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Get the Most Out of Your Expert

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Significant cases require competent, thoughtful expert testimony. Expert witnesses usually can go to the heart of a dispute more directly than percipient witnesses. Expert testimony is a powerful tool — but it must be used with care.

ROLE OF THE EXPERTS

Experts assist the finder of fact in cases that involve scientific, technical or other specialized knowledge. An expert may rely on facts or data of "a type reasonably relied upon by the experts in a particular field," regardless of admissibility. Fed. R. Evid. 703; *see also*, Cal. Evid. Code § 801(b). The expert's ability to rely on hearsay and other inadmissible material is a powerful tool for the court. Your expert is the witness who can really tell the story to the court or the jury in a simple, mostly uninterrupted narrative.

This is not just a matter of style or tactics. Some factual stories simply cannot be presented through percipient lay witnesses. If your case involves the internal operations of a piece of technology, there likely are no percipient witnesses. Who has perceived the flow of information inside a computer? That is a story that only an expert can tell. Your case might involve a widespread pattern of facts across an entire institution, with facts spread out widely in time or location. How many hundreds of witnesses would have to testify over how many months to describe how a large government or corporate institution works? An expert can study such systems, apply her field's accepted methods of deducing facts, and tell the court the story. There are due process limitations to ensure that the expert's views can be tested by disclosure and cross-examination (Fed. R. Civ. Proc. 26(a)(2); Fed. R. Evid. 705), and by evaluation of the expert's methods (*Kumho Tire Co. v. Carmichael*, 536 U.S. 137 (1999)).

ATTORNEY WORK PRODUCT

Where is the line between your adversary's right to learn the basis for your expert's conclusions and your right to protect your work product? This question has plagued the legal community. The 2010 amendments to Rule 26 are at least a partial response to these concerns. Prior to the amendments, attorneys often used extreme measures to protect their interactions with experts, hindering effective communication while also adding to the cost and stress of litigation. These measures included avoiding all email and voice mail, traveling great distances to share a computer screen, and spending hours on the telephone discussing opinions. In addition, some attorneys employed several experts (e.g., one for consultation and another for testimony) because all records of attorney-expert interactions were discoverable.

The new Rule 26 shields communications between an attorney and expert witness from discovery, except for certain exceptions. Written reports are still required under Rule 26(a)(2)(B)(ii). The report must disclose the expert's opinions and the "facts or data" considered. The 2010 version of the rule, however, is meant to exclude counsel's mental impressions or theories, according to the Advisory Committee Notes.

Drafts of expert reports are now shielded from discovery (Rule 26(b)(4)(B)). So are most communications between attorneys and experts (Rule 26(b)(4)(C)). Both changes apply to all forms of discovery and are meant to "ensure that lawyers may interact with retained experts without fear of exposing [ ] communications to searching discovery." Adv. Cmte. Note.

The rule sets out three exceptions. Communications are still discoverable if: (1) they relate to compensation for the expert's study or testimony; (2) they identify facts or data provided by the attorney to the expert, "considered in forming the opinions to be expressed"; or (3) they identify any assumptions provided by the attorney to the expert and relied upon by the expert "in forming the opinions to be expressed."

Communications may also be discoverable if a party shows substantial need and cannot gather equivalent information without undue hardship. The new rule's implementing order states that it applies to already pending cases "insofar as just and practicable."

CALIFORNIA STATE APPROACH

California law lacks a definitive rule on discovery of expert files. Cal. Code. Civ. Pro. §2034 governs expert disclosures and has been held to envision "timely disclosure of the general substance of an expert's expected testimony so that the parties may properly prepare for trial." *Bonds v. Roy*, 20 Cal.4th 140 (1999). There is little clarity about whether drafts or attorney communications must be disclosed. Some California practice guides suggest that attorneys direct their experts not to create any formal report. This practice may backfire, depriving parties of compelling settlement fodder. Courts may exclude expert testimony if the offering party "intentionally manipulated the discovery process to ensure that expert reports and writings were not created until after the specified date." *Boston v. Penny Lane Centers, Inc.*, 170 Cal.App.4th 936 (2009).

While state court practice typically does not include expert reports, expert declarations are often used in motions for summary judgment or preliminary injunction. The concerns about drafts that prompted the federal amendments thus remain for attorneys practicing in California courts.

EXPERT MANAGEMENT

1. Experienced Experts Only. Experienced experts already understand the need for controlled communications. They also know how to deliver persuasive yet objective testimony.

Do your homework. Ask colleagues for highly regarded experts. Review "Verdicts and Settlements" and online sources. Check conflicts. Interview experts carefully, meeting in person to assess how they will perform. If they lack credibility or fail

to project honesty and competence, move on. Do not be pressured by colleagues to give someone new a chance — you may face a moment, as I did, when an expert testifying for the first time agreed that my opposing counsel "made a good point."

Ideally, your expert should be balanced, having testified on both sides of a given issue. Read prior depositions and transcripts in which the expert testified. Interview attorneys who worked with the expert. You owe it to your client. Other than choosing you, the correct expert is the client's biggest single investment in any litigation.

2. Costs and Fees. The expert's budget should be managed carefully. Set the budget up front and on an hourly basis. Expert contingency fees are not allowed. Get the expert to provide regular statements. Manage your client's expectations and avoid surprises about the size of the expert's bill. When working with opposing counsel's expert, do not allow depositions to drag on. If the expert stonewalls or speechifies, or is unprepared or unqualified — end the deposition.

3. Respect the expert's time. Be respectful of the expert's opinion and time. Get to know the expert and remember that she is labeled as such for a reason — she knows more than you do about her subject. Be aware of the expert's time and scheduling. If the expert informs you she takes yoga classes on Thursday mornings, make a note not to call then. Avoid last minute requests and/or demands which may hinder the expert's productivity.

4. Protect the Record. Because the Rule 26 amendments have been in place a mere five months, there is little precedent with which to assess their true impact. You should continue to protect the record zealously. All attorney-expert communications should go through lead counsel and be treated as if the court and opposing counsel will review them. With this in mind, ensure all communications are written clearly, formally and well. All expert-attorney communications should be segregated into their own file. Make sure the expert has a clear understanding of the rules governing her file: emails, voicemails, notes and letters will be turned over at the time of deposition. Many years ago, I tried to explain these rules to an expert, whose response was to flush the toilet into the telephone, her way of telling me she would never provide her notes. Most experts are more forthcoming.

5. Explore Stipulations With Opposing Counsel to Limit Disclosure of Expert Communications. If you are in a case where the application of the new Rule 26 is uncertain, approach opposing counsel about stipulating to nonproduction of draft reports and attorney communications. Reasonable adversaries should see that the unnecessary costs and hassle of discoverable attorney-expert communications run both ways.

In almost every kind of litigation, expert testimony has clear advantages, including the synthesis of complex material and the ability to rely on hearsay. Those advantages can provide you with the key to victory — assuming you manage the expert carefully and diligently.

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