PREPARING FOR TRIAL

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19.1 INTRODUCTION

Testifying as an expert is often a four-stage process: voir dire, direct examination, cross-examination, and redirect examination. It is imperative that the client, attorney, and expert witness have the proper preparation, attitude, and teamwork in each of these stages.

It is the day of trial, the attorney for the expert's client stands up and states to the judge, "Your honor, I would like to call Fraud Buster as my next witness." The expert proceeds to take the witness stand, raises his or her right hand, the bailiff says, "Do you swear to tell the truth, the whole truth, and nothing but the truth?" and the expert replies, "Yes." Experts think they are ready, but are they really? Before the attorney can even begin questioning the expert about the 200-page report, with Exhibits A to ZZZ, the opposing attorney stands and states, "Your honor, I would like to voir dire the expert." But before it begins—

19.2 EXPERT DEPOSITIONS

A deposition is testimony under oath, especially a statement by a witness that is written down or recorded for use in court at a later date. The opposing attorney will want to depose the retained expert prior to the trial date. A deposition is not a trial; however, testimony is given under oath, and therefore the expert must always tell the truth. At trial, the opposing attorney will attempt to impeach the expert's credibility, so the consistency of the expert's testimony at deposition and at trial is critical.

The expert should follow the ABCs of testifying as a guideline to stay focused:

A. **Avoid** absolutes.
B. **Bulletproof** reports.

C. Display **class** and act as if in a class.
D. Pay attention to **detail.**
E. Know **elements.**
F. Lay a **foundation.**
G. Do not **guess.**
H. Beware of **hypotheticals.**
I. Do not **interrupt.**
J. Do not use **jargon.**
K. Be knowledgeable.
L. Make no **legal** conclusions.
M. **Missing** issues in report creates issues for you.
N. Appear **neutral.**
O. Do not answer a question if there is an **objection** pending.
P. Be **paranoid.**
Q. Be quiet after you answer the question.
R. Respond only to question asked.
S. Keep it **simple.**
T. Think before you speak.
U. Understand the question.
V. Keep an even tone of **voice.**
W. Display **wisdom.**
X. Use **X-ray** vision. (See through the cross-examiner's motives.)
Y. Be **yourself.**
Z. Display ethical zeal.

The expert should be prepared for invasive questioning by the opposing attorney. The deposition is a fishing expedition. The more the opponent can learn about the arguments the witness intends to present at trial, the more prepared the opponent will be to refute the arguments. Therefore, the number-one rule at an expert's deposition is to *respond only to the question asked.* It is important for an expert to *understand the question.* Some questions have a double entendre. The only time an expert does not have to answer the questions asked is when the answer is protected by the attorney-client privilege or Fifth Amendment right violations.

In some cases, depending on the comfort level between the expert and attorney of the expert's client, it may be helpful to have a test run of the deposition. This is helpful not only for the expert but for the attorney as well. Attorneys often find out information that they were not aware of until the trial run. Sometimes experiencing the process firsthand with the lawyer can give experts a sense of what it will be like in the deposition. This can more adequately prepare the expert, and the deposition will be more productive. Depositions are a very difficult and unnatural process of questions and answers. The question-and-answer process can be very methodical, and therefore hard to keep focused and calm. "I don't recall at this time" and "I am not sure" are better answers than guessing. If experts need to look at notes to answer accurately, they should do so. Remember, the goal of the deposition is to produce a clear and accurate transcript. Doing a test run, if possible, will emphasize the strengths and weaknesses of the expert's

testimony and case. The expert can then address the weaknesses prior to the real deposition and/or trial.

19.3 PRETRIAL MOTIONS

The most common pretrial motions involving experts are the motion in limine to bar a witness from testifying or to bar a deposition and the motion to compel documents. The purpose of a motion in limine in the context of an expert is to bar an expert's report from being admitted into evidence and/or bar the expert from testifying at the trial. The opposing attorney will attempt to bar the expert or the expert's report by challenging the expert's competence, suitability, qualifications, methodology, and relevance of opinion before the trial even starts. If the expert survives the pretrial motions, he or she may be attacked during voir dire.

