Temple American Inn of Court 2010-11 May Team

Presents

Funny Ball: Ethics and Strategies When Working With Expert Witnesses

A Three-Act Play

With Special Thanks to Jaime Scilla
and Precise Litigation Technologies

May 11, 2011

The Cast

Cracker Jack Vendor	Beatty O'Donnell
Beer Vendor	Steve Harvey
Narrator	Drew Duffy
The Phans	Marilyn Heffley Rayna Kessler Judge Shirdan-Harris Inez McGowan Elizabeth Long
Plaintiff's Counsel Al Reach	John Quinn
Plaintiff's Counsel G.C. Alexander	Jennifer Myers Chalal
Plaintiff's Expert Mike Schmidt	Eric Weitz
Defendant Ruben Amaro	Denene Wambach
Defendant's Counsel Robin Roberts	Mike Shaffer
Defendant's Expert Bill James	Bob Mongeluzzi
Judge Edwina Delahanty	Jamie C. Ray
Moderator(s)	Judge Lowell Reed Steve Harvey Eric Weitz Beatty O'Donnell

*Funny Ball: Ethics and Strategies When Working With Expert Witnesses**

ACT I

Scene 1: Take Me Out to the Ball Game

Scene 2: The Old Ball Yard

Scene 3: Back at the Ranch

Scene 4: See You In Court

ACT II

Scene 1: The Pitcher's Mound

Scene 2: Have Gun Will Travel

Scene 3: Morning of Trial

Scene 4: The Moment of Truth

ACT III

Scene 1: Justice Is Served

*****Although we have borrowed the names of real persons, the characters as portrayed are fictitious, any resemblance to real persons, living or dead, is purely coincidental, and other than the statement at issue in the fictional lawsuit the facts are all made up.

LEXSEE 2010 EMERGING ISSUES 5440

Rabiej on the 2010 amendments to Rule 26 of the Federal Rules of Civil Procedure

2010 Emerging Issues 5440

John K. Rabiej on the 2010 amendments to Rule 26 of the Federal Rules of Civil Procedure

By John K. Rabiej

December 7, 2010

SUMMARY: Important amendments to Rule 26 of the Federal Rules of Civil Procedure became effective December 1, 2010. The amendments extend work-product protection to the discovery of draft reports by a testifying expert witness and, with three important exceptions, to the discovery of communications between a testifying expert witness who is required to provide a report under Rule 26(a)(2)(B) and retaining counsel. This commentary analyzes these changes.

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ARTICLE: John K. Rabiej on the 2010 amendments to Rule 26 of the Federal Rules of Civil Procedure

Explanation of Civil Rule 26 Amendments

The amendments to Rule 26 primarily address two features of disclosure and discovery of trial-witness experts. First, Rule 26(a)(2)(C) relieves an expert witness, who is not required to provide a report under Rule 26(a)(2)(B), from an obligation to submit an extensive report. Instead, the amended rule requires the expert only to state the subject matter and summarize the facts and opinions to which the expert is expected to testify. In addition, Rule 26(a)(2)(B)(ii) requires any trial-witness expert who must submit a report to state the facts or data, but not "other information" as in the current rule, considered by the expert in forming an opinion. Second, Rule 26(b)(4)(B) and (C) extend work-product protection to the discovery of a draft report by an expert witness and, with three important exceptions, communications between the expert witness and retaining counsel.

Rule 26(a)(2)(C) addresses the reporting requirements imposed on a witness who is expected to provide expert testimony but who is not required to provide a Rule 26(a)(2)(B) report because the witness is not retained or specially employed to provide such testimony, or the witness is not an employee who regularly gives expert testimony, e.g., treating physician or in-house expert. The amended rule relieves such a witness of the obligation to submit an extensive report. Instead, the amended rule requires the expert to disclose only the subject matter and summarize the facts and opinions the witness is expected to present bearing on the opinion to be offered as an expert. Only the facts supporting the expert's opinions must be summarized. The requirement does not apply to facts unrelated to the opinion. For example, if the witness is a "hybrid fact/opinion" expert witness, the summary requirement does not apply to facts that do not bear on the expert's opinions.

The abbreviated disclosures may be contained in a written report drafted by counsel. The amendments are aimed at facilitating obtaining testimony from treating physicians or other health care professionals and employees of a party who do not regularly provide expert testimony, who would otherwise be reluctant to testify if encumbered with extensive reporting burdens. At the same time, the abbreviated report provides sufficient information to the opposing party to prevent "surprise."

Rule 26(b)(4)(B) and (C) extend work-product protection to draft reports of expert witnesses and communications between counsel and experts.

Rule 26(b)(4)(B) is added to provide work-product protection to draft expert reports. The protection is extended to the draft reports of experts who are retained or specially employed to provide expert testimony in the case or whose duties as the party's employee regularly involve giving expert testimony *as well as* to experts who are expected to testify at trial but are not required to provide a report under Rule 26(a)(2)(B), e.g., treating physicians and in-house experts. The protection applies to a report regardless of the form it is recorded, by writing, by electronic means, or otherwise.

Rule 26(b)(4)(C) is added to provide work-product protection to attorney-expert communications regardless of the form of communications, whether oral, written, electronic, or otherwise. The rule extends the protection to communications between counsel and the expert's assistants, individuals who assist the expert witness in preparing for the testimony, including the drafting of the expert's report. But the protection is limited *only* to communications between a retaining counsel and an expert who is required to provide a report under Rule 26(a)(2)(B), e.g., an expert who is retained or specially employed to provide expert testimony in the case or whose duties as the party's employee regularly involves giving expert testimony.

The advisory committee considered, but declined, to extend work-product protection to communications between counsel and a witness who is not retained or specially employed to provide expert testimony or whose duties do not regularly involve giving expert testimony, e.g., an employee with particular knowledge or expertise, a treating physician, or accident investigator. The committee concluded that extending the protection to such in-house expert witnesses or treating physicians could be too broad, and they were concerned about unforeseen consequences. (The provisions of current Rule 26(b)(4)(B), which will be renumbered Rule 26(b)(4)(D), already bar discovery in most circumstances of an expert who has been retained or specially employed in anticipation of litigation who is not expected to be called as a witness at trial.)

The amendments make clear that while discovery into draft reports and many communications between an expert and a retaining lawyer is subject to work-product protection, a party remains entitled to discovery of areas essential to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that the following subjects communicated between the lawyer and expert are open to discovery:

(1) compensation for the expert's study or testimony (including any communications about additional benefits, such as a promise of further work);

(2) facts or data provided by the lawyer that the expert considered in forming opinions (the exception applies only to communications "identifying" the facts or data provided by counsel); and

(3) assumptions provided to the expert by the lawyer that the expert relied on in forming an opinion (the exception is limited to those assumptions that the expert actually relied on in forming an opinion).

In addition to these three categories, a court may require discovery of the entire draft report or attorney-expert witness communications under limited circumstances and by court order. Discovery will be permitted on a showing of substantial need for the discovery to prepare the case and an inability, without undue hardship, to obtain the substantial equivalent by other means.

The amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The

Committee Note provides several illustrative examples. For instance, the expert's testing of material involved in litigation, and notes of any such testing, would be subject to discovery. Communications between the expert and anyone other than the party's counsel would also be subject to discovery. Inquiry can also be made about alternative analyses, testing methods, or approaches to the issues on which the expert is testifying, whether or not the expert considered them in forming an opinion. But the Committee Note also makes it clear that the rule should be applied pragmatically. Communications between an expert and in-house counsel or an expert and a party's counsel from earlier litigation would be protected.

Background and Purposes of Civil Rule 26 Amendments

The amendments address problems dealing with the discovery of an expert witness that emerged after the extensive changes to Rule 26 in 1993, which were interpreted by many courts to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require detailed reports from all witnesses offering expert testimony.

1. Subdivision (a)(2)(C) - Abbreviated Expert-Witness Report

Under the 1993 amendments to Rule 26, a party must disclose the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. The amendments distinguished between experts who testify at trial and experts who only consult with counsel. Discovery of witnesses not expected to testify at trial is not permitted, unless exceptional circumstances are shown. Witnesses expected to testify at trial were further distinguished between those who were "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" and those not falling within this definition, e.g., treating physicians and in-house experts. Experts in the former group must provide an expert witness report during discovery under Rule 26(a)(2)(B). The witness must prepare and sign an extensive written report describing expected opinions and the basis for them, but only if the witness is retained or specially employed to provide expert testimony or whose duties as the party's employee regularly involve giving expert testimony.

Rule 26(a)(2)(B) does not expressly require experts who are not retained or specially employed to provide expert testimony or whose duties as the party's employee do not regularly involve giving expert testimony to submit a report describing their expected opinions, including most notably treating physicians and in-house experts. Nonetheless courts have imposed this requirement on these experts. Though these reports are often helpful, their burden falls heavily on treating physicians over whom a party has little control and employees who do not regularly offer expert testimony. In many cases these experts have little incentive to participate in litigation and are reluctant to prepare a report because of the time and expense.

Under the amendments to Rule 26(a)(2)(C), the reporting burden of an expert witness who is not obligated to submit a report under Rule 26(a)(2)(B) is substantially mitigated. A party must disclose only the subject matter and a summary of the facts and opinions of the expert's expected testimony. The proposal responds to the "problem of surprise" by validating "the trend to require reports contrary to the rule." But it does so with much less inconvenience to the expert. It is also expected that this "abbreviated" report will facilitate the taking of the witness's deposition. This report for experts must not be confused with the reports now required under Rule 26(a)(2)(B). The amendment is intended to accommodate experts, like treating physicians, who would not otherwise provide a detailed report.

2. Subdivision (b)(4)(B) & (C) - Work-Product Protection

The 1993 amendments to Rule 26 allowed discovery of facts, data, or "other information" considered by the expert. The phrase "other information" has in practice invited efforts to compel production of all communications between a lawyer and an expert. In addition, a passage in the accompanying 1993 Committee Note promoted such a reading of the rule: "Given this obligation of disclosure [to disclose data and other information considered by the expert], litigants should no longer be able to argue that materials furnished to their experts to be used in forming their

opinions - whether or not ultimately relied upon by the expert - are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." The substitution of reports for interrogatories led to efforts to compel disclosure of drafts of reports. Many courts have taken the next step and construed the rule to authorize discovery of *all* communications between counsel and expert witnesses and *all* draft reports.

Experience with the rule has shown that routine discovery of communications between counsel and expert witnesses and the expert's draft reports has caused serious problems. Lawyers and experts take elaborate and costly steps to avoid creating any discoverable record and, at the same time, take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts - one for consultation, to do the work and develop the opinions, and one to provide the testimony - to avoid creating a discoverable record of the collaborative interaction between the retaining lawyer and the experts. The practices also include tortuous steps to avoid having the expert take any notes, making any record of preliminary analyses or opinions, or producing any draft report. Instead, lawyers strive to limit the record to only a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can impair the quality of the expert's work.

Notwithstanding these discovery-avoidance tactics, lawyers devote much time attempting to uncover information about the development of an adversary's expert witnesses during depositions, in an often futile effort to show that the expert's opinions were unduly influenced by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public comment period showed that such questioning during depositions rarely succeeded in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement, instead of on the strengths or weaknesses of the expert's opinions, do little to expose substantive problems with those opinions. Rather, the principal and most effective means to discredit an expert's opinions continue to be by cross-examining the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

Many experienced lawyers recognized the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices on their experts, and wasting valuable deposition time in exploring every communication between lawyer and expert and every change in the expert's draft reports. These lawyers routinely stipulate at the outset of a case that they will not seek draft reports from each other's experts in discovery and will not seek to discover communications between counsel and the expert. In response to persistent calls from its members for a more systematic improvement of discovery, the American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and limit discovery of attorney-expert communications, without hindering discovery into the expert's opinions and the facts or data used to support them. The State of New Jersey issued such a rule and the advisory committee gathered information from both plaintiff and defense-oriented lawyers and in a variety of subject areas about their experiences with it. The practitioners reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions. If the opinion was bad or a party suspected that the expert's opinion was unduly influenced by the lawyer, the party encountered little difficulties in refuting the opinion on cross-examination in virtually all cases reported to the committee.

Establishing work-product protection for draft reports and some categories of attorney-expert communications will not impede effective discovery or examination at trial. In some cases, a party may be able to make the showings of need and hardship that overcome work-product protection under Rule 26(b)(3)(A)(ii). But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).*

The advisory committee considered, but declined, to address the issue of whether the work-product protection

provided to an expert's draft reports and communications between counsel and the expert in pretrial discovery would later continue to bar its admissibility at trial. Work-product protection that is extended to evidence in pretrial discovery is generally honored at trial. The committee concluded that an explicit statement to that effect was unnecessary. It expected that because the Civil Discovery Rules are designed to protect the lawyer's work product, and in light of the many disclosure and discovery opportunities available for challenging the testimony of adverse expert witnesses, the same limitations will ordinarily be honored at trial. *See United States v. Nobles, 422 U.S. 225, 238-239 (1975)* (work-product protection applies at trial as well as during pretrial discovery). The committee also concluded that the admissibility at trial of communications and draft expert reports subject to discovery work-product protection is governed by the Federal Rules of Evidence.

In considering whether to amend the rule, the advisory committee carefully examined the views of a group of academics who opposed the amendments. These academics expressed concern that the amendments could prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert's services. These concerns were not borne out by the practitioners' experience who practiced in jurisdictions that did not allow such discovery or who stipulated such discovery practices. After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The committee concluded that discovery of draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

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ABOUT THE AUTHOR(S):

John K. Rabiej is the chief of the Rules Committee Support Office of the Administrative Office of the United States Courts. His office staffs the Advisory Committees of Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He has served as chief since 1992. As chief of the office he works directly with the rules committees' chairs and reporters on drafts of proposed rule amendments and prepares reports to the Judicial Conference and Congress on the amendments. He is a graduate of the University of Illinois College of Law. He was inducted into the American Law Institute in May 2004. The views expressed in the commentary represent Mr. Rabiej's opinions and do not necessarily reflect the views of the rules committees.

