J. Edgar Murdock

Inn of Court

February 16, 2016

**Expert Witnesses:**

**Reviewing Expert Report and**

**Coaching for Cross-Examination**

I. Relevant Ethical and Court Rules.

a. ABA Rules Preamble. Zealous advocacy: As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

b. ABA Rule 1.1 Competence. Thoroughness and preparation. Comment 5: Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and . . . adequate preparation.

b. ABA Rule 1.3 Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

c. ABA Rule 3.1 Meritorious Claims & Contentions. Basis in law and fact that is not frivolous. Comment 1: The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.

d. ABA Rule 3.3 Candor Toward the Tribunal. False statement of fact or law, failure to correct prior statement, and offering evidence that lawyer knows to be false.

d. ABA Rule 3.4 Fairness to Opposing Party and Counsel. Obstruction, spoliation, counsel or assist false testimony, request withholding relevant information, etc. Comment 1: Improperly coaching witnesses.

e. ABA Rule 4.1 Truthfulness in Statements to Others. False statement of material fact or law, failure to disclose a material fact when necessary to avoid assisting criminal or fraudulent act by client.

f. ABA Rule 8.4(c). Dishonesty, fraud, deceit or misrepresentation.

f. I.R.C. § 6673. Attorney has multiplied the Tax Court proceedings unreasonably and vexatiously – court may require that such attorney pay personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.

g. FRCP Rule 11. Representations to the court whether by signing, filing, submitting, or later advocating it. Attorney certifies after reasonable inquiry not for improper purpose, contentions are warranted, factual contentions have evidentiary support, and denials of factual contentions are warranted on the evidence.

II. Reviewing expert report.

a. Tax Court treats expert report as direct testimony of expert. Versus other courts.

b. Scenarios:

- In reviewing expert report, discover that a material fact is incorrect. Duties?

- Discover expert has taken position contrary to prior opinions or testimony. Duties?

- Recommending changes that are misleading or removing damaging evidence/conclusion. Improper? Limits?

- Persuading expert to add/expand conclusions. Improper? Limits?

- Expert report as an advocacy piece. Duties?

- Admonishing expert. Improper? Limits?

- Providing language to include in report. Improper? Limits?

- Editing report. Improper? Limits?

- Educating expert on law, facts, and parties’ positions. Improper? Limits?-

- Failure to understand the report (and not asking questions) but offering it into evidence because it reaches the right conclusion. Improper? Limits?

- Failure to review report that makes frivolous arguments or contains other improper material (e.g., legal arguments), is incomprehensible, or is facially unhelpful.

- Failure to protect expert report from disclosure; waiving privileges.

c. Competence/Diligence vs. Ghostwriting. Impartial witness vs. Advocate.

d. Judicial remedy.

- An expert report must be the expert’s (i.e., the expert must provide real substantive input). Fed. R. Civ. P. 26(a)(2)(B) (providing that expert testimony “must be accompanied by a written report––*prepared* and signed *by the witness*”) (emphasis in original)); TC Rule 143(g)(1). A ghostwritten (or substantially ghostwritten) report is not the expert’s and will be excluded.

- A district court (E.D. Mich.) recently criticized an expert and refused to admit his report in a patent case on the basis that the expert was a “highly qualified puppet” who “had surrendered his role to defense counsel.” *Numatics, Inc. v. Balluff, Inc*., No. 2-13-cv-11049, 2014 WL 7211167 (E.D. Mich. Dec. 16, 2014). The expert spent little time on his report and reviewing a large record; much of the language in his report resembled language in one of the defense attorney’s earlier submissions.

- Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 592 n. 10 (1993) (under FRE 104(a), proponent of expert report must establish admissibility by a preponderance of the evidence).

- Bank One Corp. v. Commissioner, 120 T.C. 174, 278 (2003):

 Respondent challenged the admissibility of Sullivan’s rebuttal report. Respondent asserted that the report was inadmissible because it was tainted in its preparation by the significant participation of petitioner’s counsel. By order dated January 15, 2003, we excluded Sullivan’s rebuttal report from evidence. We noted that Sullivan has never explained to our satisfaction that the words, analysis, and opinions in that report were his own work. We ruled that petitioner, as the proponent of the expert testimony, failed to establish the report’s admissibility by a “preponderance of proof.” See Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 592 n. 10 (1993).