Additionally, the importance of experts to be educated about what disclosures they need to provide will help avoid motions to compel documents and motions in limine. If experts fail to disclose all required documentation, they may be faced with a motion to compel documents or a motion to bar. If a motion to compel is granted, a court order will be presented stating that an expert has failed to provide certain documents and what must be provided. If a motion to bar is filed it could lead to a disqualification of the expert or limit the expert's testimony to the disclosed information.

(a) Report Drafts

Drafts of experts' reports must be disclosed, or else experts may be faced with motions to compel. Also, if experts do not have drafts of their report, they may be faced with a motion to bar their report and/or testimony. The 1993 amendments added the disclosure requirement under Federal Rule of Civil Procedure 26(a)(2)(B). Since that time, courts universally have required the production of experts' draft reports.[1] This rule is also applicable to the notes experts make throughout the process.[2] However, the question of "When is a draft a draft?" is hard to answer. For instance, if the expert starts drafting a report and after drafting only a few paragraphs quits working on it until the next day, then changes something in the previously drafted paragraphs, are these original paragraphs a draft? According to the rules, probably not. They are nothing more than the beginning concepts of a first draft of the expert's opinion. However, it is not always this clear cut, and courts have been imprecise on answering the question of what is a draft that must be kept and turned over in the discovery process.

The next cases will provide a better general understanding of what some of the parameters the courts have opined on as being a draft.

The case of *Trigon* v. *Unites States* says that the rationale for requiring disclosure of notes and drafts is that such documents reflect material that the expert "considered" in the course of arriving at the final opinions.[3] Some cases hold that *all* drafts be produced even if they reflect core attorney work.[4] Conversely, other cases do not require production if it contains work product.[5] To confuse the issue even more, *Trigon* suggested that although drafts must be produced if they are the result of consultation with counsel, they may not have to be produced if solely a result of the expert's own thoughts. Finally, one appeals court stated that although experts do not have to keep every scrap of paper created in their preparation of the report, experts do have to produce those documents helpful in

understanding the testimony or that the opposing party might use in cross-examination.[6] That being said, if experts destroy drafts and notes, their testimony can be barred in part regarding the destroyed drafts and notes.

Experts should think of record keeping from the cross-examiner's point of view: that is, what drafts and notes will be needed to preserve and produce to show their thought process from. This attention to detail will help experts avoid taking leaps in their thought processes and getting caught on cross-examination. This line of thought, however, could go so far as to include the production to opposing counsel of correspondence between the expert and the attorney about the case, including the case's strengths and weaknesses, thereby exposing one side of the case. But then again, an expert should have nothing to hide.

(b) Expert Qualifications

The attorneys and the judge will follow the rules of the controlling case law in the state in which experts are testifying to attempt to qualify or, on the opponent's side, disqualify them as expert witnesses. The experts' curricula vitae serves as the written evidence of their qualifications. It should list experts' education, licenses, certifications, work history, teaching experience, speaking engagements, professional publications, and professional memberships (including any officer designations). Finally, any distinguished positions experts hold (i.e., adjunct professor) should be highlighted.

Regarding the qualifications of an expert witness and the matters in which they may testify to, the Federal Rule of Evidence 702 titled "Testimony of Experts" 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:
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> (1) the testimony is based on 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 this case.[7]

Thus, before expert witnesses may testify as to their opinion, the attorney for the experts' client must first qualify them. Therefore, it is imperative that an expert *be knowledgeable* about the underlying facts and principles that were applied in forming an opinion. After the attorney for the expert's client has attempted to qualify the expert as an expert, the opposing attorney will have an opportunity to either stipulate that the person is an expert or will cross-examine the expert regarding his or her credentials. It is normal for experts to feel very uncomfortable and defensive during this process, since someone whom they barely know is attacking their education, experience, and methodologies. Although the expert's credentials are more than likely to be very impressive, on cross-examination, the opposing attorney will pick holes in those credentials and the expert's compliance with industry standards. The opposing attorney will question the expert's educational background, will specifically point out that the expert has never opined before regarding the specific facts present in this case, and will question whether the expert is qualified to render an opinion regarding the issue present.

