Committee News

Winter 2013

Trial Techniques Committee

SOME FRIENDLY, RANDOM ADVICE ON MOTION PRACTICE ADVOCACY

By: The Honorable Paul C. Huck, United States District Judge, Southern District of Florida

I. General Advocacy

- Judges do not like surprises! Anticipate potential problems, issues or changes in circumstances, discuss them beforehand with opposing counsel in a good-faith attempt to resolve them, and if unable to do so, bring the matter to the court's attention as soon as reasonably practical. Give the judge sufficient time to carefully consider and resolve the matter. For example, do not wait until the hearing begins or the jury is filing into the courtroom to disclose that you have a new issue, a scheduling problem or an evidentiary issue that needs resolution before the proceeding can go forward.
- Learn about your judges, including her background, how she runs her courtroom. If possible, ask the judge's former law clerk or someone who has appeared before the judge about the judge's approach to your particular kind of motion and oral argument. Of course, the judge's prior written opinions will give you insight into the judge's approach and thinking.
- As with any effective advocacy, advise the judge right up front of the specific issues being raised, the general basis for granting the motion and the relief you seek. (Or, if opposing the motion, why it should not be granted.) That way the judge can put the statement of facts into proper perspective. It is frustrating to read through several pages or listen to a recitation of facts and background information without knowing why they are significant.
- Lead with your best point and argument.
- Simplify. The judge (or jury) doesn't know nearly as much about the complex technical and legal

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Uniting Plaintiff, Defense, Insurance, and Corporate Counsel to Advance the Civil Justice System

UNDERSTANDING AND MAXIMIZING USE OF EXPERT WITNESSES

By: Adrian K. Felix, Mor Wetzler and Jessica Oliva

Did a tire defect cause this accident? How much did an accounting mistake affect the company's stock price? Is it in the best interest of the child to award primary custody to one parent or the other?

The Federal Rules of Evidence permit attorneys to call upon a broad range of expert witnesses to help answer questions like these. From engineers and forensic accountants to social workers and even other attorneys, so long as an expert uses her scientific, technical, or other specialized knowledge to help the jury (or judge, in a bench trial) better understand evidence or relevant facts, the Federal Rules of Evidence welcome properly admitted expert assistance.[1] Experts may rely on otherwise inadmissible evidence—including hearsay—in coming to a conclusion,[2] they may opine (with limited exceptions) as to the ultimate issue at trial,[3] and they are not required to lay a foundation for their opinions or explain their reasoning.[4]

But as the old adage reminds us, just because you can do something doesn't mean you should. This article provides an overview of when and how to include an expert on your trial team. It discusses retaining and evaluating expert witnesses, complying with disclosure rules specific to expert witnesses, admitting and challenging the admission of expert testimony, and managing ethical issues that may arise when using an expert.

I. Retaining and Evaluating Your Expert

Knowing when to seek an expert's advice and how to select an expert can be pivotal to your case.

1) Do you need an expert?

Because the primary role of an expert is to help the trier of fact, an important initial step is to determine whether you or the trier of fact would in fact benefit from expert help. A Delaware Chancery court judge well-versed in shareholder and derivative suits might not need an expert in corporate matters, for example, whereas a jury in New York might benefit greatly from an expert's description of modern pharmaceuticals-testing standards. Another key consideration is whether you as an advocate would benefit from expert advice in preparing: while an expert could provide insight into market conditions or issues to explore in discovery, so too might your client or experienced trial team members. And as with any decision, litigation strategy always plays a role: if your adversary engages an expert to testify, it might be helpful to engage your own expert to rebut that testimony.

2) Will your expert testify or only consult?

The distinction between testifying and consulting experts plays out not only in defining the scope of engagement, but also the scope of disclosure. As discussed more below, testifying experts must disclose much more information than an expert who only helps an advocate prepare her case. Thus, determining whether the expert's role will be to assist the judge and jury or only the trial team is a key early decision.

3) What traits and qualities do you want in your expert given the subject matter?

No two experts are the same, nor will any one expert always be the best choice or fit for a recurrent issue. The key is to analyze how the expert will be used in the case. For a testifying expert, academic credentials and previous litigation experience may be important. Whether that expert has published articles, routinely testified for one side of an issue, or has had testimony accepted or excluded in the past may impact both the expert's credibility with the trier of fact and with the judge in determining whether to admit the testimony. Other aspects affecting credibility, such as communication skills and appearance, are also important, especially when you expect your expert to testify. And of course it is worth remembering that the expert is part of the trial team; whether testifying or merely consulting, her ability ability to develop a good rapport with the trial team can be important.

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1 Fed. R. Evid. 702.