- Estate of Noble v. Commissioner, T.C. Memo. 2005-2:

 We excluded the first report from evidence on the basis of our Opinion in Bank One Corp. v. Commissioner, 120 T.C. 174 (2003). There, we excluded from evidence the rebuttal report of the taxpayer's expert that was alleged by the Commissioner to be tainted in its preparation by the significant participation of the taxpayer's counsel. Id. at 278. We held that the rebuttal report was inadmissible because the expert had not established that the words, analysis, and opinions in that rebuttal report were his own work. Id. (citing Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 592 n. 10 (1993)). As is equally true here, we were not persuaded by a preponderance of proof that the words, analysis, and opinions in the excluded report were the work of Herber.

e. Tax Court Rule 70(c)(4). Rule change effective July 6, 2012.

- Protects drafts of any expert witness report required under Rule 143(g), regardless of the form in which the draft is recorded.

- Protects communications between a party’s counsel and any witness required to provide a report under Rule 143(g), regardless of the form of the communications. Exceptions:

(i) relate to compensation for the expert’s study or testimony;

(ii) identify facts or data that the party’s counsel provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party’s counsel provided and that the expert relied on in forming the opinions to be expressed.

- Counterpart rules.

- Federal Rules of Civil Procedure Rule 26(b)(4).

- Rules of the United States Court of Federal Claims Rule 26(b)(4).

- Report of Civil Rules Advisory Committee (May 8, 2009) (reasons for change).

- Comments to Proposed Amendments to Tax Court’s Rules (May 6, 2012).

f. Are concerns valid? Does TC Rule 70(c)(4) (and counterparts) open the door for unethical behavior, improper advocacy, and ghostwriting by lawyers?

- Limits of discovery?

- Facts or data provided by counsel that the expert considered.

- Assumptions provided by counsel that the expert relied on.

- TC Rule 70(c)(3)(A)(ii) exception for “substantial need”.

- Bank One ruling still applicable?

- Discoverability regarding the drafting process. Draft reports now protected by FRCP 26(b)(4) and TC Rule 70(c)(4). But one court has held that work-product protection is no barrier when record reveals that attorney commandeered an expert’s functions or used the expert as a conduit for the lawyer’s own theories. *Gerke v. Travelers Casualty Ins. Co.*, 289 F.R.D. 316 (D. Or. 2013) (court ordered productions of all draft reports over work-product objection where expert could not specify which portions an attorney altered and the court suspected the attorney ). But query whether the 2010 FRCP revisions eliminated drafting concerns, as one court has suggested. *U.S. CFTC v. Newell*, 301 F.R.D. 348 (N.D. Ill. 2014).

III. Preparing witnesses vs. Improper “coaching”.

a. ALI Restatement (Third) of the Law Governing Lawyers § 116, Comment b. In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following:

- discussing the role of the witness and effective courtroom demeanor;

- discussing the witness's recollection and probable testimony;

- revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light;

- discussing the applicability of law to the events in issue;

- reviewing the factual context into which the witness’s observations or opinions will fit;

- reviewing documents or other physical evidence that may be introduced; and

- discussing probable lines of cross-examination that the witness should be prepared to meet.

Witness preparation may include rehearsal of testimony. A lawyer may suggest choice words that might be employed to make the witness’s meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.

b. D.C. Ethics Opinion 79 (1979): A lawyer may not: (1) suggest answers that are calculated to mislead; (2) plant testimony that does not genuinely reflect the witness’s true memory.

c. Impermissible “horse-shedding” or “wood-shedding” of expert witness.

- Preparing for cross examination. Limits? Communications discoverable?

- Scripting the expert witness. Improper? Limits?

- Shading the testimony. Improper? Limits?

- Rehabilitation of expert witness at trial/deposition or with respect to prior testimony. Limits? Communications discoverable?

d. Criminal Law.

- ABA Fourth Edition of the Criminal Justice Standards for the Prosecution Function, Standard 3-3.5, Relationship with Expert Witnesses.

- ABA Fourth Edition of the Criminal Justice Standards for the Prosecution Function, Standard 4-4.4, Relationship with Expert Witnesses.