Experts should *keep an even tone of voice.* It is important for experts to stay calm and not get defensive or adversarial. Their professionalism and credibility are being assessed

by the examiner to determine how good a witness they will be at trial. This determination will affect the examiner's willingness to settle or forge ahead to trial.

Experts should study their deposition, find the holes, and fill them or be prepared to explain their irrelevance to their testimony. Experts need to use their *X-ray vision* to see through the cross-examiner's motives before being trapped. If holes are discovered, it is best to testify about the issue on direct examination, so experts can minimize the weakness before the judge hears their cross-examination.

19.4 VOIR DIRE AND METHODOLOGY

Voir dire is the preliminary examination of the expert's witness under oath to determine the expert's competence to give relevant testimony that would assist the trier of fact. This will be the first time the judge and jury will see the expert under pressure. Perception can become reality. Experts need to follow the age-old saying, *Be yourself.* If the trier of fact believes an expert is not genuine, it is likely he or she will have the same conclusion about the expert's opinion.

The attorney for the expert's client will begin by questioning the expert about his or her credentials, education, experience, and the methodologies and theories applied to the specific facts of the case, in order to satisfy the elements of the Federal Rules of Evidence and the case law in the applicable circuit to qualify the person as an expert. The attorney should have experts testify to the detailed step-by-step process they utilized in the case. The attorney needs to ask if an expert's methodology is in compliance with standards in the industry. The witness is then proffered to the court as an expert. It is at this point that the opposing attorney will request permission to voir dire the expert. No matter whether it is the expert's first time testifying or fiftieth, the process of voir dire can be extremely unnerving. Voir dire is the opposing attorney's opportunity to bar the witness from being declared an expert on the subject in which the expert is being retained. The expert's credentials, experience, and methodology will be challenged by the examiner. The expert's competency to render an expert opinion will be attacked. The judge will then apply the standards set forth later in this section in formulating an opinion of whether to qualify the witness as an expert.

Part of the voir dire process involves questioning the methodology the expert used to render their opinion. Therefore, it is imperative that the methodology the expert follows is in accordance with the relevant case law of the applicable jurisdiction.

For example, the Federal Rules of Evidence state that the expert must apply reliable principles and methods to the specific facts of the case before the court in order to render an opinion. The sufficiency of the facts and reliability of the methodology have been defined by a series of United States Supreme Court cases.

The first case of importance is *Frye* v. US,[8] which sets forth the "general acceptance" test. The court in *Frye* ruled that while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The next and probably more often followed case is *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*[9] *Daubert* states that the trial judge is to act as a "gatekeeper" and determines whether the expert's proposed testimony is relevant, by determining whether the testimony is helpful to the trier of fact and whether the testimony truly relates to issues in the case. At this point, Federal Rule of Evidence Rule 702 has superseded *Daubert,* but the standard of review that was established for *Daubert* challenges are still appropriate.

Based on *Daubert,* these are guideline factors on whether the expert's methodology is reliable:

Testing: Has the theory or technique been tested?

Peer review: Has the theory been subjected to peer review discussion in publications?

Error rate: Does the theory or technique have a high known or potential rate of error?

General acceptance: Incorporates the *Frye* "General Acceptance" test as a factor to decide whether the theory or methodology has attracted widespread acceptance in the relevant scientific or professional community.

Another case of primary importance is *Kumho Tire Co.* v. *Carmichael,*[10] wherein the court ruled that *Daubert's* "gatekeeping" standard applies to all expert testimony by stating "[t]he initial question before us is whether the basic gatekeeping obligation applies only to scientific testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony."

19.5 PREPARING FOR EXPERT WITNESS TESTIMONY

It is extremely important for experts to meet with the attorney prior to trial to discuss preparing for it. The courtroom is an extremely adversarial environment and experts who are not properly prepared will be eaten alive. Again, the most important rule while testifying is to respond only to the questions asked. In accordance with that rule, a list of guidelines and reminders for overall preparation for trial is presented next.

