctions for failure to comply with expert disclosure requirements); Model Rule of Professional Conduct 3.4(a) (providing that an attorney has an ethical obligation to ensure that potentially relevant evidence in an attorney's possession or control is not destroyed).

With the 2006 amendments to the rules regarding discovery of electronically stored information, attorneys have increasingly become aware of additional electronic sources of evidence. It may not be a coincidence then that these proposed amendments would protect the electronic traces of attorney influence on expert work from discovery. Significantly, the proposed amendments protect draft reports and attorney-expert communications "regardless of the form," and the proposed Committee Notes make it clear that this includes electronic information. Proposed Fed. R. Civ. P. 26(b)(4)(B); Proposed Fed. R. Civ. P. 26(b)(4)(C); Proposed Advisory Committee's Note to Fed. R. Civ. P. 26(b)(4) (Proposed Amendment). Because of the difficulty in controlling electronic information, it is not surprising that attorneys would seek a blanket protection from discovery of this material.

While full discovery of draft reports and attorney-expert communications undoubtedly inhibits, to a certain extent, "robust communications" between lawyers and their testifying experts, the other side of the coin is that an open disclosure rule serves to deter attorneys from seeking to improperly influence their experts. The law professors state that "[k]nowing that their interactions with counsel will be explored, experts can be expected to write their own reports, and lawyers to avoid proposing drastic changes in the expert's draft." Professor Letter at 2. Some practitioners, recognizing the effect of the current disclosure rule and any amendments on attorney behavior, opposed the proposed changes for this reason. One stated, "I am completely unconvinced that a rule change that simply yields to the partisan instincts and habits of the lawyers is a good thing." Letter from Leslie R. Weatherhead, Sept. 24, 2008, at 3 (*available at* http://www.uscourts.gov/rules/). Another stated, "There is little doubt that the amendments would facilitate greater deception and manipulation in the presentation of a case . . . [which] could further undermine public respect for law." Letter from Kenneth A. Lazarus, Sept. 29, 2008, at 4-5 (*available at* http://www.uscourts.gov/rules/).

The requirement of disclosure of all information that an expert considered, including any draft expert reports and attorney-expert communications, has the virtue of a bright-line rule. *See Karn*, 168 F.R.D. at 641. There is no uncertainty as to what the expert must disclose, and counsel can protect work-product by simply not disclosing it to the expert witness. *Id. See also Mfg. Admin. and Mgmt. Sys.*, 212 F.R.D. at 117-18 (noting that a bright-line rule eliminates the need for courts to sift through voluminous

materials to determine whether particular information provided to an expert is fact or opinion); *Johnson v. Gmeinder*, 191 F.R.D. 638, 646 (D. Kan. 2000) (stating that " 'bright-line' rule, because of its clarity and ease of application, allows the parties to know in advance or trial what materials will be discoverable"). Without this bright-line rule, one can expect that attorneys will seek to exert greater influence over expert witness opinions by providing more attorney work-product to their experts and less access to primary source documents that may contradict the attorney's theory of the case.

The proponents of the amendments point out that the exceptions allowing discovery of certain attorney-expert communications in Rule 26(b)(4)(C) will afford opposing parties opportunities to discover evidence of attorney influence. For example, attorneys should still be able to discover some instances in which opposing attorneys have provided their experts with incomplete or biased information, through identifying the facts or data that the attorney provided. Likewise, attorneys should be able to discover if experts have relied upon assumptions that were provided by counsel. However, other more pernicious forms of attorney influence will likely be hidden from view. In particular, attorney involvement in creating the expert report, whether in drafting the report itself or in suggesting dramatic changes to the report, will not be discoverable. Likewise, experts' use and reliance upon attorney-created summaries of depositions and records could be shielded from discovery even though such summaries may be biased in favor of the attorney's position in the litigation.

One of the primary rationales offered by the Advisory Committee for the amendments is that protecting draft expert reports and attorney-expert communications from disclosure will reduce the costs of litigation. Under the current system, the Advisory Committee notes, many litigants hire two sets of experts – testifying experts, who do not receive any attorney work-product, and consultants, with whom attorneys can share their legal theories and strategies without fear of disclosure. Committee Report at 3. As with many of the justifications for the amendments, this is based upon the anecdotal experiences of the attorneys involved in the rule-making process and not upon any empirical evidence. It would be interesting to know empirically how often consultants are used in litigation and what the increased costs are. Nevertheless, even if the disclosure requirements result in some increased costs, the costs may be outweighed by the benefits of disclosure. As one court stated,

> Despite [the added burden of hiring consultants], this Court rules that effective cross-examination and the integrity of the fact-finding process outweigh the costs of retaining two experts. Modern-day litigation is an expensive proposition, and the reality of certain financial barriers is harsh, but basic equity in an adversarial system necessarily entails costs and all courts are bound by the creed of fairness. This Court is no exception.

Mfg. Admin. and Mgmt. Sys., 212 F.R.D. at 118. Additionally, a testifying expert and a consultant serve distinct purposes and there are good reasons to keep them separate. The purpose of a consultant is to help the advocate while the purpose of a testifying expert is to assist the finder of fact. Combining the consultant and testifying expert functions in one person and providing protections from discovery of work-product information will complicate the discovery process and add a layer of uncertainty that does not presently exist.

Finally, courts have found that requiring disclosure of all of the information that an expert considered does not undermine the policies underlying the attorney work-product doctrine, "which, at bottom, is intended to allow counsel unfettered latitude to develop new legal theories or to conduct a factual investigation, but without knowing beforehand if the results will be favorable to the client's case." *See Karn*, 168 F.R.D. at 640. One court reasoned:

> providing work product to an expert witness does not further this policy in that it generally does not result in counsel developing new legal theories or in enhancing the conducting of a factual investigation. Rather, the work product either informs the expert

> as to what counsel believes are relevant facts, or seeks to influence him to render a favorable opinion. Thus, requiring disclosure of an attorney's communications to the expert does not impinge on the goals served by the opinion work product doctrine.

Id. (citation omitted). *See also Elm Grove Coal Co.*, 480 F.3d at 302-03 (finding that disclosure of draft reports and attorney-expert communications does not implicate policies of work-product doctrine because counsel is not "seeking to benefit from its opposing counsel's work product," but "seeking these materials for an entirely legitimate purpose – to fully explore the trustworthiness and reliability" of the experts' opinions); *Mfg. Admin. and Mgmt. Sys.*, 212 F.R.D. at 117 (stating that "disclosing opinion or 'core' work product to an expert is unnecessary for the creation of legal information, and, thus, disclosure serves ends other than those for which work product protection exists"); *Musselman*, 176 F.R.D. at 201 (stating that if the work-product privilege is intended to foster privacy in developing legal theories, opinions, and strategies, "this interest is hardly served when the attorney discloses them to a retained expert in order to shape opinion testimony to be offered at trial").

E. If the amendments modify a privilege, they must be approved by Congress

Under the Rules Enabling Act, proposed changes to the Federal Rules of Civil Procedure that have been transmitted by the Supreme Court to Congress become effective without any affirmative action by Congress, except with respect to a rule "creating, abolishing, or modifying an evidentiary privilege." 28 U.S.C. § 2074(b) (2008). Under the Act, a rule modifying a privilege "shall have no force or effect unless approved by Act of Congress." *Id.* The law professors who object to the amendments argue that the amendments modify a privilege because they are meant "not just to forbid exploration of most lawyer-expert discussions at the discovery stage, but to prevent their use as evidence at trial." Professor Letter at 3. Additionally, the professors state that the grounds for the amendment are the same as those supporting privileges, namely, the value of private communications and the fear that such communications will be discouraged if inquiry is allowed. *Id.*

The Advisory Committee found, however, that the amendments only deal with work-product protection and do not create a privilege. Standing Committee Minutes at 16. The rules do not prevent an inquiry at trial into draft reports or attorney-expert communications even though, as a practical matter, attorneys will rarely question experts about these matters if they are unable to obtain discovery regarding them. The Advisory Committee and commentators also observed that the amendments merely modify the changes that were made to expert discovery through the 1993 amendments. *See id.*; Letter from Gregory Joseph, Nov. 15, 2008, at 3 (*available at* http://www.uscourts.gov/rules/). If the 1993 amendments did not require an affirmative Act of Congress, the argument goes, then neither should these changes. Still, the Advisory Committee was concerned enough about this interpretation that it deleted a line from the Committee Note which stated that while the protections focus on discovery "it is expected that the same limitations will ordinarily be honored at trial." Standing Committee Minutes at 16-17.

Whether the amendments modify a privilege could require a more sophisticated analysis. The 1993 amendments contained a note that stated that attorneys could not resist discovery of information disclosed to an expert by arguing that the information is "*privileged* or otherwise protected from disclosure." Advisory Committee's Note to Fed. R. Civ. P. 26(a)(2)(B) (1993 Amendment) (emphasis added). The rules imply that the disclosure of privileged material to the expert would be considered a waiver of privileges and protections (including the attorney-client privilege and the attorney work-product protection), just as a disclosure to any other third party. *See In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (concluding that "because any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver to the same extent as with any other disclosure") (citation omitted). Thus, one could argue that changes that now provide protection for that information would modify the rules of privilege waiver.

Another issue is whether extending the work-product protection of Rule 26(b)(3) to draft reports and attorney-expert communication expands the scope of the protection beyond the bounds of the rationale of the rule to protect the attorney's mental impressions, opinions, and legal conclusions, as a result of the Supreme Court's decision in *Hickman v. Taylor*, 328 U.S. 495 (1947). Finally, one might ask whether any discovery rule which merely has the effect of precluding evidence at trial, without an express prohibition, "modifies" a privilege under the statute.

IV. Conclusion

The proposed rule changes regarding expert witness discovery will clearly make working with expert witnesses much easier and somewhat cheaper for attorneys. The amendments will also allow attorneys and experts to freely exchange ideas and theories so that the attorney can present the best case for the party that he or she represents. Yet, even the proponents of the rule changes must concede that there will be some costs to the amendments. Attorneys will seek to exert even greater influence on their experts and more experts will compromise their objectivity. Undue attorney influence on expert witnesses will go undetected, and, to the extent opposing attorneys cannot present witness bias to the fact finder, our truth-seeking system of justice will suffer. Only time will tell whether the benefits of the amendments will outweigh their costs.❖

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The views expressed in this article are solely those of the author and not of the Department of Justice.

Working With Lawyers: The Expert Witness Perspective

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I. Introduction

The primary role of the expert witness is to provide the finder of fact with reliable evaluations and opinions that are based on scientific, technical, or other specialized knowledge. As explained in

Federal Rule of Evidence 702 (Testimony by Experts), expert witness testimony is meant to be substantially useful in assisting the court's understanding of the evidence and facts at issue. To fulfill that role, the expert witness must deliver evaluations that agree with accepted knowledge and experience. Ultimately, it is up to the finder of fact to determine the reliability, relevance, and weight of the expert's testimony.

II. Working with lawyers

Prior to testifying, there is significant preparation to be done, including evaluating case data and information and formulating expert opinions. This part of the litigation process typically requires extensive interaction between the lawyer and the expert witness. The lawyer-expert relationship includes a hierarchy and organization that is generally well understood by all involved: the lawyer is in charge of the overall process and provides direction and strategy; the expert evaluates case data and information and presents findings, conclusions, and opinions, in addition to providing technical guidance along the way. This process is simple in appearance only. Litigation that involves the participation of expert witnesses is most often a very complex, lengthy, and tedious process with many variables that can influence the ultimate outcome of a case. Several of the variables are human in nature and often difficult or even impossible to control or predict.

Lawyers tend to forget that experts are not educated in the law and might not have a detailed understanding of the intricacies and nuances of the legal system. Experts in turn may believe, at times incorrectly, that they understand enough of the law to navigate successfully through the litigation process. These natural tendencies of lawyers and experts can lead to unwelcome surprises.

Legal terminology can be confusing to the expert witness as their definition of a word might not always correspond to the appropriate legal definition. Terms such as "reasonable," "practical," "inaccessible," "potential," "good faith," "fair dealing," and so forth, are all legal terms of art. This terminology abounds in the rules that regulate the expert witness's role in the litigation process (see, for example, Fed. R. Civ. P. 26 and Fed. R. Evid. 702, 703, 705). Scientists, engineers, and lawyers may interpret these terms and rules quite differently, and to add to the expert witness's potential confusion, these rules can vary from one jurisdiction to another and can even vary depending on the type of litigation involved.

Of particular importance for an effective lawyer-expert collaboration is an understanding of each other's particular *modus operandi*. For the lawyer, it is essential to be familiar with the expert's standard practices, including the ways of communicating and transferring information and findings, generation and retention of draft documents, degree of staff involvement, and personal approaches to problem solving. The expert witness, on the other hand, needs to sufficiently understand the overall strategy of a case to focus on the scientific or technical aspects that are of actual relevance. None of this can occur without communication and mutual education.