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*1001 COACHING WITNESSES

Fred C. Zacharias [FNa1]

Shaun Martin [FNaa1]

INTRODUCTION

The focus of this symposium, as it was described to us, was to "highlight recurring questions and dilemmas that arise as lawyers try (and sometimes fail) to conduct their trial work within ethical boundaries established by court rules, ethical codes, and other statutes." [FN1] In this short piece, we suggest that the problems in ethical lawyering often develop because lawyers think about issues in precisely those terms; namely, how their intended conduct fits within the confines of rules, codes, and statutes. Although we all yearn for bright-line rules that tell us how to conduct our affairs, it is clear that ethics regulation tolerates a range of conduct. The propriety of particular litigation activities within the relatively broad regulatory strictures typically depends not on the precise content of the ethics rules themselves, but rather upon the reasons for which lawyers act.

We take as the vehicle for discussing this proposition the issue of coaching witnesses. [FN2] In our Professional Responsibility ***1002** courses, [FN3] we sometimes show our students clips from two videotapes involving witness preparation. The first, from the movie *The Verdict,* [FN4] involves the preparation of a defendant anesthesiologist who allegedly committed malpractice. [FN5] The defendant is coached by a team of large-firm partners and associates. Initially, the doctor's responses to his lawyer's direct examination questions are stiff, patronizing, and clinical. [FN6] After forceful prompting, however, the doctor is convinced to talk in emotional, human terms that suggest his caring nature and superhuman efforts on his patient's behalf. [FN7] His lawyers accomplish this transformation by pressing ***1003** the doctor to adopt substitute terms and phraseology that they suggest and by applauding the witness when he shows his emotions. [FN8]

In the second tape, from the television series *L.A. Law,* [FN9] attorney Michael Kuzak converts a similarly clinical character witness who "see[s] shades of gray in everyone" [FN10] into a one-sided, fully favorable witness. [FN11] For example, when asked, "[H]ave you ever known [the defendant] to be violent?", the witness initially responds, "Not really." Kuzak immediately replies, "The answer is 'No.'" [FN12] The witness soon adopts this response. The witness is strongly influenced by Kuzak's statement that his testimony will be useless unless he can adopt wholeheartedly supportive characterizations. [FN13] Wanting to help his friend, the witness ultimately incorporates the exact phrases that Kuzak has previously employed in preparing the witness to testify. [FN14]

Our students typically are unified in their responses to the tapes described above. *The Verdict* lawyer, they say, has done nothing wrong. He has not changed the substance of the testimony but has instead simply shaped it

by demonstrating to the witness how he will appear to the jury. The changes in the witness's testimony, they argue, are simply a matter of ***1004** presentation, even though these revisions may have a significant effect on the jury's response. In contrast, the students believe that Kuzak-the *L.A. Law* lawyer-has acted outrageously. He has promoted perjury, the class agrees, because he has in effect changed the story that the witness will tell.

At this point, we push the students to the wall. "What if," we ask, "we write out potential questions and possible answers for a sophisticated witness in a complicated case? We tell the witness that we are not trying to put words in his mouth but, as a starting point for preparing the witness and to save time, we are showing him various questions and answers for his reaction." The students first react scornfully to this proposition and assert that we would be suborning perjury were we to do so. However, the more we repeat that we are willing to accept as correct any account that the witness tells us, the more the students move towards the position that this conduct simply constitutes a legitimate attempt to help the witness's presentation. The law and ethics rules only forbid a lawyer from presenting evidence that she [FN15] knows to be false. [FN16] Helping one's client to present the most persuasive case is, after all, the lawyer's job.

Our Socratic questions, of course, reflect more than just hypothetical scenarios. The practice that we describe to our students reflects the actual manner in which lawyers obtain much of the evidence that is presented to tribunals-not only trial evidence. Pretrial affidavits and declarations typically are obtained almost precisely in the way we describe in our final "hypothetical." An attorney prepares a sworn declaration that contains the evidence needed to prevail on a motion and she then forwards this draft submission to an individual-usually her client or an employee-for his review and signature. When forwarding the draft declaration, the attorney may or may not expressly inform the recipient that she is prepared to edit ***1005** the draft to comport with the objective truth. In any event, she is, in fact, quite willing to do so.

Whether or not the lawyer makes any such express statement about the fungible nature of the draft, declarants ordinarily sign and return the affidavit provided to them with no (or only insubstantial) changes. The court accordingly receives evidence that is in reality the lawyer's own carefully crafted submission. The *L.A. Law* clip and the prepared testimony hypothetical thus parallel, in dramatic form, the type of witness coaching that routinely occurs in the practice of even the most well-respected of attorneys.

The students' responses to our hypothetical scenarios similarly parallel the approach of many real world litigators. These individuals often focus exclusively upon the fact that the ethics rules forbid directly only the knowing subornation of perjury. [FN17] The hasty conclusion too often drawn by these litigators is that a lawyer acts ethically so long as her coaching or declaration-drafting practices would not be viewed, under criminal law principles, as the deliberate subornation of perjury. Everything else, they believe, merely entails a permissible attempt to put the evidence in its most favorable light.

Our classroom dialogue exposes these common assumptions as well as the foundation upon which this symposium is based. A lawyer or student who focuses solely on the content of the rules, codes, and statutes in order to evaluate ethics will conclude automatically that *The Verdict* and declaration-obtaining attorneys act properly in the way they prepare testimony, but that Kuzak may have acted questionably. The codes teach us that a lawyer can neither tell a client to lie nor encourage a witness to commit perjury. [FN18] However, the lawyer is required to be loyal to the client [FN19] and to communicate fully with him. [FN20] The intersection of these ethical provisions presumably entitles the client to know (or to have the witnesses know) how his story will sound on the stand. The codes and rules similarly allow the lawyer to provide clients with efficient, professional assistance in preparing to testify. *Ipso facto,* it seems, even showing the client a ***1006** preliminary list of questions

and answers or a draft declaration in the lawyer's own words is ethically permissible.

But is it? Is showing proposed sworn testimony to an incipient witness any different than the *L.A. Law* lawyer's conduct in pressuring the character witness to change his story by *truthfully* telling the witness that he will not be called to the stand to help his friend if his evaluation of the defendant is mixed? Conversely, is *The Verdict* lawyer's clear effort to change the words that the doctor-witness uses before the jury and the demeanor he projects any more "ethical"? If we are honest about not only the *L.A. Law* and *The Verdict* lawyers, but also the actual practices described above, it seems obvious that the attorney in each instance hopes to convince the witness to say the desired things and to say them in the suggested way. This is the hope even if the proposed testimony may not be true and even if-as is certainly the case-the witnesses would not use the proposed words or present the desired image without the lawyer's intervention.

We trust that these examples show that the terms of the codes themselves do not delimit the contours of proper behavior. The codes instead depend upon lawyers to exercise discretion. More to the point, in litigation situations like those discussed above, any attorney who thinks that she can determine ethical conduct simply by looking at and following the letter of the codes will not even be *trying* to act ethically. The effort must also include deep consideration of what conduct is appropriate and what conduct is not. The correct resolution of ethical issues depends, at least in part, upon the reasons why a lawyer engages, or wishes to engage, in a particular type of coaching.