**Concurrent Expert Testimony – aka Hot Tubbing**

1. **General Description of the Approach**
	1. Began in Australia and becoming increasingly popular
	2. Practice where experts from both sides of a dispute sit down with a judge or arbitrator between them
		1. Efficient and effective way to present complex expert issues or
		2. Procedure that forces attorneys to surrender control over their proceedings
	3. Voluntary practice - either court or a party may suggest
		1. Is it really voluntary when a court requests it?
	4. Can be used in a court with a judge, where the experts question and challenge each other with the court directing and also asking questions – counsel’s role limited to stating objections
	5. Can also be used to have experts meet prior to a hearing or court (without counsel) to identify the areas of disagreement and discuss the relevant issues
2. **Used in at Least Three Decided Tax Court Cases**
	1. *Rovakat, LLC v Comm’r*, TC Memo 2011-225 (J. Laro) (Partnership tax shelter involving losses from basis strips and foreign currency transactions; losses disallowed on two grounds: (1) entity not a partnership so basis limited to cost; and (2) lack of economic substance – lack of pre-tax profit potential as determined by expert testimony).
	2. In his opinion, Judge Laro described the procedure’s use as:

Special Procedure as to Expert Testimony:

With the agreement of the parties, we directed the experts to testify concurrently. To implement the concurrent testimony, the Court sat at a large table in the middle of the courtroom with all three experts, each of whom was under oath. The parties' counsel sat a few feet away. The Court then engaged the experts in a three-way conversation about ultimate issues of fact. Counsel could, but did not, object to any of the experts' testimony. When necessary, the Court directed the discussion and focused on matters that the Court considered important to resolve. By engaging in this conversational testimony, the experts were able and allowed to speak to each other, to ask questions, and to probe weaknesses in any other expert's testimony. The discussion that followed was highly focused, highly structured, and directed by the Court.

* 1. *Crimi v. Comm’r*, TC Memo 2013-51 (J. Laro) (conservation easement case involving valuation of an easement; key issue was H&BU of land pre-easement)
		1. In his opinion, Judge Laro described the procedure as:

Concurrent Witness Procedure

The Court, following a pretrial request from the parties, directed the expert witnesses to testify concurrently. The procedure was implemented in substantially the same way as in Rovakat, LLC v. Commissioner, T.C. Memo. 2011-225 [TC Memo 2011-225], 102 T.C.M. (CCH) 264, 271 (2011). Insofar as the record includes five appraisals (the 2000 appraisal, the 2004 appraisal, the 2007 appraisal, Mr. Rinaldi's appraisal report, and Mr. Holenstein's appraisal) indicating a proffered value of $660,000, as with Mr. Rinaldi's appraisal, to $5,225,000, as with the 2007 appraisal, we cannot overstate the importance of concurrent witness testimony in these cases. We describe more fully in the opinion section the benefits of the concurrent testimony and the impact on our analysis.

* + 1. Per Frank Agostino, who represented Crimi

Before trial, the parties approached the presiding Judge about utilizing concurrent witness testimony to aid the Court to value the land and reconcile the divergent values offered by the parties’ experts. At trial, after each expert’s direct testimony and after each party had a chance to cross-examine the opposing party’s expert, the Court directed that the parties testify as to the proper value of the property at the same time, i.e., concurrently. To implement the concurrent testimony, the Judge sat at a table in the middle of the courtroom with all four experts, each of whom was under oath. The parties’ counsel flanked the experts, and although they were free to object to testimony provided concurrently, in fact, they did not. The Court then engaged the parties in a five-way dialogue about ultimate issues of fact; specifically, the highest and best use of the property and the comparable sales that each expert selected to determine value. In ruling for the taxpayers, the Court noted that the concurrent testimony process allowed the Court to straightaway focus on the core issues in dispute, which elucidated the shortcomings in each expert’s testimony.

* 1. *Buyuk LLC et al. v. Commissioner,* T.C. Memo. 2013-253 (J. Laro) (distressed asset transaction where partnership losses disallowed following determination the transaction constituted a disguised sale under § *707(a)(2)(B)* and alternatively applying the doctrines of substance over form, step transaction, and economic substance).
		1. In his opinion, Judge Laro described the procedure as:

 Concurrent Expert Witness Testimony -- Mr. Burd and Professor Bean

Following a pretrial conference and on the parties’ agreement, the Court directed Mr. Burd and Professor Bean to testify concurrently. The procedure was implemented in substantially the same way as in *Rovakat, LLC v. Commissioner, T.C. Memo. 2011-225, 102 T.C.M. (CCH) 264, 271 (2011),* aff'd, \_\_\_ Fed. Appx. \_\_\_, *2013 WL 2948023* (3d Cir. June 17, 2013). . . . . Insofar as the conclusions reached in the Burd report and the Bean report are diametrically opposed to each other, we cannot overstate the importance of concurrent witness testimony in these cases. Moreover, through Mr. Burd's and Professor Bean's concurrent testimony, we were able to flesh out some of their reports' conclusions, reasonably reconcile the experts' varying conclusions when possible, and when reconciliation was impossible, understand the basis for their disagreeing opinions and decide which opinion to rely on.