An effective working relationship might be established relatively quickly or it may take some time to develop through a process of trial and error as the lawyer and expert become more familiar with one another and their respective working styles. Because an effective relationship can sometimes form quickly and with little effort, it is not necessary for the lawyer and the expert to have a long history of working together to form an effective team for litigation.

The role and work of the expert witness in litigation can be very simple or highly complex, depending on the case at issue. For the more complex cases, the first phase of the process typically involves organizing, evaluating, and interpreting large amounts of data and materials produced in electronic and hard copy formats. This work may include reviewing the calculations and models constructed by the opposing party's experts, testing and validating hypotheses, or collecting any necessary new data and measurements, all while continuing ongoing calculations and evaluations. Meanwhile, additional information continues to come in and must be assimilated into the existing files. The work can be arduous and may involve several staff members and take months or even years to accomplish.

The second phase in the process involves writing reports, producing exhibits and discovery, and taking depositions. This phase is intense and demanding on the expert witness because it imposes strict deadlines and involves a high volume of work to be performed. In addition to keeping the strategy of the case on track, the lawyer may have several experts to manage. One challenge for the lawyer involves weighing the relative importance of all the opinions offered by the various experts and determining the potentially damaging effects that the depositions and the discovery process might have on the individual expert's opinions.

The third phase of the process is the trial itself. While a trial might last several days, weeks, or months for the lawyer, it may last just hours or days for the expert. Last minute discovery of errors or omissions or changes in overall strategy can create intense periods of stress that can be confusing, nerve wracking, and at times unpleasant for all involved.

At trial, uncertainty is higher because of the unpredictability of the effect and quality of live expert testimony. That uncertainty is somewhat reduced when the lawyer and expert have worked together before and the lawyer knows what to expect when the expert takes the stand. However, the expert's actual testimony comes with no warranties and may or may not be effective, regardless of the quality and the amount of time devoted to preparing the expert. The reaction of the fact finder to the witness might turn as much on personal predilections as on substantive testimony.

To reign in "bad science," courts are empowered to act as gatekeepers to exclude unreliable or irrelevant expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-90 (1993). This major change in the law has had some of the intended effects but does not appear to have fully solved the problem. In practice, it is indeed very difficult for a court to fulfill the gatekeeper's role fairly and effectively, and the gatekeeper function is not applied consistently across all jurisdictions. For the expert, being "*Daubered*" is a serious concern that can negatively affect one's career. This *Daubert* change has added a level of caution and rigor in the extent of expertise witnesses now claim and in the development of expert opinions. For the lawyer, perhaps the most noticeable effect of the change has been to encourage the filing of more legal motions in an attempt to bar all or part of an opposing expert's testimony. To

address these time-consuming motions, lawyers and experts have to perform additional work that might not have previously been necessary. In that sense, the change is having a negative effect on the overall cost of litigation. As a practical matter, the *Daubert* rule change appears to have made the lawyer-expert relationship even more relevant and essential for successful litigation.

The expert witness is often publicly stigmatized as ethically compromised, considered by some as nothing more than a "hired gun." This stigma is born from misconceptions and from unavoidable human nature. The concept that anyone who charges high hourly rates would say anything to satisfy the paying party, along with a few well-publicized examples of professional misconduct, serve to anchor this stigma. In reality, the enduring expert witness must demonstrate strong professional and ethical conduct. The typical expert witness may work for the plaintiff in one case and the defendant in another. The expert witness can ill afford to submit erroneous or exaggerated claims and allegations that are contrary to or go beyond what can be supported by the facts in evidence and by sound scientific or technical methodology. Doing so may ultimately prove ineffective for the case and trigger appeals. Being exposed as unethical could also spell the end of a rewarding professional career. Opinions of the court and transcripts of deposition and trial testimony constitute a public record. That record serves as an effective quality control tool that lawyers and the finders of fact can consult. To succeed as an expert witness, credibility and thoroughness have to complement education and experience.

Recognized by all is the fact that litigation costs can be extraordinarily high, particularly in complex cases. While the cost of the expert witness is but a fraction of the overall cost of litigation, only the expert witness is obliged to testify openly regarding his or her hourly rate and case billing. Such testimony contributes to the "hired gun" stigma. The hourly rate of the expert witness, however, is not equivalent to a salary, but rather represents a service fee that includes overhead costs and the amount of time that is spent on interviewing for new cases, writing proposals, and business development that includes lost wages, for example.

While law schools and the bar examination process produce lawyers with official diplomas that reflect the extensive study and preparation that is required to practice law, there are no reputable schools or recognized diplomas that certify one as qualified to be an expert witness. As a matter of fact, many people might qualify to serve as an expert witness since, according to Federal Rule of Evidence 702, an expert is one who is qualified by "knowledge, skill, experience, training, or education" in "scientific, technical, or other specialized knowledge." Just about everyone can claim specialized knowledge in some subject as a result of life experiences, for instance. In the sciences and technical fields, all graduates with a university diploma potentially qualify. In reality, however, only a few people can make a substantial living as expert witnesses. This is perhaps because it takes more than education and experience to be an effective expert witness; it takes stamina and problem solving and presentation skills, as well as good fortune. In practice, the expert is selected based on qualifications, experience, and the relevance of those attributes to the case at hand. It is also interesting to note that one of the greatest hurdles to being selected as an expert witness is to have never served in that capacity before.

III. Practical matters

As a professional environmental and water resources consultant, I have served as an expert witness and have conducted work in support of litigation numerous times. Through that experience, I have interacted with lawyers in various settings and observed that most lawyers are extremely competitive, often passionate, intellectually astute, and generally overworked. There are no universal recipes for delivering effective expert testimony or for a successful professional relationship between lawyers and experts. However, based on personal experience, there are a few considerations that often

matter. First, for expert testimony, it is important to:

- Prepare extensively and rehearse the testimony with the trial lawyer.
- Present opinions in a simple manner using easy-to-understand language and demonstratives, regardless of how complex the bases for the opinions might be.
- Address the testimony to the finder of fact.
- Limit answers and explanations to the open question.
- In cross-examination, answer only to the open question, using short answers; avoid being dragged into arguing.
- Reserve detailed explanations for re-direct to address the critiques that might have been raised in cross-examination.
- Show respect to the court and observe proper decorum.

Second, for a successful lawyer-expert relationship, it is important for the expert to:

- Be the expert, not the lawyer.
- Adapt to the lawyer's personality and *modus operandi* without compromising work performance and quality.
- Deliver work products on time.
- Keep the lawyer informed of progress, setbacks, and other difficulties.
- Keep track of the budget since it can be a limiting factor.

IV. Conclusion

The professional relationship between lawyers and expert witnesses is complex and cannot be meaningfully generalized or categorized. It is, however, an important aspect of the litigation process that can influence the outcome of a trial. The occurrence of the unexpected and finding that one is unprepared is a much-feared concern for trial lawyers. This concern can be greatly alleviated by a well-developed lawyer-expert relationship.

The practice of law and testifying as an expert witness are demanding and challenging occupations that rely on a close collaboration between people who have been educated in very different fields. This professional relationship plays an important role in the judicial system. The basis of the relationship is mutual respect, education, communication, and a thorough understanding of each other's limitations and respective role in the litigation process.❖

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The Role of Expert Witnesses in Fraud Trials

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I. Introduction

In a fraud trial, the government presents evidence of how the scheme was accomplished as well as the extent of the scheme. The scope of the fraud is primarily measured in dollars - money stolen from civilian victims or fraudulently paid to the defendants by the federal government. This article will address some of the most common issues a prosecutor will confront when calling an expert witness to prove the existence of a fraud scheme.

II. What is an expert?

An expert is a government witness called to testify to apply specialized knowledge to the evidence presented to the jury and to offer an opinion or render a conclusion. Federal Rule of Evidence 702 states:

> 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. (Emphasis added).

While criminal tax cases will be used to illustrate key concepts in this article, the principles apply to any experts who testify to an opinion developed by virtue of their training and experience. Prosecutors will normally call either a summary witness or an expert witness, and sometimes both, to help prove the alleged fraud scheme. In criminal tax cases, the government calls a revenue agent employed by the Internal Revenue Service (IRS) to testify to tax loss computations. When an agent simply testifies as to what the government's evidence shows, the agent does not testify as an expert witness but rather as a summary witness. *United States v. Pree*, 408 F.3d 855, 869 (7th Cir. 2005). "[A]s a summary witness, an IRS agent may testify as to the agent's analysis of the transaction which may necessarily stem from the testimony of other witnesses. The agent may also explain his analysis of the facts based on his special expertise." *United States v. Moore*, 997 F.2d 55, 58 (5th Cir. 1993). As an expert witness, an IRS agent's "opinion as to the proper tax consequences of a transaction is admissible evidence." *United States v. Windfelder*, 790 F.2d 576, 581 (7th Cir. 1986).

"[W]here an IRS revenue agent summarizes the evidence for purposes of establishing the tax consequences, the line between summary testimony and expert testimony is indistinct. Given the assistance such an individual can provide to the jury, it has not been unusual in previous cases for an IRS

agent to testify as an 'expert summary witness.' " *United States v. Pree*, 408 F.3d 855, 869 (7th Cir. 2005); *See also United States v. Sabino*, 274 F.3d 1053, 1067 (6th Cir. 2001); *United States v. West*, 58 F.3d 133, 139-41 (5th Cir. 1995).

In tax evasion cases, evidence includes proof of harm to the government measured by calculating the tax loss associated with the scheme. According to the United States Sentencing Guidelines Manual, "all conduct violating the tax laws should be considered as part of the same course of conduct." U.S. SENTENCING GUIDELINES MANUAL §2T1.1(2008), Application Note 2. Similarly, in cases of larceny, embezzlement, fraud, deceit, and offenses involving altered or counterfeit instruments, the loss amount is proved as well as other factors which may require the testimony of an expert regarding: the use of mass-marketing (§2B1.1(b)(2)(A)); the misappropriation of a trade secret (§2B1.1(b)(5)); or the production or trafficking of any unauthorized access device (§2B1.1(b)(10)(B)(i)).

> PRACTICE TIP: If possible, call an expert who is not the case agent to limit the extent of cross-examination. The prosecutor should carefully monitor the information provided to the expert witness, ideally providing only information given to the defendant through discovery. This eliminates any potential for the expert's opinion testimony to be based on any fact not disclosed to the defendant. The government's discovery obligations are further streamlined when the expert relies only on evidence admitted at trial to form his opinion (note that Fed. R. Evid. 703 permits the expert to rely on inadmissible facts or data).

III. Must a hearing be held to qualify the expert?

In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Supreme Court announced rules concerning the admissibility of scientific evidence through an expert witness. Under the Federal Rules of Evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. The opinion included a non-exhaustive list of factors for the trial court to use to determine an expert's reliability. Six years later, the Supreme Court held that the trial court was required to evaluate all expert testimony, without limiting the analysis to "scientific" evidence. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Rule 702 of the Federal Rules of Evidence was amended in 2000 to be consistent with *Kumho.* The Supreme Court made clear that the particular facts of each case would dictate which of the *Daubert* factors the trial court should consider in making its assessment of expert testimony. *Kumho*, 526 U.S. at 150.

In fraud cases, there is generally no dispute regarding the education and experience of the witness who will testify about agency procedures or methods used by the defendants to commit the crimes. Evidence will be used to tie each defendant to the crime as well as to quantify the harm, either through a dollar amount of ill-gotten gains or through the number of victims. Additionally, evidence will be presented to show how the defendant personally benefitted from committing the crime (for example, purchasing a palatial residence, taking an around-the-world cruise, or buying husband and wife matching red Lamborghinis). With greed at the heart of every fraud case, presenting evidence that the defendant enjoyed the fruits of the crime is relevant as it will assist the jury in determining who committed the crime. This may require the testimony of a financial expert to trace the proceeds of the crime through a series of bank accounts leading to the defendant or to explain how property titled in the names of nominees is actually owned and controlled by the defendant.