If that is the case, however, one might expect that a professional code concerned with the advancement of ethical conduct would focus expressly on the lawyer's intent and state of mind. Yet the codes avoid doing so for at least two reasons. First, because intent is a subjective element, the enforcement of intent-based rules is difficult. Second, in most cases, the *effect* of a lawyer's objective conduct on clients, third parties, and the legal system does not depend upon the lawyer's state of mind. The codes accordingly tend to treat that effect (or the nature of the conduct itself) as dispositive, thus making the lawyer's purpose seem irrelevant. [FN21]

Nevertheless, the true morality of a lawyer's conduct-both whether she has acted properly in a particular case and whether she has adopted an amoral persona or role in pursuing her client's case-inevitably depends heavily upon why the lawyer has acted in a particular way. One can ***1007** envision scenarios in which *The Verdict* lawyer, the *L.A. Law* attorney, and the declaration-writing counsel each could be deemed to be either an unprofessional or a reasonable advocate. [FN22] In our hypothetical (or not so hypothetical) situations, every lawyer can be characterized alternatively as trying to foster perjury or as attempting to educate the witness. The key to how society would view the "ethics" of the attorney's conduct would depend on why the lawyer chose to act in a particular way, how far she was willing to pursue her conduct, and the nature of her client. [FN23] It probably ***1008** would not depend primarily on what the rules say about the particular conduct at issue.

Our point, of course, is not that lawyers should ignore the professional codes. In the coaching context, for example, the rules contain many express, binding, and useful commands. Lawyers may not assist a client in committing illegality (*e.g.,* perjury). [FN24] A lawyer also may not knowingly offer false evidence [FN25] or "fail to disclose" information necessary to avoid assisting a client's fraud. [FN26] Nor may lawyers use third parties (including witnesses) to do that which they could not do themselves. [FN27]

The rules simultaneously grant lawyers a significant degree of potentially countervailing discretion. The codes establish that lawyers, rather than clients, control technical or "tactical" decisions. [FN28] But lawyers must nevertheless act loyally to their clients. [FN29] Lawyers should also not overly judge or control their cli-

ents' activities. [FN30]

The express commands in the rules also are supplemented by teachings of more general application. Lawyers are to retain independent judgment. [FN31] They must avoid "conduct involving dishonesty, fraud, deceit or misrepresentation."***1009** [FN32] Lawyers have conflicting obligations to clients and the courts. [FN33] Attorneys sometimes must consider third party or societal interests that are superior to their clients'. [FN34] For witness testimony, in particular, the codes give each lawyer discretion to "refuse to offer evidence that the lawyer reasonably believes is false." [FN35] The import of these provisions is that while attorneys should give weight to values incorporated into the codes (such as partisanship and loyalty), they cannot rely on them as a means of avoiding the exercise of moral discretion.

How can such discretion be exercised, to take our example, in the coaching context? The lawyer's justification for her conduct cannot alone provide the answer. In every case, after all, a lawyer could rationalize her efforts in perfecting a witness's presentation as driven by the laudable goal of being loyal to her client.

The key, as one of us has suggested before, [FN36] lies in the lawyer's maintenance of objectivity. Attorneys coach clients in every case, both before and during trial. [FN37] Under the American adversary system,***1010** [FN38] there is nothing wrong with helping a witness to make his point clearly, or even in noting truthful, useful observations that the witness might make. [FN39] Indeed, the very foundation of the adversarial process is the belief that the presence of partisan lawyers will sharpen the presentation of the issues for judicial resolution. [FN40] The less sophisticated or experienced the client, the more he needs such assistance. [FN41]

The primary danger of coaching is the possibility that a lawyer may so change a witness's presentation that the resulting testimony is either false or conveys an incorrect impression about the facts that cross-examination ***1011** cannot counteract. [FN42] Different clients require different levels of assistance in formulating and expressing their thoughts. A lawyer who maintains objectivity nevertheless can recognize two ethical red flags in the course of coaching a client or witness. First, an attorney can notice that she is, in fact, suggesting changes in the witness's presentation for the purpose of obtaining false evidence. [FN43] Second, she can notice that the changes she suggests are either inconsistent with previous information the witness has provided or are uniformly adopted by the witness without question. Either signals the possibility that the lawyer, perhaps even inadvertently, may be inducing false evidence.

Let us suppose that the self-aware lawyer observes one of these signals. On a rigid reading of the rules, the lawyer could conclude that she nevertheless still does not "know" that any false evidence exists and that loyalty to her client thus militates in favor of using the altered testimony. [FN44] An approach that requires the lawyer to consider the spirit of the codes as well, however, would require the lawyer to discuss these developments with her client [FN45] and to consider a refusal to use the evidence. [FN46] In the end, ***1012** the "tactical" decision of how to prepare the witness and what testimony to use is one upon which a lawyer must actively reflect. [FN47]

Let us consider another example from the real world as typical of the type of ethical considerations that attorneys should address. A standard probation condition imposed upon conviction for alcohol-related crimes in California requires the recipient to participate in Alcoholics Anonymous. [FN48] The difficulty engendered by this condition is that Alcoholics Anonymous meetings are (as the name implies) anonymous. Alcoholics Anonymous provides a sign-in sheet that probationers can complete in order to indicate their attendance. This list, however, only indicates the individual's initial presence; it does not reflect whether the person signing the list

actually attended the full meeting.

Many California probationers were believed to exploit this loophole by presenting sign-in sheets to the court as evidence of their attendance even when they had not, in fact, obtained the benefits of their required participation. Various California judges, upon learning of this problem, devised a solution: they began to "quiz" probationers when they appeared before the court to establish the completion of the terms of their probation. Judges typically asked the defendant "What step are you on?," a question that any true participant in Alcoholics Anonymous would easily be able to answer. ***1013** This simple judicial inquiry often resulted in a bewildered look on the part of the probationer and a resulting order for the continuation of probation. [FN49]

California public defenders-as repeat players in the process-became aware of this practice contemporaneously with its development. They were forced to consider their appropriate response. Public defenders, like all attorneys, have a duty of loyalty to their clients. [FN50] Simultaneously, however, lawyers have both a legal and ethical duty not to suborn perjury. [FN51] These competing principles manifested themselves in the internal discussions of California public defenders as to whether they should "prepare" their clients for the judge's anticipated questions by "reminding" them of the various steps of the Alcoholics Anonymous program.

Public defenders who looked exclusively at the rules seemed inexorably to come to the conclusion that they were not only allowed to so coach their clients, but perhaps were even ethically required to do so. The terms of the California Rules of Professional Conduct do not flatly prohibit informing a client of the usual questions and of what permissible answers might entail. The rules would prohibit coaching in the setting described above only if it is performed (1) with knowledge that the probationer has not in fact attended any meetings; (2) with knowledge that the probationer is not, in fact, on a particular step; and (3) with the intent to induce the client to perjure himself by stating that he is on a given step when in fact he is not. [FN52] Public defenders who chose to coach their clients took care not to inquire into any of these elements. They characterized their intent as simply that of an advocate who wished to advise her client of an issue that was likely to arise before the tribunal. As a result, the public defenders who ***1014** focused on the literal content of the rules ultimately engaged in conduct that, as in the *L.A. Law* hypothetical, many would consider to be clearly unethical; namely, "coaching" that resulted in deceptive, misleading, and perhaps false testimony about the probationer's alleged participation in Alcoholics Anonymous.