- Because experts are witnesses, every word they state, whether in a deposition or trial, is documented, given extreme importance, and intensely scrutinized.
- Experts need to listen to what the attorney actually asks and respond to what was asked. Experts should never assume what the examiner meant to say. If there is more than one way to interpret the question, experts should ask for clarification.
- Experts should treat each question individually. They should not assume that one question builds off the previous question. Experts should *be quiet* after answering a question and wait for the next question.
- Each and every word of a question counts. Experts should not answer the question unless they can answer every part of the question truthfully. If experts do not understand the question, they *should not guess.* They should not be afraid to inform the court that they do not understand the question.
- Experts are in charge. Everyone is listening to what they have to say. This is the expert's opportunity to impart his or her *wisdom.*
- Experts can control the speed, tone (they should not be sarcastic), and difficulty of the questions.
- Experts should answer the questions as simply as possible. Technical answers lead to confusion. Experts must remember to *keep it simple* and use laypeople's terms when responding.
- Keys for experts are to *think before you speak, answer the question,* and then stop talking. In order to understand the question, experts should repeat it in their head before answering.
- Experts should not try to prove the other side wrong. They should appear *neutral,* impartial, unbiased, and independent. This will greatly enhance their credibility.

(a) Expert Disclosure

Federal Rule of Evidence 501 titled "General Rule" regarding attorney-client privilege states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

The landmark case of *U.S.* v. *Kovel*[n] extends attorney-client privilege to third parties hired by a lawyer or a client to assist in providing legal services to a client. However, the role of an expert (i.e., a consulting nontestifying expert or a testifying expert, discussed later) will impact whether the expert's work is "discoverable" or whether the work is protected by Federal Rule of Evidence 501 and *U.S. v. Kovel.*

(b) Consulting Expert versus Testifying Expert

There are various types of experts, and it is extremely important from the commencement of the services that experts define with the client what their roles and responsibilities will be, as this will impact whether to execute the engagement agreement with the client or the attorney. In addition, experts' roles impact whether their work is "discoverable." If the expert is retained as a testifying expert, his or her role will be to testify in open court and submit a report; in such cases, experts will need to execute an engagement agreement with the client. As a testifying expert, the expert's working file, including drafts of his or her report, are discoverable. However, if experts are retained as consulting, nontestifying advisors by the attorney, their work file is protected under the attorney-client privilege, and experts can execute the engagement agreement with the lawyer. If experts switch from being consulting experts to testifying experts, all of their notes, memorandums, drafts, and so on become discoverable from the time the experts were retained as a consultant. Therefore, experts need to *be paranoid* from the beginning regarding what they write or information learned, as it may become discoverable.

If experts are retained as consulting, nontestifying advisors by the attorney, their work file is protected under the attorney-client privilege so long as the experts are assisting the attorney in giving legal advice to the client, but there are certain things experts should do to ensure the attorney-client privilege. Specifically, experts should:

- Execute the engagement agreement with the lawyer, not the client, and clearly specify the experts' roles and responsibilities.
- Label work product as "protected by the attorney-client and work product privileges."
- Not speak to the potential client prior to being retained by the attorney. (However, if the expert happens to be the client's current accountant, the expert should segregate the matters that will be part of the attorney-client privilege.)[13]
- Communicate only with the client at the counsel's direction.[14]

This list, although not exclusive, should give experts guidelines. It stresses the importance of abiding by the controlling case law. Experts in a consulting role should request instructions from the attorney on local rules for preserving the privileges.

However, if experts are retained as testifying experts, their role will be to testify in open court and submit a report, and the experts will need to execute the engagement agreement with their client. As testifying experts, the experts' working file, including drafts of their report, are discoverable and not protected by attorney-client privilege.

(c) Direct Examination

The courtroom is like a classroom. The attorney is the teacher, the judge and jury are the students, and the expert is the teacher's aide. Experts should answer the teacher's questions with *class* so the students in the *class* can become educated on the subject experts are testifying to and also trust the information given. On direct examination, the lawyer will ask experts questions. Experts will explain the theories, research, methodology, and processes utilized. Ultimately experts will render an opinion.