Large-scale, complex fraud cases often require witnesses to summarize voluminous evidence. A witness who is a human calculator testifying about the preparation of summaries sought to be admitted into evidence would initially appear to be a summary witness, not an expert. This testimony is frequently helpful in a very lengthy trial or is necessitated by the lack of a stipulation by defense counsel. The key question to ask is: Did the witness apply some specialized knowledge that was used to prepare the chart? If the spreadsheets are strictly summaries of bank account activity, the answer is "no." If the spreadsheet

is quantifying improper claims filed with Medicare, then the specialized knowledge about Medicare procedures is required to form an opinion as to whether the claim was proper or not. In most circumstances, it is better to file an expert notice and ultimately not need expert testimony than to have the judge rule your witness is an expert on the eve of trial when you filed no such notice. Accordingly, a notice pursuant to Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure should be filed and should state the witness's area of expertise (Medicare billing procedures, Ponzi schemes, or the proper tax consequence of a financial transaction), the topics about which the witness will testify (usually limited to the areas of expertise), and the basis of the witness's opinion (applying the specialized knowledge to the facts of the case to arrive at a conclusion - billing procedures not followed, no true product/service was sold, or a tax deduction was false). As the trial date approaches and trial preparation is substantially complete, the prosecutor should provide defense counsel with copies of the loss computations and all summaries or charts the expert will discuss during his testimony. Simultaneously, the prosecutor should inform defense counsel and the court whether he will seek to introduce any of the summaries or charts into evidence.

> PRACTICE TIP: When drafting the expert notice to file pursuant to Fed. R. Crim. Proc. 16(a)(1)(G), state, if applicable, that the opinion will be based solely on evidence introduced to the jury. When providing spreadsheets summarizing the loss amount due to fraud, label all preliminary computations DRAFT and conspicuously list the date on the draft. At trial, the numbers may be different due to evidentiary rulings or witness testimony. During cross-examination the expert should ask to look at counsel's document to readily identify the computations as preliminary drafts, and re-emphasize the expert's testimony was based on the evidence presented at trial.

IV. Expert may not render an opinion about an element of the crime

> Federal Rule of Evidence 704 provides:
>
> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The Ninth Circuit rejected an argument that the expert witness's testimony usurped the fact-finding function of the jury in *United States v. Marchini*, 797 F.2d 759, 765-66 (9th Cir. 1986). The hybrid summary-expert witness concluded that the defendant "had omitted wages from [the forms] during the time periods involved in the case," after explaining the basis for his calculations. *Id*. The court held that the district court did not abuse its discretion by admitting the testimony because the expert was properly qualified to draw such conclusions, developed those conclusions based on the evidence adduced at trial, and had been cross-examined by the defendant. *Id*. at 766. *But see United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991) (held abuse of discretion when court permitted expert testimony that invaded the province of the jury by opining on the ultimate question and making credibility determinations).

Defense counsel may challenge the use of the government's expert when his testimony involves a summary of the evidence at trial upon which the expert relied when forming his opinion (for example, that the business office was a boiler room soliciting investors for a Ponzi scheme). Defense counsel may

argue that this is inappropriate and should be excluded as it improperly allows the government to make two closing arguments. Counsel's objection should be defeated by 1) referencing the explicit requirement in Rule 702(3) of the Federal Rules of Evidence, that the expert will apply "the principles and methods reliably to the facts of the case," and 2) citing to the plethora of cases permitting expert testimony in fraud cases, including *United States v. Bedford*, 536 F.3d 1148, 1157-58 (10th Cir. 2008); *United States v. Pree*, 408 F.3d 855 (7th Cir. 2005); *United States v. Mikutowicz*, 365 F.3d 65 (1st Cir. 2004); *United States v. Monus*, 128 F.3d 376, 385-86 (6th Cir. 1997); *United States v. Stokes*, 998 F.2d 279, 280-81 (5th Cir. 1993); *United States v. Barnette*, 800 F.2d 1558, 1568 (11th Cir. 1986). *But see United States v. Crabbe*, 556 F. Supp. 2d 1217, 1225-32 (D. Colo. 2008) (court found revenue agent was qualified to offer expert opinion but excluded agent's opinions as expert testimony because the underlying data or the methodology used was unreliable). The prosecutor must emphasize the role of the expert witness is to help the jury to understand the evidence or to prove a particular fact at issue. It is proper expert testimony to do this and does not intrude on the jury's determination of the guilt or innocence of the defendant.

In criminal tax cases, the focus of the trial is on one element of the crime - willfulness. The government must prove three elements in a tax evasion case: 1) the defendant had an additional tax due and owing; 2) that he committed an affirmative act of evasion (similar in concept to an overt act of a conspiracy); and 3) that he acted willfully - with the specific intent to violate a known legal duty. Tax fraud counts may also be included in indictments charging illegal activities with a profit motive, such as narcotics trafficking and alien smuggling. Defense attorneys realize that when the government is able to present evidence showing the defendant lived an extravagant lifestyle using the illegal funds, perhaps spending more money in a few years than most jurors will earn in their lifetimes, the greater the jury appeal the case will have. Consequently, defense counsel may file motions to attempt to limit that testimony by trying to stipulate to a dollar amount of fraud or by arguing that tax loss is not an element of the crime of filing a false income tax return and therefore is not relevant. Similarly, when defendants try to steal money from the government, they are ordinarily charged with filing false claims. That type of crime requires the government to prove that an item on the claim (as a payment for reimbursement under a government contract, a Medicare billing, or a tax return) is materially false. In all of these cases, the prosecutor should argue that the scope of the fraud, as well as the disposition of the fraud proceeds, are both relevant to proving the defendant is the person who committed the crime.

Other types of expertise which may be used in a fraud case include testimony regarding the seizure and analysis of electronic evidence or handwriting. Additionally, testimony explaining a mass marketing scheme, or what device-making equipment is and how it was used in an identity fraud scheme, may assist the jury in understanding the evidence and would be information not known to the average juror.

V. Expert may not explain the law to the jury

During fraud trials, an expert's opinion or conclusion will frequently be based on his analysis of the evidence admitted during the trial. When the testimony involves applying rules of the investigating agency to the facts of the case, a prosecutor must be cognizant of the potential argument that the government expert is usurping the role of the court. The best practice is to track the language of Rule 702, which permits an expert witness to testify to an opinion when: "(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." Fed. R. Evid. 702.

In *United States v. Wade*, the defendant challenged admission of a revenue agent's expert testimony on the grounds that the expert improperly "state[d] legal conclusions by applying the law to the facts." 203 Fed. Appx. 920, 929 (10th Cir. 2006). The Tenth Circuit explained that experts are allowed "to

apply the law to the facts to reach a discrete legal conclusion relevant to the case" because it is not "evidence that purely addresses questions of law." *Id*. at 930. Consequently, a properly qualified revenue agent may "analyze a transaction and give expert testimony about its tax consequences," which "necessarily will include the agent's understanding of the applicable law as a backdrop to explaining how the government analyzed the transaction." *Id*. *See also United States v. Bedford*, 536 F.3d 1148, 1157-58 (10th Cir. 2008).

It is crucial to explain to the judge that the expert witness is testifying to an opinion based on his training and experience, which he applied to the specific facts of the case. In *United States v. Monus*, 128 F.3d 376, 385-86 (6th Cir. 1997), the Sixth Circuit rejected defense arguments that the expert's testimony invaded the province of the jury and was impermissible legal testimony when the agent did not give an opinion about the defendant's guilt, but "merely gave his opinion that the events assumed in [the hypothetical] would trigger tax liability." *Id*. at 386.

A recent district court case illustrates this important distinction. In *United States v. Frantz*, 2004 WL 5642909 (C.D. Cal. Apr. 23, 2004), the court explained that experts may testify regarding "ultimate issues," even though they may not offer legal conclusions. *Id*. at *17. The court concluded that when the revenue agent testifies about the proper tax treatment of certain transactions, he does not offer a legal conclusion; rather, the revenue agent merely testifies to the tax treatment of payments, so the trier of fact must still determine guilt or innocence. *Id*. at *18-19. As a result, the testimony is not an impermissible legal conclusion and even though it addresses the "ultimate issue," the testimony is admissible. *Id.* at *19. A Ninth Circuit opinion concisely states the point: "Experts interpret and analyze factual evidence. They do not testify about the law because the judge's special legal knowledge is presumed to be sufficient[.]" *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (citations omitted).

Most circuits have pattern jury instructions that are used to guide the jury in deciding how to evaluate an expert witness's testimony. Instruction 4.17 of the *Ninth Circuit Manual of Model Criminal Jury Instructions* provides:

> You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions. Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

VI. Expert testimony related to a defendant's state of mind

Defense counsel often call mental health experts in cases involving defendants who challenge the jurisdiction of the United States courts, the authority of the Internal Revenue Service, or the constitutionality of the income tax laws (collectively referred to as tax defiers). A prosecutor should first refer to the language of Fed. R. Evid. 702 when drafting a response as to the admissibility of this expert testimony - how will it "assist the trier of fact?" If it is being introduced to prove the defendant did not, or could not, act intentionally, and state of mind is an element of the crime, then it is inadmissible opinion testimony that goes to the ultimate issue, a clear violation of Rule 704(b). Nonetheless, based on a recent appellate opinion, the government should not seek to exclude such testimony outright but rather should ask the court to conduct a hearing to discuss the areas in which the defense expert may testify. In *United States v. Cohen*, the Ninth Circuit held that a psychiatrist's testimony regarding the defendant's narcissistic personality disorder was relevant and would have assisted the jury in evaluating the evidence. 510 F.3d 1114 (9th Cir. 2007). The psychiatrist's written report stated that Cohen "did not intend to violate the law," a clearly impermissible expert opinion under Fed. R. Evid. 704(b) since willfulness was an element

of one of the crimes with which Cohen was charged. *Id*. at 1123. The Ninth Circuit reasoned that "[e]ven if the jury had accepted this diagnosis, the jury would still have been required to determine what impact, if any, that condition might have on Cohen's ability to form the requisite *mens rea* - the intent to evade the tax laws." *Id.* at 1126.

Proffered expert testimony regarding a defendant's mens rea must be carefully scrutinized to determine if it is embracing the ultimate issue to be decided by the jury. Such an inquiry should focus on the defendant's knowledge, not on the knowledge of a reasonable person, although the jury may "consider the reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held." *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993); *United States v. Middleton*, 246 F.3d 825, 837 (6th Cir. 2001). Any testimony about the reasonableness of a defendant's belief that the business was legitimate, or that the tax deduction was proper, is irrelevant. The key issue is whether the defendant *actually had* this belief at the time the crimes were committed.

VII. Charts and summaries

To make voluminous evidence more easily understood, the prosecutor may have the expert witness prepare charts and summaries. The prosecutor must determine if they will be demonstrative aids during the expert's testimony or if they will be introduced as substantive evidence to go back to the jury room. The trial court has broad discretion pursuant to Rule 611(a) regarding the use of demonstrative aids. Additionally, the proponent of a summary under Rule 1006 must establish the admissibility of the underlying documents as a condition precedent to introduction of the summary. *United States v. Johnson*, 594 F.2d 1253, 1257 (9th Cir. 1979). The proponent must also establish that the underlying documents were made available to the opposing party for inspection. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984). Rule 1006 provides: "the contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." Fed. R. Evid. 1006. Since the circuit courts of appeal inconsistently interpret these rules, the government should request a jury instruction when admitting charts as substantive evidence.

The *Ninth Circuit Manual of Model Criminal Jury Instructions* have two instructions addressing summaries. Instruction 4.18 states:

> Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Instruction 4.19 applies when the summaries have been admitted: "Certain charts and summaries have been received into evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves."

> PRACTICE TIP: Prepare spreadsheets using the evidence at trial and omit argumentative headings. This will limit defense objections to the introduction of the spreadsheets as substantive evidence.

VIII. Conclusion

Experts can be indispensable assets in the government's fraud case, whether they are used to prove the mechanics of the scheme, the extent of the scheme, or to present evidence to enhance jury appeal. When the prosecutor clearly defines the expert's role and is careful to limit the testimony so as not to invade the province of the court or the jury, the hard-earned conviction won at trial will be preserved on appeal. ❖

ABOUT THE AUTHOR

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Direct and Cross-Examination of Expert Witnesses in Civil Litigation: Where Art Meets Science

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I. Introduction

In modern civil litigation, expert witnesses are often decisive to the outcome of a case, especially at trial. Consequently, it is crucial that government attorneys present the best expert witness case possible by eliciting persuasive expert witness testimony in the government's case and uncovering the major biases and flaws in the opposing party's experts. This is accomplished through effective direct and cross-examinations. While the general rules of direct and cross-examinations apply equally to experts as they

do to other witnesses–for example, counsel should let the witness talk and explain on direct, but should lead and control the witness on cross–expert witnesses present special challenges.

Experts are often specially retained for the litigation and an attorney almost always presents an expert specifically because his or her views favor the attorney's theory of the case. Almost invariably, you will need a testifying expert if you want to refute any point for which your opponent has hired an expert. Tempting as it may be to match wits with the opponent's expert yourself and try to outfox the expert with well-structured logical arguments, the court's recognition of an expert's qualifications gives the expert license to intellectually ramble in ways that only another expert can deter.