Both Professor Bean and Mr. Burd agree that doing business in Russia would require extensive due diligence and strict compliance with documentation. Both experts further agree that several steps in the transactions, such as the payment mechanism under the collection agreement, would implicate the restrictive currency control laws.

1. **Perceived Benefits - Pros**
	1. Experts more likely to make concessions and find common ground during “open and frank” discussion - reduces partisan bias and allows parties to resolve some issues between themselves (which means some issues off the table and court need not decide, unless court determines otherwise)
	2. Easier for court to get to root issues by directly posing questions to the experts
	3. Testimony is more understandable as both sides of a case are presented at same time, so no lengthy separations of complex expert concepts
	4. Court can more easily and efficiently identify issues on which the experts and agree and disagree, and then narrows experts testimony to the critical issues
	5. Narrows expert testimony to the critical issues so don’t get lost in minutiae
	6. Allows court to more readily separate credible portions of expert reports from the unreliable (*Crimi*)
	7. Reduce costs – experts in a field likely to know each other or know of each other and can quickly identify the real areas of disagreement and work to find areas of agreement
	8. Provides court a single forum to instantly reconcile competing evidence
2. **Perceived Disadvantages – Cons**
	1. Strips lawyers of ability to present the expert testimony and evidence – while may still have opportunity for cross-examination, much more limited and may not be as effective
		1. Increases risk / unknowns into proceedings in presentation of evidence
		2. Experts more likely to stray into “unwanted” analysis
	2. Puts substantial pressure on your expert’s personality
		1. Requires more than knowledge and experience to support expert opinion: expert must also be convincing
		2. Advocacy skills – charming, skilled, speakers do better
		3. Older, established experts may be able to “bully” younger, less-experienced experts who be more likely to defer
		4. Assertive versus soft-spoken characteristics
	3. Impact on appeal unclear – while 3rd Circuit affirmed *Rovakat*, it did so in a nonpublished opinion; however, it did affirm for all reasons articulated in the Tax Court opinion, thereby implicitly accepting “hot tubbing”
	4. Judge’s belief that concurrent evidence creates more work for the court, rather than creating efficiency
		1. This is somewhat of a red herring as rather than creating work, it shifts some post-trial work to pre-trial work; overall, likely to be efficiencies as Judge has opportunity to directly question experts and ensure record is fully developed
3. **Suggestions if Considering Hot Tubbing**
	1. Run a “mock” hot tub to test your expert before coming to a view
	2. Consider the position of your client and where expert testimony fits - be aware of timing of expert testimony and what works best
		1. If you represent Petitioner, and Respondent has strong expert whose testimony you don’t want to be last thing the Judge hears, hot tubbing – concurrent evidence – might allow for a better presentation
		2. If you represent Petitioner, and Respondent has flawed expert, traditional testimony and cross exam might be better presentation
	3. Consider the possible outcomes
		1. Know your expert issue – is there middle ground that works and can still lead to a favorable result for your client? E.g., valuation issue?
		2. Is the issue up or down with no middle ground – no room for consensus? E.g., possibility of pre-tax profit?
4. **Reality of Hot Tubbing**
	1. Rather than eliminating expert bias, doesn’t it put more pressure on expert to be an advocate?
	2. Will it be respected on appeal?
	3. What are the ethical considerations? Are you zealously advocating for your client if you agree to hot tub?
5. **Articles on Hot Tubbing**

Judge Jack Zouhary, Splash! Hot tubbing in a federal courtroom, Ohio Lawyer Online (March/April 2015) available at <https://www.ohiobar.org/NewsAndPublications/OhioLawyer/Pages/Splash-Hot-tubbing-in-a-federal-courtroom.aspx>.

Lisa C. Wood, Experts in the Tub, 21-SUM Antitrust 95 (Summer 2007)