Most of the direct examination questions will consist of who, what, where, when, how, and why. These questions are known as foundation questions. Experts must be able to *lay a foundation,* or they will not be allowed to testify about that aspect of the case. On direct, the attorney's use of leading questions (i.e., questions that suggest to the witness the answers the lawyer wants to receive) is very limited. Therefore, expert and attorney must coordinate the testimony in an orderly fashion. A basic understanding of the rules of evidence and the *elements* of the cause of action involved can aid experts in helping the attorney present the experts' testimony.

Because experts are witnesses, every word they state, whether in a deposition or trial, is documented, given extreme importance, and intensely scrutinized. Experts should *avoid absolutes* like "always" and "never." All the cross-examiner has to find is one exception to destroy their credibility.

Expert Opinions

Once they are qualified as experts, they will be asked to testify as to their opinion regarding the matter at issue. Federal Rule of Evidence 703 titled "Bases of Opinion Testimony by Experts" states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their prohibitive value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.[is]

Federal Rule of Evidence 704 titled "Opinion on Ultimate Issue" states:

> (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.
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> (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.[16]

Federal Rule of Evidence 705 titled "Disclosure of Facts or Data Underlying Expert Opinion" states:

> The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.[17]

Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of the case. That is, experts cannot testify about legal issues on which the judge will instruct the jury.[18] *Legal conclusions* made by experts are inadmissible in court. If experts are not careful, their entire report may be subject to a motion in limine and result in them and their reports being barred from trial.

Exhibit Evidence

An expert's report is a key part of both direct examination and cross-examination. On direct examination, the lawyer will attempt to put the expert's report into evidence as "exhibit evidence." The expert's report speaks just as if it were on the witness stand testifying; therefore, it must speak for itself. Because the report cannot answer cross-examination questions, experts have to endure cross-examination and attacks on their report. It is not an expert's job to be adversarial. Experts should merely answer the questions and remain professional. As mentioned, experts are making a record, so whatever they say will be documented.

Federal Rule of Civil Procedure 26(a)(2)(B), "Elements Required for Written Reports of an Expert Witness"

The expert's report is the backbone to expert's testimony. In order to testify the expert must produce a report that meets certain requirements. The federal rules of Civil Procedure require the following:

> (B) Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
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> (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the data or other information considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous ten years; (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.
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> (C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
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> (i) at least 90 days before the date set for trial or for the case to be ready for trial; or (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure."

Application of Federal Rule of Civil Procedure 26(a)(2)(B)

The primary exhibit experts will be testifying to is their written report. Experts should keep in mind some important guidelines regarding all written reports. All documents, including schedules, charts, graphs, and written narratives, whether part of an expert's report or presented as exhibit evidence in support of the testimony, should clearly indicate that they were prepared solely for use in the subject dispute or litigation. Further, depending on the situation, experts should indicate the status of the document, such as "draft," "tentative," "preliminary," or "subject to change," as experts may obtain additional information prior to the final report. Or when working as nontestifying, consulting experts or before being designated as the testifying expert witness, experts should designate that the report is "privileged and confidential" and prepared for litigation under the attorney work product privilege. These types of documentation may be utilized in the court process:

- Written reports submitted to the trier of fact (usually prior to oral testimony)
- Exhibits that support or explain oral testimony
- Written reports prepared by an expert and submitted to the client (for purposes of settlement)
- Affidavit in lieu of testimony
- Working papers, supporting documents submitted for discovery

It is imperative that experts *pay attention to detail,* or it will come back to haunt them. In particular, *missing issues* or critical facts in the report are an open invitation to the cross-examiner to destroy an expert's credibility by pointing out the holes in the report. Experts' final written report and any supporting exhibits should be *bulletproof,* meaning they should be so specific, credible, and substantiated that expert testimony is unnecessary.

In sum, in the written report, experts must state all opinions and all explanations for the basis and reasons for the opinions. Experts' final opinions should be supported in a step-by-step process or drill-down method listing of exhibits. The analysis and data should be laid out succinctly and methodically, with one exhibit leading to the next to explain an expert's final opinion. There should be no holes or leaps in an expert's report, and each fact supporting an expert's opinion should be stated in an exhibit, with the next exhibit building off it. One exception, however, is that sometimes experts will have a subjective opinion that they testify to; this is acceptable, but experts should definitely have some underlying facts to support their subjective opinion.