It is not unusual for an expert to become very invested in his or her opinions. An attorney presenting an expert on direct examination wants to show that the expert's opinions are the natural result of an objective inquiry. Sometimes, however, convincing your own expert to present his or her testimony in a particular way is not as easy as you might think. On the other hand, an attorney cross-examining an opposing party's expert witness wants to reveal the weaknesses and biases in the expert's opinions. Yet, it is almost always a difficult challenge to get an expert to concede matters that undermine the persuasiveness of the expert's opinions. Experts are usually highly intelligent and sometimes a little arrogant. By definition they have "scientific, technical, or other specialized knowledge" that you probably do not possess. Fed. R. Evid. 702. These factors make the direct and cross-examination of the expert witness more difficult than the examination of a run-of-the-mill fact witness.

In our years of presenting direct testimony of experts and cross-examining opponent's experts, we have developed an approach to these examinations, often learning from our own mistakes. There are some hard and fast rules to follow but there is no formulaic method. How you approach the expert examination will often depend upon the personality of the expert and the circumstances of the case. Like much of trial advocacy, examining expert witnesses is an art, not a science. To turn the phrase a little, your expert witness examination is where the art of trial advocacy meets the "science" of expert witness testimony. Through lessons from our own experiences, we hope that we can help you win the inevitable "battle of the experts" that arises in civil cases.

II. Direct examination of expert witnesses

A. Choosing the expert and making complete pretrial disclosures

Envisioning the direct examination of your experts should begin very early in your case, ideally at the time when you are first understanding the issues, deciding which experts you will need, and choosing them. Simply put, you want to find experts who will persuasively present opinions to the trier of fact that will advance your theory of the case.

One cannot overstate the importance of choosing the right individual to be your expert. You must thoroughly vet your expert before retention to make sure that the expert is not vulnerable to challenge, either through a *Daubert* motion to exclude the expert's opinions or through impeachment at trial by confrontation with material that undermines the credibility of the expert or the persuasiveness of the expert's testimony. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). It is even more important for you to thoroughly investigate the experts you hire than it is to investigate your opponent's experts. If your opponent excludes or seriously undermines your expert, your case is critically compromised. On the other hand, if you fail to discover damaging material on your opponent's experts, you've simply lost an opportunity to undermine your opponent's theory of the case. Therefore, it is imperative that you perform a comprehensive investigation of any experts whom you are considering hiring. Determine whether the potential experts' opinions have ever been excluded; find out whether there is anything in the experts' writings that contradict your theory of the case; investigate whether the experts

have ever been disciplined by a licensing board. These are just a few potential areas of inquiry in vetting your experts. *See* Jennifer L. McMahan, *Researching Expert Witnesses Online: Resources and Strategies,* in this issue of the U.S. ATTORNEYS' BULLETIN.

The experts you choose should be good teachers and persuasive communicators. You should conduct an extensive in-person interview with the potential expert before retention. Size up the expert. Are the expert's explanations easy to understand? Is the expert a likable person? Does the expert respond well to challenges? These factors will determine how persuasive the expert will be to the finder-of-fact. Be wary of experts who earn a lion's share of their income as experts in litigation, particularly if they almost always testify for the plaintiff or the defendant. On the other hand, be careful about hiring an academic or other expert who has never testified before. You do not want the expert to learn how to be an expert in litigation from the mistakes he or she makes in your case. An ideal expert is: (1) a highly qualified expert in his or her field; (2) a persuasive teacher, yet one who comes across as an objective instructor rather than as an advocate; (3) a person with enough litigation savvy to avoid being easily tripped up by your opponent; and (4) a person who can offer expert opinions that materially advance your theory of the case. These experts are not easy to find, but they exist if you take the time and effort to look for them. Once you have some candidates, it is important to do reference checks. Consult with other lawyers who have used the experts before and do not simply confine your contacts to those individuals whom the experts tell you to call. *See* Michele Masais, *Finding Expert Witnesses: Advice, Examples, Tips, and Tools,* in this issue of the U.S. ATTORNEYS' BULLETIN.

Another important preliminary step in the direct examination of your experts is the preparation of expert disclosures under Federal Rules of Civil Procedure 26(a)(2). For most experts, this rule requires a comprehensive disclosure, including a complete statement of the expert witness's opinions and the bases and reasons for the opinions. Fed. R. Civ. P. 26(a)(2)(B)(i). At this time, the expert must also disclose any exhibits that the expert will use to summarize or support his or her opinions. Fed. R. Civ. P. 26(a)(2)(B)(iii). These two rules require that you disclose the substantive content of expert witness testimony at a fairly early stage of the litigation. The expert may supplement these disclosures during a deposition, or you may make a formal supplementation of the disclosures under Fed. R. Civ. P. 26(e).

Because of the expert disclosure requirements, it is extremely important that the expert disclose all of the opinions in the expert report or supplementation, as well as any supporting reasoning and illustrative material that you need for the direct examination. This will often require a substantial amount of work with the expert in advance of the expert disclosure – discussing the case, providing necessary materials to the expert, and considering how the expert will convey the opinions and supporting rationale. Your communications with your expert and any draft expert reports may or may not be discoverable. Under the current rules, most courts compel discovery of any information that the expert considered, including attorney-expert communications and draft expert reports, even if this disclosure would reveal privileged information or information protected by the attorney work-product doctrine. *See* Adam Bain, *Working with Expert Witnesses in the Age of Electronic Discovery,* U.S. ATTORNEYS' BULLETIN (May 2008). The possibility of discovery may influence the way in which you work with your expert, as you do not want to create fodder for your opponent's cross-examination of the expert. *See id.* Proposed changes to the Federal Rules of Civil Procedure, however, would protect draft expert reports and most attorney-expert communications from discovery. *See* Adam Bain, *Considering the Proposed Changes to the Federal Rules of Civil Procedure Regarding Expert Witness Discovery*, in this issue of the U.S. ATTORNEYS' BULLETIN.

Once the discovery process is complete, the expert's direct examination is basically confined to the pretrial disclosures. If the witness attempts to testify at trial to a matter not previously disclosed pursuant to Federal Rules of Civil Procedure Rule 26, the court should not allow that testimony unless the failure to disclose was "substantially justified" or "harmless." *See* Fed. R. Civ. P. 37(c)(1). This is

particularly important with respect to exhibits that the expert wants to use during direct examination. In preparation for direct examination in the weeks before trial, the attorney and the expert often determine that they want to use substantive or demonstrative exhibits that were not previously disclosed under Rule 26(a)(2)(B)(iii). Unless the parties' attorneys reach an agreement regarding disclosure of exhibits for use during expert direct examinations, the court may prohibit the expert's use of exhibits that have not been previously disclosed pursuant to Rule 26. *See* Fed. R. Civ. P. 37(c)(1). Even if the exhibit is simply a PowerPoint slide of items that the expert wishes to emphasize, which the expert could just as easily write on a chalkboard, the court may prohibit the exhibit's use because the exhibit will "summarize or support" the expert's opinions. Of course, with proper prior disclosure, summaries are admissible under Fed. R. Evid. 1006.

B. Preparing for the direct examination

Once you have prepared your expert disclosures, there are still several steps to preparing a successful direct examination. The first step is primarily defensive, but is crucial to a successful expert presentation. You need to carefully prepare your expert for the deposition. When your opponent is deposing your expert, there are likely two things that he or she is trying to do: (1) develop material to challenge the admissibility of your expert's opinions under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and Fed. R. Evid. 702, and (2) develop material to undermine your expert's direct testimony on cross-examination. What does that have to do with your direct examination? Of course, if any of your expert's opinions are excluded, it will affect the scope of your direct examination. If the expert is excluded entirely, there will be no direct at all. More typically, if your opponent develops material in the deposition to use in cross-examination, you will have to decide (discussed in more detail below) whether, and to what extent, you need to defuse that cross-examination during the direct.

Beyond the typical deposition pointers that you would give to any witness, fact or expert – such as "answer only the question asked" and "do not guess or speculate" – you want to anticipate as much as possible the potential vulnerabilities in your expert's opinions. Then, you will want to practice with the expert on how to respond to any challenges to his or her opinions. This will require a lot of work examining the expert's prior testimony and writings as well as considering any criticisms that your opponent's experts have raised. Put yourself in your opponent's shoes. How would you approach a deposition and cross-examination of your expert? If your expert can successfully handle difficult questions at the deposition, it will be less likely that your opponent will be able to develop material to challenge your expert on cross-examination. Consequently, it becomes less likely that you will need to devote parts of your direct examination to defusing points that you expect your opponent to raise in cross. The deposition also gives you the opportunity to see how your expert responds to difficult questions. What points does the expert communicate effectively? How could the expert improve his or her presentation?

The next step in preparing for the expert's direct examination is constructing its organization and presentation. You will first need to establish that your expert is qualified and then determine an order for the presentation of the expert's opinions. There are several schools of thought regarding the best way to elicit expert opinions. Some believe that you should establish all of the facts and bases for an expert's opinion first, before eliciting any opinions. Others adhere to a traditional practice of eliciting opinions through "hypothetical questions" before showing, through the expert's recitation of the bases for the opinions, that the hypotheticals match the facts of the case. We believe that the most effective presentation of an expert's direct examination elicits a summary of the opinions early in the examination followed by a more detailed elaboration of individual opinions and the facts and reasoning supporting each opinion. This approach is sanctioned by Fed. R. Evid. 705, which allows an expert to testify to an opinion and give the reasons therefor without first testifying to underlying facts or data. Importantly, this

approach does not leave the fact-finder waiting for the expert's conclusions and wondering why the expert was called to testify.

Thus, we typically: (1) establish the expert witness's qualifications; (2) briefly have the witness describe his or her involvement in the case with respect to what the expert was asked to do and how he or she went about accomplishing the task; (3) elicit a summary of the expert's opinions; (4) question the expert on individual opinions, allowing the expert to elaborate on how he or she reached the opinions and emphasize the points that are important to the case; and (5) ask summary questions that allow the expert to reiterate his or her opinions and profess a strength of belief in those opinions, using the "magic words," *e.g.*, "to a reasonable degree of scientific certainty," if necessary.

Next, you will need to determine how to defuse the best points your opponent is likely to make in cross-examination. This is a crucial part of the construction of your direct examination. You will want your expert to explain major weaknesses or problems in the expert's testimony while you are in control. You, unlike your opponent, will not interrupt the expert while he or she explains the weakness or problems. A criticism of your expert's qualifications or opinions is much more damaging if it is heard for the first time on cross-examination and the expert is not given an opportunity to provide an explanation. If done correctly, defusing the cross-examination will take the wind out of the sails of your opponent's cross and actually enhance the persuasiveness of your expert's testimony by allowing the expert to meet challenges head-on. Defusing the cross-examination during direct, however, requires you to exercise good judgment in determining: (1) which points your expert really needs to explain; and (2) where those points best fit within the direct, so they do not detract from the expert's testimony, but rather enhance it. Defusing cross-examination is clearly an art, not a science. Generally, you don't want your direct to become too defensive by addressing every minor point of criticism. At the worst extreme, you may raise some criticisms that your opponent had not even intended to use in cross. But, when you know your opponent will cross-examine your expert on certain points, it is much better to bring a point up in direct first, rather than wait for your expert to confront it in cross.

For example, if your expert and the opposing expert have each received similar compensation for their respective work, you probably do not need to address your expert's compensation during the direct examination. On the other hand, if there is a great disparity – your expert has received hundreds of thousands of dollars in compensation for working on the case, whereas the opposing expert has received much less – you probably need to address expert compensation in direct examination, because you know that your opponent will address it during cross. How can you turn this disparity in compensation to your advantage? Perhaps your expert is the preeminent expert in the field and can demand a much higher hourly rate because of the inherent value of the expert's time. You can have your expert explain this in direct examination. Or, more likely, your expert had to do a lot more work, reviewing a much greater universe of materials, before the expert was comfortable in reaching opinions. By showing in direct the amount of work that was necessary to reach the expert opinions – and why this justified the compensation that the expert received – you can bolster your expert's opinions, defuse a potential area of cross examination, and throw doubt on the opinions of your opponent's expert.

Needless to say, you will want to think through this part of the direct examination very carefully by going through the questions thoroughly with the expert and considering how the questions and answers will come across to the finder of fact. Make sure to devote the necessary time and thought to this important step. All of your hard work in finding the expert, developing the expert's opinions, and constructing the expert's direct will be for naught if your opponent destroys your expert during cross-examination. A few well-placed questions and explanations in the direct examination will be well worth the time and effort in defusing the cross-examination. Of course, you cannot anticipate everything. Some points that seem minor during pretrial preparations may have a significant impact in cross. Fortunately,

you still have the re-direct examination to allow your expert to elaborate on and explain his or her testimony.