Other California public defenders faced with the same dilemma responded differently. These public defenders examined not only the terms of the ethics rules, but also their goals, the reasons for the contemplated coaching, and the conduct the system expects of a reasonable, objective lawyer. They concluded that the contemplated coaching was intended, improperly, to put words into a witness's mouth that did not, in fact, accurately convey reality. They reasoned that attorneys legitimately concerned that their clients might actually have forgotten the basic precepts of the Alcoholics Anonymous program could effectively jog the clients' memories without the lengthy explication and coaching that would facilitate perjury. The contrasting conclusions reached by the two sets of California public defenders demonstrate the dichotomous results achieved when a lawyer bases her conduct upon the reasons for which she acts rather than upon the mere content of the rules.

Compare this approach to the one taken by the District of Columbia Bar in the ethics opinion that most directly considers the issue of witness coaching. [FN53] The D.C. Bar addressed the propriety of the conduct of lawyers who prepared testimony for witnesses or suggested answers to witnesses, the basis of which did not first derive from the witnesses themselves. [FN54] The D.C. Bar's opinion assumed that "the proper focus is indeed on the substance of the witness's testimony which the lawyer has, in one way or another, assisted in shaping; *and*

not on the manner of the lawyer's involvement." [FN55] The opinion concludes that neither the nature of nor the intent underlying the lawyer's conduct has "significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading." [FN56]

***1015** The D.C. Bar's approach stems from a literal reliance on the *mens rea* elements of the D.C. Bar Code of Professional Responsibility. [FN57] The difficulty with the decision, of course, is that the lawyer who wishes to help the client present false or misleading evidence can easily do so without "knowing" of its falsity. So long as the focus is, in the D.C. Bar's words, "not on the manner of the lawyer's involvement," [FN58] the lawyer can justify his complicity on the simple basis of loyalty to the client's interests.

The D.C. Bar's analytical regime would immunize lawyers who contemplate coaching (such as the California public defenders) from the need for introspection. The D.C. Bar opinion suggests that even if an attorney deliberately coaches precisely in order to shape and/or distort her client's testimony, the lawyer still does not act unethically so long as the attorney does not know that the resulting testimony is untrue. This focus radically conflicts, we assert, with the deeper personal analysis that should govern the conduct of attorneys. [FN59]

***1016** An exclusive reliance upon the literal content of the ethics rules does have one potential advantage. By equating legal ethics with mere compliance with express ethical prohibitions, the system perhaps would advance a rough degree of adversarial equality. The duty of loyalty, one might argue, requires every attorney to advance the interests of his client to the maximum degree possible so long as this conduct is not barred by expressly codified ethical commands. The arguable advantage of such a regime is that particular clients will not be disadvantaged in the adversarial process because they employ an "ethical" counsel (who fails, for example, to coach them through the questionable means described above) while confronting an unethical counterpart who employs these means and yet complies with express ethical commands. [FN60]

The rules, however, do not in fact attempt to ensure such equality of unethical behavior, nor should they. The professional codes expressly and repeatedly allow and encourage lawyers to engage in discretionary moral decisionmaking even if their adversary does not share a similar ethical view. [FN61] An equality rationale thus does not appear to motivate the contemporary ethical focus. We should not prefer an alternative regime in any event; it seems bizarre to set the ethical bar at its absolute lowest in an effort to convince no attorney to rise above it. This is not, we think, what it means to be a legal professional, much less one with moral and ethical discretion.

Our point is a simple one. Coaching, like many other tactics and conduct in litigation settings, is not-and perhaps cannot be [FN62]-fully ***1017** addressed in the codes. [FN63] That arises in part because professional code drafters cannot conceive of and address all issues and in part because the propriety of even identical conduct may vary from case to case. [FN64] The consequence of that reality is that lawyers cannot rely fully on the terms of the codes in resolving ethical issues that arise. [FN65] Deciding how to conduct "trial work within ethical boundaries established by court rules, ethical codes, and other statutes" [FN66] is the easy part of the litigator's job. The hard part is remembering that identifying ethical practice goes far beyond that task.

[FNa1]. Professor, University of San Diego School of Law, San Diego, California. B.A. 1974, Johns Hopkins University; J.D. 1977, Yale University; LL.M. 1981, Georgetown University.

[FNaa1]. Associate Professor, University of San Diego School of Law, San Diego, California. A.B. 1988, Dart-

mouth College; J.D. 1991, Harvard University.

[FN1]. Letter from Susan David Dwyer, Special Projects Editor, *Kentucky Law Journal,* to Fred C. Zacharias, Professor, University of San Diego School of Law (July 1, 1998) (on file with author).

[FN2]. Although many commentators have touched on this subject, only a few have directly addressed the ethics of witness preparation. *See, e.g.,* John S. Applegate, *Witness Preparation,* 68 TEX. L. REV. 277 (1989) (arguing that the appropriateness of particular conduct depends upon a fact-specific evaluation of what the adversary system requires); Richard C. Wydick, *The Ethics of Witness Coaching,* 17 CARDOZO L. REV. 1 (1995) (arguing that a lawyer's permissible authority to affect witness testimony through preparation is narrow); Joseph D. Piorkowski, Jr., Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389 (1987) (urging lawyers to consider their ethical responsibilities); *see also, e.g.,* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 127-31 (1978) (discussing the intersection of witness preparation and the subornation of perjury). The paucity of attention to this subject is somewhat surprising given that some ethicists believe that the conduct of attorneys in interviewing and preparing witnesses, "more than almost anything else, gives trial lawyers their reputations as purveyors of falsehoods." DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 96 (1988).

[FN3]. The events that we discuss herein are often drawn from the experiences of one or the other of us. We nevertheless take literary license and refer to these activities as "ours."

[FN4]. THE VERDICT (20th Century Fox 1982).

[FN5]. In *The Verdict,* a pregnant patient undergoing a routine procedure receives the wrong anesthesia and, as a result, lapses into a fatal coma. James Mason plays the role of a Machiavellian defense lawyer who leads a team of large firm lawyers in defending the anesthesiologist in the resulting medical malpractice action. *See id.*

[FN6]. For example, when first asked what caused his patient to be deprived of oxygen, the doctor responds, "She'd aspirated vomitus into her mask." His attorney, upon hearing the doctor's description, counsels him to "cut the bullshit, please. Just say it. She threw up in her mask." The doctor immediately parrots his lawyer's proposed characterization and responds, "She threw up in her mask." *Id.*

[FN7]. The doctor, for example, starts (at his counsel's urging) to refer to his patient-whom he presumably barely knew-as "Debby" rather than "she" or "the patient." The doctor similarly alters his characterization of his role in the treatment. The doctor initially responded that he was "one of a group" when asked if he was Debby's anesthesiologist. His attorney responds bluntly, "You were not part of a group. You were her anesthesiologist. Isn't that so?" The doctor immediately relents: "Yes." *Id.* The doctor's testimony, after extensive preparation, concludes with his wholehearted adoption of his attorney's characterization of his activities in bringing "30 years of medical experience to bear [on a] patient riddled with complications" in an effort to "reach[[[ ] down into death" and save her. *Id.*

[FN8]. *See supra* notes 6-7. This prodding comes in a fairly intimidating setting in which the lead attorney practices a vigorous and up tempo direct examination with the doctor in front of twelve partners and associates who sit as a mock jury and interject comments. As the pace of the testimony increases, the lead attorney's reactions seem more like an order or direct substitute for the doctor's words than a suggestion or explanation of the effect of the doctor's testimony. *See* THE VERDICT, *supra* note 4.