Expert witnesses cannot read their testimony from the report but must testify based on their knowledge of preparing the report. During direct examination, experts can be on the witness stand for a significant period of time, and sometimes they may need to refresh their memory about the report. If this happens, experts may use their report to refresh their recollection, to substitute for their forgotten testimony upon authentication of the writing, or in cross-examination of the witness.

There are two ways in which a witness may refresh his or her recollection: (1) present recollection revived or (2) past recollection recorded. For present recollection revived, witnesses may use any writing or thing for the purpose of refreshing present recollection. Experts usually may not read from the writing while they testify, because the writing is *not authenticated,* is *not in evidence,* and may be used solely to refresh their recollection. The writing is intended to help experts recall by jogging their memory. The sworn testimony must demonstrate a *present* recollection.

For past recollection recorded, if experts state that they have insufficient recollection of an event to enable them to testify fully and accurately, even after they have attempted to revive their recollection, the *writing itself may be read into evidence* if a proper foundation is laid for its admissibility. This use of a memorandum as evidence of a past recollection is frequently classified as an *exception to the hearsay rule.* The foundation for receipt of the writing into evidence must include proof that:

- The witness had personal knowledge.
- The writing was made by the witness under his or her direction or that it was adopted by the witness.
- The writing was timely made when the matter was fresh in the mind of the witness.
- The writing is accurate.
- The witness has insufficient recollection to testify fully and accurately.

Rules of Evidence

It is important for experts to understand how the courtroom operates so that they are fully educated and, therefore, more at ease while testifying. Further, experts' opinions and testimony, in order to be admitted into evidence, must comply with the rules of evidence. This discussion focuses on the Federal Rules of Evidence; however, each state has its own rules that may not be the same as the federal rules. As such, be sure to review the applicable state and local rules.

The Federal Rules of Evidence are applicable in all *civil and criminal* cases in the United States courts of appeal, district courts, the court of claims, and in proceedings before United States magistrates. Evidence law can be stated in one sentence: Material and relevant evidence is admissible if competent.

Materiality exists when the proffered evidence relates to one of the substantive legal issues in the case. The use of probative evidence contributes to proving or disproving a material issue.

Relevance is defined by Federal Rule 401 as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Competence is the requirement that the proffered evidence, concededly material and relevant, does not violate an exclusionary rule. The most common exclusionary rule is Federal Rule of Evidence 403 titled "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time," which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Testimonial Evidence

There are two types of evidence experts will be testifying about: direct and circumstantial evidence. Direct evidence relies on actual knowledge and goes directly to a material issue without intervention of an inferential process. Circumstantial evidence relies on inference and is evidence of a subsidiary or collateral fact from which, alone or in conjunction with a cluster of other facts, the existence of the material issue can be inferred. To the extent possible, experts want to rely on direct evidence (i.e., a paper trail). Sometimes experts will have to rely on circumstantial evidence. When relying on circumstantial evidence,

experts will be vulnerable on cross-examination. Therefore, the underlying facts of experts' circumstantial evidence need to be as bulletproof as possible.

It is the job of experts to anticipate every possible attack that can be made on their opinion. The courtroom presentation of evidence can be a deciding factor in a judge's decision. As such, it is imperative for experts to remember the Boy Scout Motto: "Be prepared." The attorney should spend adequate time preparing experts for their testimony. It is important to sequence experts' testimony so it is easy for the judge to follow. This will also help lay the proper foundation for experts' testimony and paint a picture for the court. Experts must remember at all times that jurors and judges are normally not financially sophisticated. Therefore, experts should explain as much as possible in lay terms and use demonstrative evidence to highlight the facts they relied on to develop their opinion. Experts should *avoid jargon* used to convey an impression of authority.