Another important step in preparing the direct examination is to consider its presentation. With respect to presentation of the expert witness testimony, you might want to think about Richard Gere's number "Razzle Dazzle" from the movie, Chicago. In the number, Gere's character, emphasizing the importance of "production" in the direct examination of his star witness, Roxie, sang "Give 'em an act, with lots of flash in it." The takeaway from this for expert witness direct testimony is that you do not want to let it get too dry and technical. Intersperse the direct testimony with exhibits, demonstrations, and real life examples to which the fact-finder can relate, where appropriate. If the court allows, let the expert get off of the witness stand and use an exhibit or chalkboard. These days, people expect illustrations and short sound bites. If you provide these to the fact-finder effectively, they will greatly enhance the persuasiveness of the expert's testimony. Of course, as mentioned above, any exhibits that you use must be appropriately disclosed under the Federal Rules of Evidence.

The final, and perhaps most important step in the direct examination, is to practice the direct examination with the expert. Of course, there is a danger in over-practicing the direct testimony so that it appears rehearsed, rather than natural. However, going through the testimony on numerous occasions with the expert is crucial because it allows you to determine what works and what does not. If possible, have another person observe a session of your mock direct examination and ask for feedback. Particularly with an expert witness, there is a danger that certain parts of the testimony will be "over the head" of the intended audience. After working with an expert for a long time, you will become familiar with the concepts and jargon of the expert's field and you will intimately know how the expert's opinions relate to your case. It is easy to lose sight of the fact that the trier of fact may know nothing about the expert's field or how the expert's testimony relates to the case at the time the expert takes the stand. Also, consider video-recording the mock direct examination for your personal review and use it with your expert in offering pointers to improve the examination. Once you are comfortable with the substance and flow of the direct examination, you are ready to present it to the fact-finder.

C. Conducting the direct examination

Your first mission in the direct examination of an expert is to show that the witness is an expert and, in fact, a very well-qualified expert. Your opponent may offer to stipulate to your witness's expertise. Don't agree, even if it is a bench trial and the court wants you to stipulate to qualifications to move things along. You need to establish your witness's qualifications because, if done correctly and not belabored, this will enhance the persuasiveness of the expert's testimony. Think hard about your expert's qualifications and be creative in how you present them. Emphasize those qualifications that are relevant to the issues in your case or are otherwise interesting to the finder of fact. Don't belabor the qualifications in a rote or formulaic fashion. For most of the direct examination, the focus of the examination should be on the witness and not the attorney. In other words, the expert should do ninety percent of the talking. During the examination of the expert witness's qualifications, however, you are permitted to use leading questions because it is a "preliminary matter." *See* Fed. R. Evid. 104. Thus, you may decide to use some leading questions to emphasize certain points or move the examination along. Be aware that, after you have established qualifications, your opponent also has the opportunity to *voir dire*, or question your expert on matters regarding the witness's qualifications. Therefore, it is important to cover necessary matters and defuse any weaknesses going to qualifications before your opponent gets an opportunity to question the expert.

Because the focus of the direct examination is on the witness and not the attorney, we recommend that you do not use a script. Use an outline which contains the points that you want the expert to cover. Use primarily open-ended questions that allow the witness to teach and persuade the finder of fact.

Examples include: "What is your opinion?", "How did you reach that conclusion?", and "What factors did you consider?" Listen carefully to the expert's testimony. You know the points that you want the expert to cover. If the expert misses an important point, make sure to follow up. For example, you may ask, "What consideration did you give to the speed of the vehicle at the time of the accident?" if the expert forgot to mention speed in explaining the bases for the opinion. There will be certain points that you want your expert to make that will require more direct questions. You may consider writing these questions and highlighting them in your outline. Examples include questions regarding particular factors that are important to the expert's opinion or questions that allow an expert to explain a criticism of the opinion.

While you listen to the expert's testimony, watch out for lapses into technical jargon or concepts that the fact-finder may not understand. If necessary, stop the expert and ask the expert to explain the jargon or concept to the fact finder. For example, you may ask, "Doctor, can you explain to the jury what 'hydraulic gradient' means?" In this way, your role during the expert's examination is that of an assistant to the fact-finder in understanding the expert's opinions. You also assist the fact-finder by using questions that cue the expert to use exhibits or demonstrative aids, for example, "Doctor, have you prepared a chart that illustrates your opinion?" Finally, you will assist the fact finder by using transitions or "sign posts" in your questions to show that you are moving to a different topic. You may ask questions such as, "Doctor, let's turn to the second opinion that you are offering today. Please describe the basis for your conclusion that the surgeon did not use the appropriate standard of care."

Last but not least, it is important to end on a strong note. Ask questions that allow the expert to summarize and conclude the testimony; however, make sure that the question is not objectionable. One of the worst things you can do is end your direct examination on a sustained objection. Have a safe question in your pocket just in case the last question you ask elicits an objection that the court sustains. Once you have finished, sit down, keep your focus, and listen closely to the cross-examination.

III. Cross-examination of expert witnesses

A. Preparing for cross-examination

An effective cross-examination of an expert witness requires extensive preparation. Because the best source of material for the cross-examination of an expert is the expert's deposition, it is extremely important to prepare extensively for the deposition and conduct the deposition in a way that will yield fodder for your cross. Consequently, you will want to compile all of the information that is available regarding the expert and the expert's field before conducting the deposition. The reason that extensive preparation prior to the deposition is so important is because, ideally, you will use the deposition to "lock-in" the expert's testimony on matters that you want to elicit during your cross-examination. Among the material that you will want to review are the expert's prior deposition and trial testimony, as well as the expert's prior writings. Has the expert made previous statements or rendered opinions that contradict his or her opinions in your case? Has the expert been disqualified or offered flawed or biased testimony in previous cases? You also want to perform an extensive investigation into the expert's background. Has the expert ever been disciplined in his or her field? Has the expert ever committed a crime? Are there any misrepresentations on the expert's curriculum vitae? There are several techniques for uncovering this material that are beyond the scope of this article; however, the assistance of a librarian or investigator can be invaluable. *See* Jennifer L. McMahon, *Researching Expert Witnesses Online: Resources and Strategies* and Michele Masais, *Finding Expert Witnesses: Advice, Examples, Tips, and Tools*, in this issue of the U.S. ATTORNEYS' BULLETIN.

You also want to search for any texts in the expert's field that include information that supports your theory of the case. If you can establish a text as a "learned treatise," under Fed. R. Evid. 803(18), you can read statements from the text into the record during your cross-examination. This exception to the hearsay rule applies not only to what one normally considers a "treatise," but also to any "periodical or pamphlet on a subject of history, medicine, or other science or art," so long as the text is established as "reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." Fed. R. Evid. 803(18).

In addition to gathering these materials and reviewing them closely to mine for potential nuggets for your cross, you will want to examine carefully the expert's Rule 26 disclosure. The disclosure may point to potentially fruitful areas of inquiry during the deposition. For example, the disclosure may show that the expert failed to consider materials that would be significant to the expert's opinions. Or, the expert may have incorrectly or incompletely listed his or her qualifications. You should discuss the expert's disclosure with your own expert or consultant. Your expert or consultant can often help you identify areas in which the opposing expert's opinions are vulnerable and he or she may even formulate questions for your deposition. Be wary, however, that your communications with your testifying expert are likely discoverable, pending an amendment to Fed. R. Civ. P. 26. *See* Adam Bain*, Considering Proposed Changes to the Federal Rules of Civil Procedure Regarding Expert Discovery*, in this issue of the U.S. ATTORNEYS' BULLETIN.

Once you have all of this ammunition for your deposition, you need to determine what to use and how to use it. To a great extent, this is a matter left to your sound judgment, depending upon the circumstances of the case. If you expect that the case will settle, you may decide to reveal everything that you have developed in your investigation to strengthen your settlement position. However, if you reasonably foresee that there will be a cross-examination in the future, you may decide not to use everything that you have uncovered. If you could easily conduct the cross-examination based upon the materials alone, then you may decide not to disclose the materials during the deposition. The Civil Rules provide that impeachment exhibits need not be disclosed in advance of their use at trial, and for good reason. Fed. R. Civ. P. 26(a)(3)(A). There is value to confronting a witness with impeachment evidence for the first time at trial. You are more likely to get an unprepared and more telling response. A guiding principle of cross-examination, especially with experts, is to know what the answer to your question is before asking the question. If there is any doubt about how the witness could believably respond to a question regarding a matter, it is usually preferable to ask the question first during deposition.

Your expert is an excellent sounding board for the deposition and trial questions for your opponent's expert, but you must always be mindful of the fact that your communications with your expert are not protected by the attorney-client or work product privilege, pending an amendment to Fed. R. Civ. P. 26.

In conducting the deposition, you should continually be thinking about the potential use of the testimony on cross-examination. Ideally, during certain portions of the deposition you want the expert to offer short responses of agreement or disagreement to questions that you pose. You may ask the expert open-ended questions at the deposition and then pick out pieces of the response that you turn into short closed questions. This testimony will serve as the basis for your cross-examination of the expert. If the expert says something different at trial you will use the deposition questions and answers as "prior inconsistent testimony" to challenge the expert's credibility. *See* Fed. R. Evid. 613.

With respect to authoritative treatises, you may decide to ask in a straight-forward manner whether the expert considers a particular treatise, textbook, or article to be authoritative (or you might ask the expert generally what texts he or she considers "authoritative"). If a text is well-known in the field, such as Gray's Anatomy, the expert may look foolish by refusing to admit that it is authoritative. Some well-coached experts will refuse to admit that any text is authoritative. Don't worry. That answer looks

foolish too, and, as we discuss in the next section, there are other ways to establish that a text is authoritative for purposes of your cross-examination. We almost always insist on taking the expert's deposition at his or her office. For one thing, it will be hard for an expert to deny that a text which is kept close-at-hand is authoritative. (Additionally, the expert will not be able to evade a question or request for production by claiming that the material is "back at the office"). Once you have established that a text is authoritative in the deposition, you do not need to do anything else with it. The Federal Rules of Evidence allow statements within the text to be read into evidence without further colloquy with the witness. Fed. R. Evid. 803(18).

Once you have finished the deposition, you have not necessarily finished collecting materials for your cross-examination. You may come across material that you were not able to obtain prior to the deposition. Additional testimony and information may become available through the course of the pre-trial discovery. Continue to examine this material for your cross-examination but realize that you will not be able to question the expert about it in a no-risk deposition setting. To use the material in cross-examination, you need to be confident in your ability to force an answer from the expert based upon the material alone.

With trial on the horizon, it is time to prepare the cross-examination questions. Attorneys have many different styles for this, and there is no one right way to do it. Unless you have an amazing memory that is unaffected by adrenaline, you should write out your specific cross-examination questions with clear, double-checked, and rehearsed references to the material you will use for impeachment, if impeachment becomes necessary. In scripting the cross-examination questions, you should mirror the language of the impeaching material. Using such precise questions will make it harder for the expert to stray from the answer that you want and will make your impeachment more forceful.

When it comes to choosing what style of questions to ask, you should only ask leading questions to which you can force an answer. These questions usually demand a "yes" or "no" response and allow no opportunity for explanation. Using such leading questions on cross-examination is particularly important with expert witnesses. Expert witnesses are often coached to take any opportunity on cross-examination to explain their testimony and they relish the opportunity to do so. When this happens, you have lost the flow and force of your cross. Consequently, only ask questions to which you can force a "yes" or "no" answer (or other, similar short responses).

Here are a few ways to force just such an answer: (1) quote the witness's deposition testimony so that the witness risks impeachment if he or she does not provide the expected answer, (2) faithfully quote a document so that the witness must agree that the document contains a certain statement, or (3) ask the witness a question to which the response is so obvious that the witness looks foolish if he or she gives anything but the expected response.

When deciding which questions to ask as far as subject matter is concerned, you should consider asking questions that elicit responses that support your theory of the case, including responses that bolster the opinions of your experts. Of course, you should also consider questions that elicit responses that undermine the persuasiveness of the expert's opinions, including questions that reflect on the witness's qualifications, opinions, and credibility. Be selective. You have likely developed a lot of material that you could use to cross-examine the expert but it is extremely important to choose from that material the few points that make for the most effective cross-examination. Keep in mind that the most powerful cross is typically a short cross. You need not refute every point that the expert has raised because you usually only want to make a few powerful points on cross-examination. Where the expert's qualifications, assumptions, and reasoning are sound, do not address them in your cross-examination. Find and highlight the places where the opponent's analysis differs from yours. Begin and end the cross- examination on your most powerful points. You want to make absolutely certain that you can force the answer you want

when you ask the last question of your cross-examination. Never let your cross- examination end with a long exposition of the opposing expert's adverse opinion.