2 Fed. R. Evid. 703; *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 643 F. Supp. 2d 482, 494 (S.D.N.Y. 2009); *United States v. Dukagjini*, 326 F.3d 45, 58 (2d Cir. 2003); *United States. v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008). Moreover, otherwise inadmissible evidence relied upon by an expert may be admitted if its probative value in assessing the expert's opinion substantially outweighs its prejudicial effect. Fed. R. Evid. 703; *United States v. Dukagjini*, 326 F.3d 45, 51 n. 3 (2d Cir. 2003).

3 Fed. R. Evid. 704.

4 Fed. R. Evid. 705.

UNDERSTANDING AND...

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II. Disclosing and Deposing Your and Your Opponent's Expert

Federal Rule of Civil Procedure 26 governs the disclosure of expert witnesses. As mentioned above, different disclosure requirements apply to testifying experts than to so-called consulting experts whose role is limited to assisting in trial preparation and attending trial.

1) Consulting/Trial Preparation Experts

Non-testifying experts have minimal disclosure obligations: they cannot be served interrogatories or deposed, except under exceptional circumstances where it would be impracticable for the opposing party to obtain facts or opinions from another source.[5]

2) Testifying Experts

In contrast, testifying experts are subject to far greater disclosure rules. Parties must identify any expert witness who may provide testimony under Fed. R. Evid. 702, 703, or 705.[6] Moreover, for each identified expert witness who is either retained specifically to provide expert testimony in the case or whose employment for the party includes regularly providing expert testimony, the party must produce a written report, signed by the testifying expert, which describes the expert's opinions and conclusions, the data and other facts supporting these opinions and conclusions, and the expert's qualifications and compensation.[7]

For testifying expert witnesses who are not specifically retained or employed as experts, such as a plaintiff's examining physician, a less extensive summary of anticipated testimony may be disclosed instead of a full report.[8]

Testifying experts may be—and in practice frequently are—deposed by the opposing party.[9] In the past, an expert's draft reports and other documents were often considered discoverable.[10] Since Rule 26 was amended in 2010, however, such documents are protected as work-product, and thus, are *not* discoverable absent a showing of substantial need and inability to find the information elsewhere without undue hardship.[11] In addition, while Rule 26(b)(4)(C) protects communications between attorneys and testifying experts from disclosure, there are several significant exceptions that are all discoverable: communications relating to the expert's compensation; communications that identify facts or data provided by the party's attorney and considered in forming the opinions expressed; and communications which identify assumptions provided by the party's attorney and relied upon by the expert.

Thus is it important to determine early on whether your expert will testify, and if so, what information you may provide without putting privileged or sensitive information at risk of disclosure.

III. Admitting Your Expert and Excluding Your Opponent's

Under Rule 702, a witness qualified as an expert may testify in the form of an opinion if the testimony is based on sufficient facts or data, if it is the product of reliable principles and methods, and if the witness has reliably applied the principles and methods to the facts.[12] Whether an expert's testimony is admissible thus depends on the expert's qualifications, the relevance of that testimony to the case at hand, and the reliability of the methodology used by the expert.

1) *Daubert, Kumho Tire,* and *General Electric*

In 1993, the Supreme Court first examined the use of expert scientific testimony at trial under Rule 702 in *Daubert v. Merrell Dow Pharmaceuticals*.[13] Holding the Federal Rules of Evidence governed the admission of expert testimony (as opposed to the standard previously set forth in *Frye v. United States*[14]), the Court explained that scientific testimony does not need to be based on a "generally accepted" methodology to be admissible.[15] Rather, the trial court's role as gatekeeper is to ensure that

5 Fed. R. Civ. P. 26(b)(4)(D).
6 Fed. R. Civ. P. 26(a)(2)(A).
7 Fed. R. Civ. P. 26(a)(2).
8 Fed. R. Civ. P. 26(a)(2)(C).
9 Fed. R. Civ. P. 26(b)(4)(A).
10 *See, e.g.*, Andrew T. Berry & Jessica Insua, *Some Current Issues on Expert Depositions and Discovery*, ALI-ABA Course Study Materials, Opinion and Expert Testimony in Federal and State Courts, Course number SK075 (May 2005).
11 Fed. R. Civ. P. 26(b)(4)(B).
12 *See, e.g.*, *Nimely v. City of New York*, 414 F.3d 381, 395-97 (2d Cir. 2005); *see Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 294 (E.D. Va. 2001).
13 509 U.S. 579 (1993).
14 293 F. 1013 (D.C. Cir. 1923)
15 *Daubert,* 509 U.S. at 587.

expert testimony is admitted only if it is both relevant and reliable. In determining the reliability of expert scientific evidence, the *Daubert* Court listed several factors a court might consider: whether the expert's methodology can be and has been tested; whether the theory or technique has been subjected to peer review and publication; what the known or potential rate of error of the methodology is; and whether the method has achieved general acceptance among the relevant scientific community.[16]