[FN9]. *L.A. Law* (NBC television broadcast).

[FN10]. *Id.* In this episode, the witness is a humanities professor and the best friend of a colleague accused of murder. The lawyer plans to call the professor as a character witness. The witness wishes to help the defendant, whom he truly likes and admires.

[FN11]. Kuzak is particularly concerned about the witness's willingness to volunteer that the defendant has previously exhibited a temper and, like many people, has not always gotten along with everyone. *See id.*

[FN12]. *Id.*

[FN13]. Kuzak, after the witness has expressed his unwillingness to perjure himself, states, "I'm not asking you to lie. But if you can't express your friendship with some conviction, then I can't put you up there [to testify]." *Id.*

[FN14]. The witness ultimately testifies at trial in seeming direct contradiction to his earlier practice testimony-using the precise language suggested by Kuzak-that the defendant was a "gentle, caring individual" who was "utterly incapable of the brutality with which he's been charged." *Id.*

[FN15]. To avoid confusion, we refer to the lawyer facing a potential ethical quandary as female and the other actors (e.g., clients, witnesses, opposing counsel) in the process as male.

[FN16]. *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1998) (forbidding a lawyer to "knowingly ... offer evidence that the lawyer knows to be false").

In referring to "the rules" or "the codes" in this article, we refer to the body of professional regulation that is encompassed by the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980), the MODEL RULES OF PROFESSIONAL CONDUCT (1998), and the state variations of those codes. Because most jurisdictions' codes are similar with respect to the subjects that we discuss, we will not identify specific provisions in the different codes. We will instead confine our references to the most commonly adopted version of these provisions, the Model Rules.

[FN17]. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.

[FN18]. *See id.* Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ....").

[FN19]. *See id.* Rule 1.7 cmt. ("Loyalty is an essential element in the lawyer's relationship to a client.").

[FN20]. *See id.* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

[FN21]. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT.

[FN22]. If, for example, a lawyer is dealing with a witness who has difficulty expressing his ideas, there probably is nothing wrong with helping him to tell his story. *See, e.g.,* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.4.3, at 647-48 (1986) ("Lawyer interviews with witnesses in preparation for testimony have become an accepted and standard practice in the United States.") (footnote omitted). Similarly, if a witness is unfamiliar with a courtroom or intimidated by the prospect of testifying or being cross-examined, a lawyer reas-

onably may put the witness at ease by practicing with him or suggesting mechanisms by which he can overcome his nervousness. *See, e.g.,* State v. McCormick, 259 S.E.2d 880, 882 (N.C. 1979) ("It is not improper for an attorney to prepare his witness for trial, to explain the applicable law ... and to go over before trial the attorney's questions and the witness'[s] answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can."); Applegate, *supra* note 2, at 298, 322 (discussing valid and potentially invalid justifications for preparing witnesses). It may also be perfectly acceptable for a lawyer to draft a witness's declaration in the lawyer's own words in order to expedite its signing or to avoid hearsay or other evidentiary objections that might flow from the witness's use of his own language.

On the other hand, the more that a lawyer substitutes her own words for the witness's and the more those substitutions change the facts to which the witness will testify, the greater the risk of suborning perjury or the creation of "false evidence." *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (forbidding lawyers to "knowingly" introduce false evidence); *id.* Rule 3.3(c) (authorizing lawyers, in their discretion, to refuse to offer evidence that they "reasonably believe" to be false). Some commentators have even suggested that helping to change the demeanor of a witness constitutes impermissible tampering with the underlying evidence every bit as much as helping to change the facts presented. *See, e.g.,* Applegate, *supra* note 2, at 298-99 (discussing problems of "molding" a witness's demeanor); Piorkowski, *supra* note 2, at 404-05 (discussing when influencing demeanor may be tantamount to changing the facts).

[FN23]. Compare, for example, a lawyer who observes in passing to a witness that "Your testimony isn't very persuasive," with a lawyer who makes the same observation with a wink.

[FN24]. *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (forbidding counseling or assisting a client in illegal conduct).

[FN25]. *See id.* Rule 3.3(a)(4).

[FN26]. *Id.* Rule 3.3(a)(2).

[FN27]. *See, e.g., id.* Rule 8.4(a) ("It is professional misconduct for a lawyer to ... violate or attempt to violate the Rules of Professional Conduct ... or do so through the acts of another.").

[FN28]. *See, e.g., id.* Rule 1.2(a) (allocating to lawyers control over the "means by which [client objectives] are to be pursued.").

[FN29]. *See, e.g., id.* Rule 1.7 cmt. (discussing loyalty); Rule 1.6 (adopting a strict rule of confidentiality).

[FN30]. For example, lawyers are only required to remedy client misconduct towards a tribunal when they "know" that misconduct has occurred. *See id.* Rule 3.3(a); *cf. id.* Rule 3.3(c) (granting a lawyer discretion not to introduce evidence that she "reasonably believes is false.").

[FN31]. The codes accordingly give lawyers control over certain decisions and suggest that lawyers may refrain from obtaining every potential benefit available to their client. *See, e.g., id.* Rule 1.2 (giving lawyers control over the means of litigation); *id.* Rule 1.2 cmt. (giving lawyers discretion not to press advantages). The codes accord lawyers discretion to act, or not to act, in numerous other situations as well. *See, e.g., id.* Rule 1.6(b) (setting forth exceptions to confidentiality); *id.* Rule 3.3(c) (giving lawyers discretion not to use certain evidence). *See generally* Fred C. Zacharias, *Reconciling Professionalism and Client Interests,* 36 WM. & MARY L.

REV. 1303 (1995) (describing lawyers' general reactions to the discretionary authority granted in the professional codes).

[FN32]. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c).

[FN33]. *See, e.g., id.* Rule 3.3 (describing lawyers' obligations to tribunals).

[FN34]. *See, e.g., id.* Rules 1.6, 3.3(b) (establishing exceptions to strict confidentiality).

[FN35]. *Id.* Rule 3.3(c).

[FN36]. *See* Zacharias, *supra* note 31 (discussing the reaction of lawyers to the availability of discretion in the codes).

[FN37]. Lawyers would be remiss if they did not prepare their witnesses for the pressures of the courtroom and the tricks of cross-examination. *See* ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL § 1.01 (Trial Practice Series 1988) (arguing that the preparation of witnesses is the most important aspect of trial advocacy); Applegate, *supra* note 2, at 289 ("The obligation to prepare [witnesses] ... is clear from the duties of competence and zealousness, however, the extent of that obligation is not clear."). In the view of at least some commentators, such preparation typically should include "possible ways in which the witness might respond to [argumentative] questions." John G. Koeltl & Paul C. Palmer, *Preparing A Witness to Testify: Addendum, in* LITIGATION 5, 36 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5135, 1992); *cf.* Wydick, *supra* note 2, at 52 (arguing that witness preparation should be designed to minimize its effect on the facts the witness will describe).