What question should you almost always avoid? You should not ask the expert an ultimate question regarding the expert's opinion to which you cannot force the answer, for example, "So, Doctor, wouldn't you agree with me that plaintiff's condition could not possibly have been caused by his exposure to formaldehyde?" Even if you think you have asked all of the preliminary questions that lead to the conclusion that you want to draw, avoid the temptation to ask that last question. Nine times out of ten, the expert will disagree with you and ruin your cross-examination. Do not worry that you have not made the conclusion explicit. If you have asked the preliminary questions carefully, the fact finder has followed you to the conclusion that you will explain in your closing argument. You do not need to spell it out, if at all, until then. In fact, social scientists have found that the persuasive effect is greater if the fact-finder is allowed to reach a conclusion first on its own, rather than have the conclusion spoon-fed to it by counsel.

Carefully consider a logical organization to your cross-examination. You may want to elicit testimony that is favorable to your case first, before undermining the expert. You may want to cross-examine the expert on qualifications during *voir dire*, before the expert has testified to any opinions. Even if you do not expect to exclude the expert, an airing of the weaknesses in the expert's qualifications at this time will undoubtedly lessen the impact of any testimony that follows.

Finally, practice the cross-examination out loud. If executed correctly, the cross-examination becomes your argument in the form of a series of propositions that you will repeat to the fact finder in your closing argument and that, through your skillful cross-examination, your opponent's expert has endorsed. Just as you would practice any other argument, you want to hear how it will sound.

B. Conducting the cross-examination

Once you have carefully organized the cross-examination of the opposing expert, the most difficult part in conducting the cross-examination will be establishing and maintaining control. If you have carefully constructed your questions to force the answer you want, you have won half the battle. But no matter how careful you have been, the expert will likely try to interrupt your flow with an explanation or reiteration of the expert's opinions. When that happens, there are several techniques to reestablishing control. The one that will work for you depends upon the expert, the judge, and the circumstances. Consider these:

- As the expert starts to explain an answer with a "Yes, but . . .," try raising your hand slightly and gently saying, "Excuse me, doctor, you've answered my question." Then immediately move on to the next question. Often the opposing lawyer will stand up and object, "Your honor, the witness was trying to explain when counsel cut him off." You can say, "The witness will get a chance to explain in re-direct." The judge may or may not allow the witness to provide the explanation.
- If the expert does not answer the question with a yes or no response, but begins to give an explanation, gently interrupt the witness. "Excuse, me doctor, I do not think you heard me, my question was . . . . yes or no?" The witness, may respond, "I cannot answer that question, yes or no." In response, you could say, "Doctor, are you saying that you cannot answer . . . yes or no . . ." then use your impeachment material, as appropriate.
- If the expert explains an answer completely, "Yes, but . . . ," instead of interrupting the expert, you object to the expert's response as non-responsive and move to strike the rest of the response after "yes." This technique is generally disfavored because it depends upon the court for control and courts are often reluctant to assist counsel in controlling a

witness this way. However, some judges may be willing to assist counsel particularly if the expert is repeatedly refusing to answer the question as specifically asked.

Impeachment or the threat of impeachment is also effective in controlling the expert. You may consider beginning a cross-examination by reminding the witness of his or her deposition. This could be simply done by stating, "Good morning, doctor. We met once before at your deposition." You also may want to make the witness aware that you have the deposition by holding it or placing it on the lectern. If you have the opportunity to impeach the witness early in the cross with the deposition, that impeachment may serve to control the witness for the remainder of the examination.

It is important, however, to pick your impeachment carefully. The impeachment must state a clear, concise contradiction, that is, yes vs. no or black vs. white. Conditional answers and the word "maybe" dilute any attempted impeachment to the point that it usually hurts more than helps. If the expert admits in deposition that something was not considered or reviewed, it is a good bet that the item has been considered and fit neatly into the expert's analysis by the trial date, making it dangerous to attempt impeachment with "You did not consider ___ in forming your opinions, did you?"

Any impeachment that is required should be executed quickly and cleanly because you do not want to give the witness any opportunity to explain the discrepancy between the two statements. You should have the impeaching material readily available to you while you conduct the cross-examination. Pure impeachment exhibits – those that have not been previously disclosed to your opponent – should be marked with copies immediately available for the witness, opposing counsel, and the court.

Proper impeachment is accomplished in three steps:

(1) Commit the witness to the testimony on which you will impeach – "You testified on direct that you deducted income taxes from your future wage calculations?"

(2) Identify the impeaching testimony – "I have the transcript of your deposition and will read from page __, beginning at line ___."

(3) Read the impeaching testimony into the record – "In response to my question, 'Did you subtract the portion of Mr. Smith's expectable future earnings that he would have to pay the state and federal governments as income taxes?' you responded, 'No.'"

Unless a different procedure is required by local rule or custom, do not let the witness read the impeaching testimony, examine the transcript, or respond in any way before you move on to your next point. The prior inconsistent testimony you are reading into the record is admissible under Fed. R. Evid. 801(d)(1) and the three steps of impeachment lay the proper foundation, so the witness need not say anything past committing to his current testimony in step 1 above. Again, you do not want to give the expert any opportunity to explain away the inconsistency.

If the expert will not commit to the testimony you wish to impeach—"It doesn't appear that way, but in reviewing my calculations, the discount rate I used in reducing to present value was adjusted by a factor that lumped the tax deduction into the present value calculation,"—then the impeachment is useless and you will have to judge whether to pursue the point in other ways. This example also illustrates why you need an expert to keep your opponent's expert honest—if their expert's answer is hogwash regarding the discount rate adjusting for taxes, then your economist will know immediately and can explain (and probably even illustrate) the misrepresentation.

Ideally, with respect to learned treatises, the opposing expert witness has admitted that the source you seek to use is authoritative. If so, at the point in the cross-examination where it makes the most sense to use the source, you can cross the expert with the admission that the text is authoritative. Then, simply read the statement that you want to use into evidence. Do not give the expert a chance to comment. No

question is necessary under Fed. R. Evid. 803(18). The less opportunity you give the expert to talk the better your cross-examination will be because you are presenting the evidence in the format you prefer.

Even if you were not able to get the expert to admit at deposition that the text that you wish to use is authoritative, you may still be able to use the source during cross-examination. The rule provides that the source can be established as authoritative "by other expert testimony or by judicial notice." Fed. R. Evid. 803(18). If you want to use a source during the expert's cross-examination, make sure to have it established as authoritative through prior testimony of your expert or have an offer of proof (in the form of a declaration) ready if your expert has not testified yet. Then, simply stop the cross-examination at the appropriate time, with whatever preliminary questions are necessary, and announce your intention to read from the learned treatise referencing your foundation for doing so. Then, read the selected text. Again, do not give the expert an opportunity to comment and resume your questioning.

Finally, your demeanor during cross should be firm and professional. Do not become argumentative with the witness. Particularly, as it involves the expert's field of expertise, an argument with an expert witness is not an argument you are likely to win in the eyes of the fact finder. As you conduct your examination, your demeanor should show the fact finder that you have proven your points. In this vein, as with your direct, it is extremely important to end cross-examination on a strong note. Make sure the final question is one that is strong and forces a helpful answer, allowing no room for explanation.

IV. Conclusion

Litigation is best conducted as a far-sighted, thoughtful process. You should be identifying your triable issues and formulating your basic trial tactics as you write your initial disclosures. Even in cases that "should" settle because of bad facts and daunting exposure, early and ongoing trial preparation keeps you positioned to maximize your effectiveness. If chosen well and handled carefully, expert witnesses can be invaluable assets. Keep yours well-informed and draw on their skills to enhance your presentations at every stage of the process.❖

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The views expressed in this article are solely those of the authors alone and not of the Department of Justice.

Researching Expert Witnesses Online: Resources and Strategies

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I. Introduction

In recent years, litigation has increasingly come down to a "battle of the experts." In order to win that battle, attorneys need to make sure they have as much information as possible, not only on opposing counsel's experts but also on those hired by the Department of Justice (DOJ). Even if you have what is considered to be the complete Curriculum Vitae (CV) of the expert, you need to verify that the information is accurate as well as look for anything not included in the CV. More than one attorney has fallen into the trap of thinking that because an expert is prominent in his field or seems truthful when asked about his background, that further vetting is not necessary. The worst time to learn about an expert's secrets is during cross-examination by opposing counsel.

While conducting this type of research can be time consuming and difficult, it is a necessity for thorough trial preparation. Fortunately, the DOJ librarians have become adept at this kind of research and can assist DOJ attorneys in vetting their experts. Investigating the background of an expert tends to be more of an art than a science, but what follows is an outline of some of the resources the DOJ law librarians typically use when conducting these investigations, as well as some insight into what kinds of information might be found there. For a more complete list of resources and Web sites, refer to *Researching Expert Witnesses Online* on the DOJ Virtual Library. DOJNet Virtual Library Research Guides, Researching Expert Witnesses, http://dojnet.doj.gov/jmd/lib/civil/experts.php.

II. Licensure and professional status

Most expert witnesses are licensed by one or more state licensing authorities and possibly have specialty certifications as well. An expert's CV might contain information on state licenses but it is necessary to verify that what is listed is accurate and up-to-date, as well as to check for other information that might not be listed. Librarians often begin research on an expert by obtaining a background report from a database such as Accurint or Lexis. The report will typically include some information on professional licensure and employment history, but it will also list previous addresses dating back 20 years or more. By making a note of each state in which the expert has resided, one can get an idea of where the expert might be licensed.

Westlaw's PROFLICENSE-ALL database contains a variety of professional and commercial license information from all 50 states and the District of Columbia, as well as the Drug Enforcement Administration (DEA) and the Federal Aviation Administration (FAA). The Lexis Professional Licenses search includes 49 states, the District of Columbia, and several U.S. territories. Searching these databases is a good place to start, but not to end, state licensure verification. Westlaw and Lexis provide basic licensure information that includes the status of the licensee but you need to go to the source to obtain the most up-to-date and complete information. For example, a medical license record in Westlaw for a certain doctor in California indicates that his license is renewed and valid. If you search for that same doctor in

the Medical Board of California's database of licensed physicians (Physician License Lookup, http://www.medbd.ca.gov/lookup.html), you will see that while the doctor's license is currently valid, he was previously suspended not only by California but by two other states as well. The Web site includes the PDF of the disciplinary documents and extensive details on the actions taken and the reasons for them.

Not only can you obtain in-depth disciplinary information from state licensure board Web sites, you can also find detailed background reports on the licensee. This is especially true for doctors. Many state medical boards have physician profiles that include any lawsuits filed against the doctor, previous work experience, and specialty certifications. Finding the correct Web site for verifying state licensure is not always easy. The DOJ library staff has put together a guide, *Professional Licensure Information by State*, to assist with this research. DOJNet Virtual Library Research Guides, Medical and Professional Licensure, http://dojnet.doj.gov/jmd/lib/civil/licensure.php. Another useful source for identifying links to state professional licensing authorities is the Professional License Verifier from BRB Publications, http://verifyprolicense.com/. Click on a state, and you will see a long list of links to licensure databases including every profession from acupuncturists to wrestlers.

While you can sometimes obtain disciplinary records from state professional licensure boards' Web sites, not every jurisdiction makes this information readily available. It might be necessary to contact the board to learn more about disciplinary actions, but you can also try subscription databases. Lexis has a database of health care providers' sanctions that includes records from more than 440 state and federal agencies. Librarians have found disciplinary records in this database that were not available through other sources. Westlaw's MBADMIN-ALL database contains medical board administrative decisions from a few states: Arizona, New York, Vermont, Virginia, and Wisconsin. Access to the database is through librarians or Legal Resource Managers (LRMs) as it is not included in the Department's flat rate contract with Westlaw. For doctors, one other source to check is the DEA Office of Diversion Control list of cases against doctors. Case Against Doctors, http://www.deadiversion.
usdoj.gov/crim_admin_actions/.

Many professionals, especially those in the health care field, are certified by specialty boards. When verifying certification, it is important to also look carefully at the certifying board as not all of them are considered reputable. If a doctor is considered a specialist in his field, he should be certified by a specialty board such as those under the umbrella of the American Board of Medical Specialties (ABMS). ABMS has a Web site where one can register in order to search a doctor's name; however, the organization strongly discourages free use of the database by non-patients. For these searches, you should use Lexis.com, which has an ABMS database that includes everything on the ABMS Web site and more. In addition to information on specialty board certifications, the Lexis ABMS database will often include other professional background information.

A few other places you can find potentially negative information on medical professionals include:

- The HRSA Health Education Assistance Loan Program Database: lists doctors who have defaulted on medical school loans, http://defaulteddocs.dhhs.gov/.
- The HHS Office of Inspector General Database: lists medical professionals who have been excluded from participating in federally-funded health care programs, http:// exclusions.oig.hhs.gov/.
- The Scientists' and Non-Profits' Ties to Industry Database: could provide information on potential conflicts of interest, http://cspinet.org/integrity/.