When testifying, it is important to avoid absolutes, such as "never" or "always." Using absolutes often comes back to haunt experts on cross-examination. There is, however, "usually" an exception. Experts should use modifiers such as, "almost" or "rarely" when describing a situation. If the cross-examiner finds any exception to an expert's absolute, the expert will lose credibility. If experts use words that allow a little wiggle room, it is difficult to impeach them. It also gives experts some flexibility to adjust their testimony to avoid impeachment.

It is just as important for experts to be prepared as it is for them to help prepare the attorney. As experts, it can be intimidating to testify. If the experts are not attorneys, or not practicing attorneys, they may not know the procedures involved in testifying. There are many common things that witnesses may not know but are afraid to ask or won't tell the lawyers. This fact can cause more damage than good. Preparing is a two-way street, experts have to know how the legal system works, and the lawyer has to understand the work experts performed and the reports they prepared.

Experts should not be afraid to ask the lawyer questions. Experts should never feel embarrassed about clarifying procedural or substantive issues. They should ask the lawyer to explain any legalese that they may not understand. Further, experts should never feel threatened by lawyers; it is okay to ask for help. The bottom line is that most experts are not used to testifying and may not always properly explain the legal process and its intricacies. Because experts are highly educated, lawyers may assume that they understand the legal process and how to testify.

However, keep in mind that being an expert does not automatically mean being a communicator. Communicating the results of experts' reports can be difficult. Experts should meet with the lawyer and discuss the report. Doing so will alleviate some of the difficulty. Further, meeting with the lawyer will give experts an opportunity to make sure the lawyer understands the methodologies, process, and opinions contained in the report. It is experts' job to make sure the lawyer understands the basis of their reports and what their testimony will encompass, so that the attorney can ask the proper questions on direct examination.

(d) Preparing for Objections

Last, throughout the course of the litigation, many times when an attorney asks a question to a witness, the other lawyer will object. Experts should *not answer the question if an objection is pending.* The judge will either state "Sustained" or "Overruled." Then, depending on the ruling, the judge should instruct the expert whether to answer the question posed. If the objection is sustained, experts do not have to answer the question; if overruled, experts

will answer the question. The six most common questions that are objected to, with a brief description, are presented next.

1. **Compound.** Requires a single answer to more than one question
2. **Argumentative.** Leading questions that reflect the examiner's interpretation of the facts
3. **Conclusionary.** Calls for an opinion that the witness is not qualified to answer
4. **Assuming facts not in evidence.** A question that assumes a disputed fact is true and in evidence
5. **Cumulative.** A question that has already been asked and answered
6. **Harassing and embarrassing**

(e) Preparing for Cross-Examination

Cross-examination is the most important and effective part of litigation. The experts have explained their theories, research, methodology, processes, and ultimately their expert opinion on direct examination. Now the opposing lawyer will use leading questions to pick and choose what to attack and highlight and how to challenge the experts' credibility. Experts should *not interrupt* the examiner or become argumentative. A qualified and experienced litigator will use leading questions, which, more often than not, can be answered with a yes or no. If experts can answer the question with a yes or no, they should do so and not try to elaborate. Experts can elaborate on redirect examination. Whenever possible, experts are better off explaining an issue with their attorney, not the opponent's attorney. They should resist that urge to explain the flaw in the cross-examiner's portrayal of their opinion during cross.

On cross-examination, attorneys will try to trap experts by using these tactics:

- The lawyer will try to make the opponent's expert *their* witness and use the opponent's expert to reinforce their case by attempting to get them to agree to facts that support the lawyer's case without reexplaining the expert's theory.
- The lawyer will attack an expert's facts, because the expert's opinions are based on his or her facts.
- Experts need to *beware of hypotheticals.* The lawyer will change the facts that experts interpret to see how that would change their conclusion.
- The lawyer will try to expose an expert's bias (i.e. money, friendship).
- The lawyer will attack the expert's credibility based on treatises, books, or articles of well-known scholars.
- The lawyer will attack the big and little mistakes in the report.
- The lawyer will try to expose why the expert's thinking is wrong. (Usually this backfires, so experts need to be patient and calm.)