To be realistic, lawyers inevitably affect witnesses' testimony, at least to some extent, when the lawyers speak to witnesses in the course of gathering evidence. In practice, therefore, lawyers can begin the process of preparing the witnesses for trial at the investigation stage. *See, e.g.,* MARVIN E. FRANKEL, PARTISAN JUSTICE 15 (1980) ("[E]very lawyer knows that the 'preparing' of witnesses may embrace a multitude of other measures, including some ethical lapses believed to be more common than we would wish.... [T]he process often extends beyond helping [to] organize what the witness knows, and moves in the direction of helping the witness to know new things."); Wydick, *supra* note 2, at 9-11 (discussing ways in which lawyers may affect witness testimony).

[FN38]. Lawyers in other countries, by contrast, find the very notion of preparing witnesses abhorrent. *See* Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century,* 21 FORDHAM INT'L L.J. 1239, 1249-50 n.37 (1998) (describing the Australian view that preparing witnesses is unethical and the Canadian view that it is illegal). In England, barristers typically do not even interview witnesses before trial. *See, e.g.,* Gordon Van Kessell, *Adversary Excesses in the American Criminal Trial,* 67 NOTRE DAME L. REV. 403, 435 (1992); Karen L.K. Miller, *Zip to Nil?: A Comparison of American and English Lawyers' Standards of Professional Conduct, in* CIVIL PRACTICE AND LITIGATION TECHNIQUES IN THE FEDERAL COURTS 199, 204 (A.L.I.-A.B.A. Continuing Legal Educ. 1995).

[FN39]. *See* JEFFREY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS §§ 9.02, 9.04, 9.31 (Trial Practice Series 1992) (noting ways in which witness preparation is important to the adversary system); *cf.* Wydick, *supra* note 2, at 12 (noting the responsibility of an adversarial lawyer to present the relevant material in a "coherent and convincing manner").

[FN40]. *See* Applegate, *supra* note 2, at 340-41 (noting ways in which witness preparation supports the theory of adversarial advocacy); *cf.* Lon Fuller, *The Adversary System, in* TALKS ON AMERICAN LAW 31 (Harold J. Berman ed., 1961) ("The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation."). *See generally* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 VAND. L. REV. 45, 54-55 (1991) (identifying the theory of the adversary system).

[FN41]. *See, e.g.,* ARON & ROSNER, *supra* note 37, at 84; Koeltl & Palmer, *supra* note 37, at 22 (noting factors that influence the need for pre-deposition witness preparation).

[FN42]. Model Rule 3.3 makes clear that the production of false evidence is an evil that the code drafters wish lawyers to avoid. However, the codes preclude lawyers from introducing such evidence only in situations in which a lawyer "knows" that this evidence is false. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1998).

[FN43]. The codes suggest only a distinction between "knowing" and "unknowing" presentation of false evidence. *See id.* Rule 3.3. By contrast, the distinction we suggest here is between inadvertently and intentionally trying (or hoping) to produce false evidence.

[FN44]. We assume, for purposes of this discussion, that the use of false evidence would be tactically wise in the particular case. *Cf.* HAZARD, *supra* note 2, at 129-30 (discussing the questionable conclusion that cross-examination will ferret out false testimony).

[FN45]. The Model Rules expressly require lawyers to discuss "the status of a matter" with clients, but only vaguely suggest that the lawyer discuss moral issues as well. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a). *Compare id.* Rule 1.4 (requiring communication with clients) *with id.* Rule 2.1 (requiring lawyers to "exercise independent professional judgment and render candid advice"). To the extent the rules encourage attorneys to engage in moral discourse with clients, they do so by giving lawyers discretion in certain situations and by noting the existence of the sometimes conflicting values of client autonomy, the interests of third parties, and the goals of courts and the legal system. *See* Zacharias, *supra* note 31, at 1357-62 (discussing moral discourse between lawyers and clients).

[FN46]. The Model Rules give lawyers discretion in this area, but neither require active consideration of this option nor provide guidelines as to when its utilization would be appropriate. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4). Lawyers thus may well follow personal or financial incentives in the exercise of their discretion. *See, e.g.,* Zacharias, *supra* note 31, at 1327-50 (discussing various lawyer-based incentives, as opposed to client-based ones, that may affect the exercise of discretion).

[FN47]. *See, e.g.,* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (allocating to lawyers the decision making authority over the means employed in litigation).

It is beyond the scope of this Article to identify the precise methods that attorneys should use to divine ethical conduct in the coaching context. Others have begun that process. John Applegate, for example, "suggests that the appropriateness of any witness preparation technique should depend on whether the structure of the adversary system requires such a technique in the particular context in which it is employed." Applegate, *supra* note 2, at 282. Richard Wydick goes further and argues that a lawyer must prepare a witness "in the manner least likely to harm the quality of the witness's testimony." Wydick, *supra* note 2, at 52. Joseph Piorkowski takes the more preliminary approach-consistent with this Article's precepts-that lawyers should consider "whether their

witness preparation techniques may have the effect of inducing a witness to falsify or misrepresent material facts, either expressly through actual testimony or implicitly through demeanor." Piorkowski, *supra* note 2, at 390.

[FN48]. *See, e.g.,* CAL. VEHICLE CODE § 13352, 13352.5 (Deering 1999).

[FN49]. The information regarding the effect of probation-based Alcoholics Anonymous on California courts is based on Professor Shaun Martin's personal knowledge through observation, discussions with students, and conversations with practicing attorneys.

[FN50]. *See, e.g.,* RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rules 3-300, 3-310 (1996).

[FN51]. *See, e.g.,* CAL. BUS. & PROF. CODE § 6068(d) (West 1998) (requiring lawyers to employ "such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rule 5-200 (1996) (implementing § 6068(d)).

[FN52]. *See* RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CAL. Rule 5-200 (1996). Indeed, as long as the client truthfully testified that he was given a step-whether he had actually attended any of the required meetings or not-there would not even be any perjury to begin with, much less any that the lawyer had wilfully induced.

[FN53]. *See* D.C. Bar, Formal Op. 79 (1979) [hereinafter Formal Op. 79]. The Bar issued its opinion based upon provisions that follow MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980) and that were substantially identical to the provisions of the Model Rules.

[FN54]. Formal Opinion 79 specifically addressed whether lawyers could themselves write direct testimony of witnesses for submission to administrative agencies and, more broadly, "the ethical limitations on a lawyer's suggesting the actual language in which a witness's testimony is to be presented...." Formal Op. 79, *supra* note 53.

[FN55]. *Id.* (emphasis added).

[FN56]. *Id.*

[FN57]. *See* D.C. BAR CODE OF PROFESSIONAL RESPONSIBILITY (1972). The Code was in effect at the time of Formal Opinion 79. The D.C. Bar did not adopt the ABA's Model Rules of Professional Conduct until the mid- 1980s. *See Preface to* D.C. BAR RULES: APPENDIX A. RULES OF PROFESSIONAL CONDUCT (1998).

[FN58]. Formal Op. 79, *supra* note 53.