- The Legacy Tobacco Documents Library: includes information on doctors and scientists who have done research paid for by tobacco companies as well as many full-text PDF medical and scientific journal articles, http://legacy.library.ucsf.edu/.
- Quackwatch: a site created by a retired doctor to alert consumers to health-related frauds and fallacies. It includes a page on "questionable" certifying organizations. For example, the American Board of Forensic Examiners (found listed on a number of expert witness CVs), is an organization that would certify anyone who paid a fee and passed a simple ethics examination. A 2002 article in the ABA Journal reported that a psychologist obtained certification from the board for his cat, http://www.quackwatch.org.

Another aspect of researching a professional's background is looking into any companies with which the expert is affiliated. Westlaw's EA-ALL database is a good place to start. It searches Secretary of State filings (for all states excluding Delaware) as well as several companies' directories. Another source is Duns Market Identifiers on Lexis which includes both domestic and foreign companies and their executives. Once the companies with which the professional is associated are identified, more accurate and in-depth information can be found from Secretary of State filings of the relevant state. The *Guide to Corporation Records by State* on the DOJ Virtual Library provides links to incorporation filings for each state and some foreign countries. DOJNet Virtual Library Research Guides, http://dojnet.doj.gov/jmd/lib/civil/corporation.php. For even more detailed information, including financial health and government contracts, ask your librarian to obtain a Dun & Bradstreet report on the company.

III. Legal proceedings

A key component of expert witness research is to find any litigation with which the expert was involved, either as a party or an expert witness. This can be the most time-consuming but valuable part of the research on an expert. Decisions, jury verdicts, and trial filings can be obtained through a number of databases on Westlaw and Lexis. A complete list of suggested databases can be found in the *Researching Expert Witnesses Online* guide on the DOJ Virtual Library. DOJNet Virtual Library Research Guides, Researching Expert Witnesses, http://dojnet.doj.gov/jmd/lib/civil/experts.php. It is necessary to search both databases because both Westlaw and Lexis vary in the sources that they offer. A search in all federal and state cases in each database might vary only slightly, but a jury verdicts search could yield far different results in each. Databases that you might not think to search but that often contain information on cases in which experts have testified include federal and state agency decisions, briefs, litigation reports (such as Mealey's), and federal and state civil and criminal filings. The ADVERSE-ALL database in Westlaw is especially helpful for identifying civil suits, liens, and bankruptcies.

In order to obtain more information about federal cases in which the expert was involved, docket searching (described in more detail below) is a good place to start. For state and county courts, however, it can be more difficult to find details on expert testimony and case outcomes. For those courts, you might be able to find more information on the court Web sites than you can in Westlaw or Lexis. Another DOJ Virtual Library page, the *Guide to Court Resources*, provides direct links to federal, state, and county courts. DOJNet Virtual Library Research Guides, Court Resources, http://dojnet.doj.gov/jmd/lib/civil/courtsguide/main.php; also available on the DOJ Internet site, Guide to Court Resources by State, http://www.justice.gov/jmd/ls/state.htm. The county court Web sites, in particular, often provide case information that you cannot find elsewhere. For example, a record came up for one potential expert in the ADVERSE-ALL database on Westlaw. The record indicated that there was a civil suit filed against the expert but that it was dismissed. The case was filed in Broward County, Florida. By using the *Guide to Court Resources,* you can find the Recorded Documents database for the Clerk of Court/County Recorder for Broward County. A quick search in that database (which goes back to 1978) yields the court

filings for the case in PDF format, which clearly show that the cause of dismissal was due to the court's inability to locate the defendant.

Westlaw, and especially Lexis, are increasingly adding to their expert witness filings content. On Lexis, you can now find expert witness summaries for a number of experts that include a list of cases in which they have testified, how many times they have been challenged, and the outcomes of those challenges. These summaries should not be considered comprehensive. Other expert witness content found in Lexis (all available under the DOJ flat rate contract) includes expert witness transcripts and transcript excerpts, federal and state expert witness filings, and *Daubert* tracker and filings. Lexis recently purchased IDEX, an expert witness research database, and has added their content, including transcripts and depositions, verdicts and settlements, and CVs and resumes. None of the IDEX resources are currently under the flat rate contract but librarians or LRMs should be able to obtain them. Westlaw has several *Daubert* and expert witness databases but the most useful (DAUBERT-DOCS and EW-DOCS) are not under the DOJ contract. Your librarian or LRM can also obtain these documents, but keep in mind that they can be quite expensive.

Transcripts and depositions can be the most difficult documents to find. *Researching Expert Witnesses Online* lists several sites where one can obtain transcripts and depositions for a fee. DOJNet Virtual Library Research Guides, Researching Expert Witnesses, http://dojnet.doj.gov/jmd/lib/civil /experts.php. Librarians will exhaust all free or flat rate resources before obtaining documents from these transactional databases or recommending that attorneys purchase them through commercial Web sites. In some cases, you can find transcripts and depositions included as filings in federal courts. DOJ has a flat rate subscription to Lexis Courtlink which provides the same information as Pacer, and then some. The databases provide a single search, which is where librarians often begin when searching for filings related to an expert. If the expert has provided a list of cases on his CV or if cases are identified through other searches in Westlaw or Lexis, it is also possible to search by docket number or case name. It is sometimes necessary to pull up the docket and update it with the court in order to obtain the most recent version and to see which expert witness filings are available. In addition to transcripts and depositions, Courtlink is also a great source for motions to exclude experts and the accessibility of the dockets makes it easy to see the outcome of the motions. While DOJ does not have flat rate access to court documents through Westlaw, the contract does include full-text dockets and docket updating. Librarians search the DOCK-ALL database on Westlaw to identify federal and state cases that might not have surfaced on Lexis.

Local newspapers are another source for information on trials and expert testimony, as well as general background information on experts. In one case, a local news search on a fairly reputable expert revealed an arrest for being drunk and disorderly in public. As with cases, news searches should be conducted in both Lexis and Westlaw as each has different sources. The most complete source on Lexis for news, which is not very easy to find, is the All News/All Languages database. In Westlaw, the database to search is ALLNEWSPLUS, though searchers should be aware that the default date setting is for the last 3 years, so the search needs to be expanded to include all available years. The Justice Libraries subscribe to a number of other news databases that are provided to all employees through their desktops. These databases include Newsbank, which provides a number of local newspapers that are not available in Westlaw or Lexis. DOJNet Virtual Library, Full-Text Resources Online, http://dojnet. doj.gov/jmd/lib/fulltext.php.

IV. Publication and conference proceedings

While the expert's CV might include what seems like a complete list of publications, it is advisable to search for any others that might have been left off. You do not want to find out during trial

that an article your expert wrote contradicts the opinion he is providing in your case. In addition to the news databases mentioned above, the Justice Libraries also subscribe to a number of full-text journal article databases including those provided by Ebscohost, GaleInfotrac, Proquest, and Ovid. Among them are Medline Plus Fulltext, CINAHL (nursing literature) Plus Fulltext, Proquest Psychology Journals, Ovid Medical Journals, Environmental Source Complete, and Business Source Complete. Anyone on a Department of Justice computer can obtain access through IP authentication.

As no single source provides access to all publications written by an expert, it is important to search a variety of sources. The above-mentioned databases will include full-text journal articles and citations, but their scope is limited. Google Scholar is one option for searching across a wide number of disciplines and sources. Google Scholar, http://scholar.google.com/. If you use the advanced search page, you will see how to search by author. Results include not only journal articles but also books, book chapters, and conference proceedings. The database also includes information on how many times a publications is cited.

For experts in healthcare-related fields, Medline is the best place to start. Medline, http://www.ncbi.nlm.nih.gov/pubmed. The recently redesigned site is the most comprehensive available for searching peer-reviewed medical and life sciences literature, going back to 1953. Be aware that the only way to search by author is by using last name and first and middle initials, so if your expert's name is common you will need to narrow your search. One method is to use the MeSH database to focus on a particular subject area. The *Researching Expert Witnesses* guide contains suggested databases for literature searching in a number of other disciplines, including civil engineering, social sciences, and economics. DOJNet Virtual Library Research Guides, Researching Expert Witnesses, http://dojnet.doj.gov/jmd/lib/civil/experts.php. The list provided is not meant to be comprehensive but only to provide some examples of what types of databases are available. Your librarian will have access to even more databases and will know which ones to search according to the expert's professional interests.

While it is a myth that every book ever written is owned by the Library of Congress, their collection is very extensive and their catalog (http://catalog.loc.gov) is not a bad place to search for books written by an expert. An even better database is WorldCat, available through FirstSearch, http://firstsearch.oclc.org/fsip. WorldCat is the largest library union catalog in the world and contains library holdings for the majority of the United States and many foreign libraries. This makes it a good place to search not only for books but also dissertations and theses written by experts while they were pursuing their degrees. Verifying academic credentials can be very difficult, but finding a record for a thesis or dissertation written by the expert is one way to verify Masters and post-doctorate degrees. Undergraduate degrees are a bit more difficult, though a search in the library catalog or on the Web page of the university might provide some method of verifying that the claimed degree was received. The University of Texas at Austin provides a Web site with links to accredited universities by state. University of Texas at Austin, World, U.S. Universities by State, http://www.utexas.edu/world/univ/state/. Be wary of universities and colleges not on an accredited list. There are a number of Web sites where people can purchase degrees, such as http://www.belforduniversity.org/, which is currently advertising a special of 10 percent off on all degrees. The Federal Trade Commission has a site with more information on verifying academic credentials. Federal Trade Commission, Consumer Protection, Facts for Business, http://www.ftc.gov/bcp/edu/pubs/business/resources/bus65.shtm.

Depending on the expert witness you are researching, he or she may have testified before Congress. Westlaw's USTESTIMONY database contains agendas and witness lists for U.S. congressional committee hearings, transcripts of oral statements, and written statements submitted to committees of Congress dating back to 1993. In Lexis, the US/CIS Index provides abstracts of congressional committee hearings, prints, reports, and documents that are published by some 300 active House, Senate, and Joint committees and subcommittees dating back to 1789. The library has purchased a number of databases

through Lexis that include the full-text of hearings, reports, CRS reports, and the Congressional Record, all dating back to the establishment of Congress. Access to LexisNexis Congressional (http://www.lexisnexis.com/cis) is available to all DOJ employees through IP authentication.

V. Web searching

While all of the previously-mentioned databases are available through the Web, this section is focused on finding information using general Web search engines. Depending on how common the expert's name is and how much he or she has written or testified, this research can be quite time-consuming but also very worthwhile. In the case of one expert, an attorney declined to hire him after a librarian found his professional Web site, which included a picture of him in a pink rabbit suit. For many searchers, Google (http://www.google.com) is the default search engine. Certainly no Web search would be complete without searching Google, nor would it be complete if your search stopped there. Each of the search engines has a database of Web sites that they have crawled and stored (cached) on their servers and each database is unique. The top four Web search engines are currently Google, Yahoo! (http://search.yahoo.com), Bing (http://www.bing.com), and Ask.com (http://www.ask.com). If you are trying to do a comprehensive search, you will want to search in all four, or at least the top two (Google and Yahoo!). When searching, use various forms of the person's name such as "John L. Smith," "John Smith," "JL Smith," "Smith, John," etc.

Other Web sites that could provide important background information on expert witnesses include:

- ZoomInfo – provides a "dossier" of professional information for a person you are searching, http://www.zoominfo.com
- Pipl.com – in one search, you can find profiles on social networking sites such as Facebook and Myspace as well as information from LinkedIn, Amazon.com, and the general Web, http://www.pipl.com
- Google Groups – find out about discussions by or about an expert. Past searches have resulted in comments by jurors about an expert's testimony and an expert's involvement in a radical political group, http://groups.google.com
- Expert's Web site – If it does not come up in a general search engine, try entering the expert's name or company name followed by .com
- Public Records Resources Online – a DOJ Virtual Library guide that provides links to public records resources to investigate the background of people, http://dojnet.doj.gov/jmd/lib/civil/publicrecords.php.

VI. Conclusion

A thorough background investigation on an expert can take hours or days. The resources listed here will provide a good beginning to anyone interested in doing this type of research. In some cases, searches might lead you down another path not covered here. Continue to follow the trail whenever possible and be sure to ask your librarian for help. They not only have the training to do this research but also have access to some tools and search techniques that you do not. It might not be clear why you would want to search all of these places for information on a potential or opposing expert witness, but it usually

makes sense once you have done the research. Surprising and useful information can turn up in the most unexpected places.❖

ABOUT THE AUTHOR

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Finding Expert Witnesses: Advice, Examples, Tips, and Tools

Michele Masias
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I. Introduction

Often, the key to achieving a successful trial outcome is having credible expert witnesses to support your legal strategy. While there are various traditional ways to identify suitable expert witnesses through established Department of Justice (DOJ) and U.S. Attorney's office networks, the legal support role provided by DOJ librarians is often overlooked. Using a variety of resources such as licensing, legal proceedings, academia, literature, databases, directories, and professional associations, the DOJ librarians have become adept at helping DOJ attorneys find skilled expert witnesses who have the desired specialized knowledge, education, experience, or training in the relevant area.