In response to these tactics, the job of experts is to take their time, answer the question asked, and stay calm. It is acceptable to answer "I don't know," but experts should not use this as an escape. Most important, experts should try to remain consistent with their previous testimony from their deposition. One of the easiest ways for an opposing attorney to lower an expert's credibility with the judge is to show inconsistencies with the expert's testimony from deposition and at trial. This process is called impeachment. At the deposition, the expert testified under oath, and a transcript of the proceedings was made. If the opposing

attorney finds inconsistencies with the expert's testimony, although the transcript will not be admitted into evidence, the lawyer will use the transcript to attack the expert's credibility and try to impeach him or her.

To survive these tactics, experts must learn to think like litigators. Litigators are very paranoid, and they think of every angle or twist that a piece of evidence can present. They question what different perceptions exist from a sentence of testimony or in a report. Experts should also think of every way a litigator may twist their words.

(f) Redirect Examination

The opposing attorney may not give experts an opportunity to explain why there are inconsistencies in their report or testimony, but that is okay. The experts' attorney will have an opportunity to "rehabilitate" them on redirect examination by asking questions either to clarify or expand on any answers that may have been damaging. Experts should remain confident, knowing that they can rely on their attorney to clarify their position on redirect. However, it is highly unlikely that the experts' attorney has the financial sophistication to know that an expert needs to be rehabilitated. Therefore, experts should establish a signal to alert the attorney that they want to be asked on redirect a question that allows them to clarify their answer on cross-examination.

19.6 CONCLUSION

Attorneys are under an ethical obligation to advocate zealously on behalf of their clients. An expert's ethical obligation is to be unbiased and impartial when rendering opinions. This difference can put an expert in an uncomfortable position, when the attorney or client requests certain results. Experts must maintain *ethical zeal* throughout their retention. It is imperative that experts not succumb to pressures put on them by the attorney or client. It is unethical to guarantee predetermined results. Although experts may gain financially by telling an attorney or client that they can achieve a predetermined result, this will surely result in short-term gain, long-term pain. Once an expert's reputation is impugned, his or her credibility with the courts is compromised. It will not be long before attorneys no longer retain that expert's services. If an expert has a reputation of ethical honesty, however, such credibility before the court will provide him or her long-term benefits, both professionally and financially. It is therefore advisable for experts to be zealously ethical.

19.7 NOTES

1. See, for example, *Am. Fid. Assurance Co.* v. *Boyer I,* 225 F.R.D. 520 (D.S.C. 2004).
2. *Fidelity Nat'l Title Ins. Co. of New York* v. *Intercounty Nat's Title Ins. Co.,* 412 F. 3d 745 (7th Cir. 2005).
3. *Trigon Ins. Co. v. United States,* 204 F.R.D. 277 (E.D. Va. 2001).
4. *B.C.F. OilRef. Inc.* v. *Consol Edison Co. of New York,* 171 F.R.D. 57 (S.D.N. Y. 1997).
5. *Ladd Furniture Inc. v. Ernst & Young,* 41 Fed. R. Serv. 3d 1633 (M.D.N.C. 1998).
6. *Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat's Title Ins. Co.,* 412 F. 3d 745 (7th Cir. 2005).
7. Not all jurisdictions follow the Federal Rules. The Federal Rules are used in the following materials as an example of the types of rules applicable to experts. Therefore, be sure to review the applicable state and local rules.

8. *Frye* v. *US,* 293 F. 1013 (D.C. Cir. 1923).
9. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).
10. *Kumho Tire Co.* v. *Carmichael,* 526 US 137 (1999).
11. State laws can vary. Therefore, it is imperative to know that applicable state law.
12. *U.S. v. Kovel,* 296 F 2d 918 (2nd Cir. 1961).
13. *U.S. v. Cote,* 456 F. 2d 142 (8th Cir. 1972).
14. *U.S. v. Bein,* 728 F 2d 107 (2nd Cir. 1984).
15. See footnote 7.
16. See footnote 7.
17. See footnote 7.
18. *Bammerlin* v. *Navistar Internal! Transp. Corp.,* 30 F. 3d 898, 900 (7th Cir. 1994); *Harbor Ins. Co. v. Continental Bank Corp.,* 922 F.2d 357, 366 (7th Cir. 1990).
19. See footnote 7.