In *Kumho Tire Co. v. Carmichael*,[17] the Court held that the *Daubert* standard applies not only to scientific expert testimony but also to expert testimony based on "technical" and "other specialized knowledge." The Court reiterated that district courts have the same flexibility in determining how to analyze reliability as in making the ultimate reliability determination. Courts are thus free to apply the *Daubert* factors outside the scientific context if relevant to the reliability inquiry.[18]

The Supreme Court provided an example of *Daubert* analysis in 1997 in *General Electric Co. v. Joiner*. In this case, a municipal worker sued his employer for exposure to a chemical, alleging this exposure had caused him to develop cancer. The plaintiff's experts pointed to studies showing infant mice directly injected with large amounts of the chemical at issue developed a different type of cancer. The Court reversed the Eleventh Circuit and held that the district court properly excluded the plaintiff's experts as insufficiently reliable. Because these studies were "so dissimilar to the facts presented in this litigation," the district court could not be said to have abused its discretion.[19]

The Court also clarified that although *Daubert* focuses on methodology, "conclusions and methodology are not entirely distinct from one another. . . . A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[20] Where an expert's data and conclusions are connected by only the expert's *ipse dixit*, that testimony is properly excluded.[21]

2) Apple v. Motorola

Because the admission of expert testimony—like most pretrial issues—is subject to an abuse of discretion standard on appeal, it is relatively rare to see appellate decisions on this issue. Thus a decision last year by Judge Posner sitting by designation in the Northern District of Illinois has drawn some attention. In *Apple v. Motorola*,[22] Judge Posner excluded experts for *both* parties as insufficiently reliable because each failed to proceed as she would in a "parallel non-litigation context."[23] The experts failed to demonstrate that they "employed in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," and so the court barred their testimony as unreliable.[24] For example, one excluded expert had obtained information essential to his analysis by asking his own party for that information instead of a disinterested source, as he would have done outside the litigation context.[25]

Though as a general rule courts leave determinations of reliability to the finder of fact, this case is an important reminder that where an expert witness focuses so much on the litigation at hand that he fails to meet the standards of his profession, his testimony may be inadmissible.

IV. ETHICAL CONSIDERATIONS

A few ethical considerations to keep in mind when retaining experts and using expert testimony:

Cornering the market on experts:

This tactic involves hiring multiple experts as "consultants" to prevent the adverse party from using them in the litigation. Although this tactic is not expressly forbidden, attorneys have an affirmative duty to engage in discovery in a responsible manner consistent with the spirit of the Rules of Civil Procedure.[26]

Assisting expert in preparing opinion/report:

Even though an attorney is permitted to assist in the preparation of the expert report, ghost-writing is

16 *Daubert*, 509 U.S. at 593-94.

17 526 U.S. 137, 141 (1999).

18 *Id.* at 142; *see also Emig v. Electrolux Home Prods., Inc.,* No. 06-CV-4791, 2008 WL 4200988, at *7 (S.D.N.Y. Sept. 11, 2008) ("the Supreme Court has made clear that the *Daubert* factors are only to be applied where it makes sense to do so").

19 *Id.* at 144-45. The Court moreover clarified that the standard of review relating to the admission of evidence under FRE 702 remained abuse of discretion, the same level of review applied to other evidentiary rulings. *Id.* at 143.

20 *Id.* at 146.

21 *Id.*

22 No. 1:11-cv-08540, 2012 WL 1959560, at *1 (N.D. Ill. May 22, 2012).

23 *Id.* at *7.

24 *Id.* at *2.

25 *Id.* at *9.

26 *See, e.g.,* The Sedona Conference, *The Case for Cooperation*, 10 Sedona Conf. J. (Supplement) 339 (2009).

not permitted. An expert must prepare her own report and the opinions expressed therein must be her own, otherwise she will not be able to satisfy the requirements of Rule 702.[27]

Ex parte communications with opposing experts:

Ex parte communications with adverse expert witnesses, similar to such communications with opposing parties, are prohibited and may result in disqualification of counsel.[28]

Hiring an opposing expert in a different case:

Though not directly prohibited, attorneys have a duty to avoid the appearance of trying to improperly influence an opposing party's expert; hiring an opposing expert, even in a different case, may violate this duty.[29]

There are many considerations involved in the use of expert witnesses. Without a doubt, a good expert can help build a case, and a great expert witness can substantially undermine an opponent's case. As you assemble your team on the case, consider the above questions and guidelines to ensure that you maximize the benefits of your experts and prepare against the opposing party's corresponding experts.

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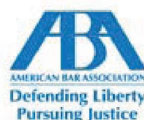
27 *Trigon*, 204 F.R.D. at 294.

28 *Carlson v. Monaco Coach Corp.*, No. CIV. S-05-181, 2006 WL 1716400, at *4 (E.D. Cal. June 21, 2006).

29 *See Erickson v. Newmar Corp.*, 87 F.3d 298, 301-02 (9th Cir. 1996).



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