This article will provide general information for finding an expert using the resource categories mentioned above. These tools are broadly laid out on the *Finding Experts Research Guide* and the *Researching Expert Witnesses Guide*. DOJNet Virtual Library Research Guides, Finding Expert Witnesses, http://10.173.2.12/jmd/lib/civil/findingexperts.php; DOJNet Virtual Library Research Guides, Researching Expert Witnesses, http://10.173.2.12/jmd/lib/civil/experts.php.

II. Legal proceeding search tools

One of the best ways to search for experts is to search legal proceedings databases to find experts who have testified before. For this, DOJ librarians use Westlaw's Jury Verdicts (JV-ALL) database. JV-ALL helps reduce the "noise" that an attorney would get if they searched comprehensive case law databases such as ALL-CASES in Westlaw or federal and state cases in Lexis. One especially helpful feature is that there is a field exclusively for experts so an attorney can be extremely precise when

searching. For example, an attorney looking for a "computer valuation" expert in JV-ALL could use the search formula "w/10 expert AND computer" to target their selective candidate experts. In addition, if the attorney is seeking an expert by region, there are verdict and case files for each state, which allows for significant and selective narrowing. Finally, the user friendly feature of JV-ALL allows the user to display case outcome search results.

One thing to keep in mind while searching for the perfect expert witness is that you may discover negative information such as malpractice cases and judgments against the potential experts. Because this type of information could be very damaging to your case, it is always prudent to search and identify *all* information, both good and bad, that is available on your potential expert.

Another resource that is not well-known but can be extremely helpful in finding an expert is Westlaw's TRANSCRIPTS database, which contains transcripts of congressional testimony and broadcasts from more than 80 radio and television programs. Finally, the Westlaw LEGALNP search tool provides archived and current information from legal newspapers.

III. Academia search tools

When searching for an expert witness, college and university Web sites are excellent places to start. In fact, many academic department Web sites provide background information on faculty, which may often include key information on a potential expert witness such as:

- Field of study and special area of interest
- Curricula vitae (CV) and biography
- Special projects and interests
- Committees and working groups
- Grants, recognition, and awards
- Memberships and affiliations

The *Finding Expert Witnesses* guide on the DOJ Virtual Library has a variety of Web sites that can help you search academic Web sites. DOJNet Virtual Library Research Guides, Finding Expert Witnesses, http://10.173.2.12/jmd/lib/civil/findingexperts.php. One search tool on the guide is a link to a compilation of universities in the United States created by the University of Texas. University of Texas at Austin, World, U.S. Universities by State, http://www.utexas.edu/world/univ/state/.

Using this site, an attorney can limit his or her search for a prospective academic expert by starting with a university in a specific geographic region or state. For example, an attorney can search for an academic expert in the state of California and then narrow the potential candidates to specific universities such as the University of California at Berkeley or the University of Southern California. For medical institutions, the Association of American Medical Colleges hosts a listing of member medical schools that can be useful for searching for professional, medical experts. Association of American Medical Colleges, Member Medical Schools, http://services.aamc.org/memberlistings/index.cfm?fuseaction=home.search&search_type=MS.

While Google may provide vast amounts of information, the reliability of the information is sometimes questionable and often difficult to filter. Using the Google Advanced Search option is one way to ensure more dependable and on-target results, because an attorney can use filters and limit search results to just the .edu academia domain. For example, using the ".edu" domain and specifying search terms such as "toxicology, AND Maryland OR Virginia OR Columbia" would provide information on

toxicologists working in the Washington, DC, metropolitan area affiliated with academic institutions.

IV. Literature search tools

Because of their knowledge, authors are often sought as potential expert witnesses. Therefore, knowing how to perform a literature search of a particular field of study can be extremely helpful. The *Finding Expert Witnesses* guide hosts a link to the Virtual Library full-text article databases, which provides access to a wide variety of proprietary and free Web-based literary resources that can help locate articles, books, monographs, and conference proceedings. DOJNet Virtual Library, Fulltext [sic] Resources Online, http://10.173.2.12/jmd/lib/fulltext.php.

One of these resources, EbscoHost, provides access to a variety of subject-related databases that include:

- Academic and Business Source Premier
- Regional Business News and EconLit
- Environment Complete
- Medline with full-text and CINAHL (nursing literature) with full-text

EbscoHost database users needing to find literature about lead testing could use the term "toxicity testing" as a subject heading and the word "lead" as an abstract term. If the outcome of the search offered too much information, the EbscoHost database offers a variety of features to help users narrow their results by filtering publication types, date ranges, and subject headings.

The Virtual Library's *Finding Expert Witnesses* guide also offers many helpful resources for locating medical and scientific literature and includes hyperlinks to a variety of National Library of Medicine (NLM) databases that allow for access to PubMed, Medline Plus, and TOXNET. DOJNet Virtual Library Research Guides, Finding Expert Witnesses, http://10.173.2.12/jmd/lib/civil/findingexperts.php. Other medical literature search tools, such as the Medical Subject Headings (MeSH) database, provide a consistent way to retrieve information that may use different terminology for the same general and specific medical topics. For example, MeSH users starting a search on "cancer" are system-aided by the recommendation of a secondary search on the refined term "neoplasm." Another helpful feature of the Medline database is that users can narrow search parameters to authors from specific universities or medical institutions by employing field description tags found on the PubMed Web site.

The literature-searching section of the *Finding Expert Witnesses* guide also hosts links to an assortment of science-related Web sites including: SCIRUS, one of the most comprehensive science-specific search engines for science-related Web searching; Science.gov, for scientific information provided by U.S. Government agencies; and Westlaw's WNS-CR for finding news and information about science and technology from newspapers, magazines, trade journals, and other sources. DOJNet Virtual Library Research Guides, Finding Expert Witnesses, http://10.173.2.12/jmd/lib/civil/findingexperts.php.

For legal literature, Westlaw's All Law Reviews, Texts & Bar Journals (TP-ALL) database is very useful. A link to TP-ALL, as well as links to subject-specific databases, can be found on the *Researching Expert Witnesses* guide. DOJNet Virtual Library Research Guides, Researching Expert Witnesses, http://10.173.2.12/jmd/lib/civil/experts.php. Some of the subject-specific databases in *Researching Expert Witnesses* include the American Society of Civil Engineers; ZMath, which is a European mathematical society Web site for finding mathematics and statistical literature; Human-Computer Interaction Resources, for finding ergonomic and human factor literature; and the NASA Astrophysics Data System for locating astrophysics, physics, and geophysics literature.

Google Scholar is also a useful resource tool for finding a broad spectrum of authoritative, scholarly, peer-reviewed literature. Google Scholar, http://scholar.google.com/.

PRACTICE TIP: A simple search using the terms "pharmacy benefits manager" offers users a remarkable ability to canvas the literature on what has been written on this subject.

Because search engines like Google and Yahoo! index all available Web sites, they are helpful resources for finding experts in private industries under the ".org" domain, which you can select on the Google Scholar Advanced Search screen option. With this tool, users are able to populate the "Find Articles" section using a variety of search options such as "with all the words," "exact phrases," or "without the words" options. Moreover, the "Subject Area" search allows users to narrow search results by a variety of subject areas including biology, life, and environmental sciences; business, finance, and economics; medicine, pharmacology, and more. Another helpful feature about Google Scholar is that the search engine retrieves documents in user-friendly and downloadable formats such as Microsoft Office Word and Adobe PDF documents.

Several Web sites are listed in the *Finding Expert Witnesses* guide that are helpful in searching for authors who have written textbooks on a particular subject. DOJNet Virtual Library Research Guides, Finding Expert Witnesses, http://10.173.2.12/jmd/lib/civil/findingexperts.php. FirstSearch/WorldCat is a worldwide union catalog of more than 9,000 member institutions. For example, a keyword search in the FirstSearch database using the search terms "cost accounting standards" results in a variety of reference materials, books, and articles about cost accounting. The Library of Congress Online Catalog (http://catalog.loc.gov/) is another great place to search for books by subject, keyword, and a host of other parameters. Library of Congress Online Catalog, http://catalog.loc.gov/. Finally, do not forget to check out brick-and-mortar and Web book stores such as Barnes and Noble and Amazon.com, which are also good places to find material and information leading to potential experts.

V. Directory search tools

Because directories are often organized by specialties and geographic regions, they are invaluable in seeking out expert witnesses and information on specific subject matters. Users can also search directories by keywords as well as by conceptual terms, which allows users to narrow or expand the pool of potential experts.

While there are several medical Web sites and directories, the American Board of Medical Specialties database stands out for its ability to search by medical specialty and geographic region. For example, an attorney needing to find an oncologist in Denver, Colorado, could search the American Board of Medical Specialties directory and find medical specialty professionals by narrowing their search to a specific specialty such as "oncologist" and could further filter their results by the geographic location, "Denver, CO." Similar to searching academic Web sites, healthcare facilities and hospital Web sites are also good places to seek out medical expert witnesses.

Another directory that can be useful for finding experts is JurisPro, which is a favorite tool of librarians. Even though the experts are self-referred, the information about the experts often includes CVs and audio clips, which help users better understand not only the extent of the expertise of the potential witness but also their demeanor.

PRACTICE TIP: Attorneys can search JurisPro by specific topics such as carbon monoxide or asbestos.

Along with the literature and legal proceedings tools, Westlaw and Lexis offer several directory databases that are very helpful in finding expert witnesses and other information. For example, Westlaw's

Experts CV database contains curricula vitae and resumes of experts, expert witnesses, and investigators. Westlaw's Profiler-EW directory includes links to related jury verdict summaries, expert testimony, and litigation reporters. To access Lexis's expert witness directories, go to Public Records > Courts & Filings > Jury Verdicts & Experts > Expert Witness Directories. Lexis directories can help you discover expert witness summaries, briefs, and transcripts covering various areas of expertise in environmental concerns, chemical engineering, medicine, and other topics.

VI. Professional association tools

Another strategy that DOJ librarians use to find potential experts is to search professional associations. Associations are available for almost every profession and many have online membership directories. The Virtual Library guide provides several sources that can connect users to professional associations. The Virtual Library's Professional Licensure guide is one of these resources. DOJNet Virtual Library Research Guides, Professional Licensure Information by State, http://dojnet.doj.gov/jmd/lib/civil/licensure.php.

In addition to the licensing records of medical and scientific professional associations, the guide lists a wide variety of professional licensing resources under the heading "Other Professions," including ergonomics, land surveying, maritime and trade, rehabilitation counselors, and business valuation associations.

For example, under the links to nonmedical professional associations on the guide, a link is available to the Appraisal Institute Membership database. Attorneys needing to locate a real estate appraiser could click on "Find an Appraiser," the second tab from the left located at the top of the Appraisal Institute Membership homepage. Then they could use the "Quick Search" option to search by zip code and within a radius of the zip code; use the "Search By Services" section to search by a business services type, or by property types such as commercial, industrial, agricultural, public, etc.; or using the map located on the right hand column, narrow the search to a particular state and city to find appraisers in a specific geographic region. Often, the search results provide not only experts' names but also contact information such as an e-mail address and links to their company Web site. In addition, professional association Web sites often have information about conferences and publications so users can search the site by staff or by topic.

The *Finding Expert Witnesses* guide also hosts links to help you locate other professionals via associations related to the expert's field such as the Gateway to Associations, The Scholarly Societies Project, and the Encyclopedia of Associations on Lexis. DOJNet Virtual Library Research Guides, Finding Expert Witnesses, http://10.173.2.12/jmd/lib/civil/findingexperts.php.

VII. Fee-based sites

While DOJ Librarian services and tools are free of charge to DOJ attorneys, DOJ librarians also recognize that there are special cases where using fee-based search tools to find expert witnesses may be necessary. Attorneys interested in paying for services to locate experts can find a variety of fee-based sights to consider on the *Finding Expert Witnesses* guide such as Lexis IDEX, which offers access to deposition transcripts and bibliographies of experts' publications. DOJNet Virtual Library Research Guides, Finding Expert Witnesses, http://10.173.2.12/jmd/lib/civil/findingexperts.php. Similarly, Westlaw offers EXPNET for a $200 fee. TASA is another searchable Web site that displays only the

number of experts available, without any other information – requiring you to call TASA to obtain additional information. The fee for this service is generally $100 per hour or no more than the expert's normal hourly rate.

Attorneys are encouraged to talk with DOJ Librarians to get more information about expert witness research assistance.❖

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