[FN59]. The deficiency of the D.C. Bar's approach is exemplified by common coaching practices in civil discovery. Lawyers in pretrial settings typically use preexisting documentary evidence to prepare clients and witnesses for their depositions. *See* THEODORE Y. BLUMOFF ET AL., PRETRIAL DISCOVERY: THE DEVELOPMENT OF PROFESSIONAL JUDGMENT § 67, at 188 (1993) (discussing deposition preparation). Recognizing that jurors emphasize the significance of such documents, lawyers sometimes attempt to dissuade friendly wit-

nesses from offering testimony that conflicts with the written records. Some lawyers also assume that jurors will believe even false testimony, so long as it is not contradicted by contemporaneous documents. Accordingly, it is common practice for such lawyers to encourage a witness to review key documents produced during discovery (and transcripts of earlier testimony) before his deposition. The witness can thus predict what the other side can, and cannot, safely contend. The witness may, perhaps, then respond falsely to the questions he is asked.

The lawyer, of course, owes a duty to help the witness avoid surprise. *See, e.g., id.* § 67, at 182-85 (preparing friendly witnesses for depositions is a lawyer's pretrial duty); A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 323-24 (1998). We do not mean to suggest that preparing a witness is *per se* improper, nor do we dispute that showing the witness documentary evidence can have legitimate aims. In reality, however, the information that the lawyer provides often is designed to enable the witness to respond creatively to the available documentary evidence. Witnesses can feel relatively safe in articulating untrue claims so long as their testimony does not conflict with the written evidence. Attorneys who "coach" their clients or witnesses to fashion a story that is consistent with the written record can simultaneously foster the introduction of false testimony while remaining ignorant of the true set of facts. Under the D.C. Bar Opinion's approach, lawyers are justified in introducing the altered testimony on the grounds that the lawyers do not "know" that it is false. *See* Formal Op. 79, *supra* note 53.

[FN60]. This dilemma is discussed in Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 182-83 (1996) (discussing difficulties in having lawyers apply different roles to different clients).

[FN61]. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.16, 2.1, 3.3(c) (1998).

[FN62]. As Wigmore noted long ago:

> [T]o prevent the abuse by any definite rule seems impracticable.
>
> It would seem, therefore, that nothing short of an actual fraudulent conference for concoction of testimony could properly be taken notice of; there is no specific rule of behavior capable of being substituted for the proof of such facts.

2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §788 (2d ed. 1923).

[FN63]. *Cf.* Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 705 (1991) ("The Code fails to impose any significant limit on a lawyer's conduct in preparing his own witnesses for trial, with the result that the propriety of the lawyer's conduct must be defined primarily by criminal laws dealing with subornation of perjury.") (footnotes omitted).

[FN64]. *See* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 261 (1993) (discussing the relationship between specificity in code provisions and their ability to cover a broad range of conduct).

[FN65]. *Cf.* Zacharias, *supra* note 31, at 1327-50 (discussing some of the many contexts in which the codes terms provide only limited guidance for lawyer conduct).

[FN66]. Letter from Susan David Dwyer, *supra* note 1.

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For Opinion See 122 S.Ct. 807

Supreme Court of the United States.
Dr. Donald C. AUSTIN, Petitioner,
v.
AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, Respondent.
No. 01-449.
November 6, 2001.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Respondent's Brief in Opposition

Russell M. Pelton, Counsel of Record, Michael A. Chabraja, Colleen E. Young, Ross & Hardies, 150 North Michigan Avenue, Suite 2500, Chicago, Illinois 60601, (312) 558-1000, Attorneys for Respondent.

QUESTIONS PRESENTED

Supreme Court Rule 14 requires that a Petition for Writ of Certiorari shall contain "[T]he questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail." The Rule further requires that "[T]he questions should be short and should not be argumentative or repetitive." The questions presented by the Petitioner fail to comply with the Rule in that they improperly argue and/or suggest that only surgeons who testify for plaintiffs are subject to punishment under the Association's disciplinary procedures.

A proper statement of the questions will assist the Court in determining whether to grant or deny the Petition. The Respondent accordingly presents this Court with the following questions:

(1) Whether a disciplinary action taken by a private association with respect to one of its members is subject to judicial review under Illinois law where the member fails to show that an important economic interest is at stake.

(2) Whether a private, voluntary association of neurological surgeons may discipline one of its members who fails to abide by the association's code of ethics and expert witness guidelines applicable to all members who testify as expert witnesses in legal proceedings.

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

Respondent, the American Association of Neurological Surgeons, hereinafter referred to as "AANS", is the party responding to the Petition for Writ of Certiorari. The AANS is an Illinois not-for-profit organization with a membership comprised of neurosurgeons. The AANS has no stock and, accordingly, there is no parent or publicly held company that owns 10% or more of the Association's stock.

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***1 COUNTER-STATEMENT OP THE CASE**

At its core, this case concerns an internal disciplinary proceeding held by the American Association of Neuro- logical Surgeons ("AANS") with respect to one of its members. The AANS is a private, voluntary association of neurological surgeons whose primary purpose is to promote the advancement and pursuit of excellence in neurological surgery. Petitioner, Dr. Donald C. Austin ("Dr. Austin"), was a member of the AANS from 1963 to 1997, when he

was suspended for six months for violating the AANS' Code of Ethics and Expert Witness Guidelines. Upon the effective date of his suspension, April 14, 1997, Dr. Austin resigned from the AANS and never attempted to reinstate his membership.

The disciplinary proceeding against Dr. Austin stemmed from expert witness testimony he provided on behalf of the plaintiff in a medical malpractice action against Dr. Q. Michael Ditmore, a neurological surgeon and member of the AANS. The plaintiff in that action sustained permanent injury to her recurrent laryngeal nerve after an anterior cervical fusion surgery performed by Dr. Ditmore. Dr. Austin opined that the mere existence of a permanent recurrent laryngeal nerve injury establishes surgical negligence and that the neuro-surgical community generally accepted his opinion. The jury returned a verdict in favor of Dr. Ditmore and against the plaintiff.

Subsequent to the conclusion of the malpractice action, Dr. Ditmore exercised his right under the AANS' Bylaws to file a charge of unprofessional conduct against Dr. Austin. Dr. Ditmore asserted that Dr. Austin's testimony had violated the AANS' Code of Ethics and Expert Witness Guidelines. The AANS' Code of Ethics mandates ***2** that a member who testifies as an expert witness shall "diligently and thoroughly prepare himself or herself with relative facts so that he or she can, to the best of his or her ability, provide the court with accurate and documentable opinions on the matters at hand." The Expert Witness Guidelines require that prior to offering expert testimony, a member should, *inter alia*, become familiar with all pertinent data of the particular matter at issue; review prior and current concepts related to standard neurosurgical practice in the matter at issue; and identify as such, personal opinions not generally accepted by other neurosurgeons.[FN1]

> FN1. The AANS' Expert Witness Guidelines encourage member neurosurgeons to testify impartially and prudently for both plaintiffs and defendants in matters brought before the courts.

The AANS' Professional Conduct Committee ("PCC"), which processes charges of unprofessional conduct of any nature brought by one member against another, held a formal hearing on Dr. Ditmore's charge against Dr. Austin on October 15, 1995. Dr. Ditmore and Dr. Austin both attended the hearing and were represented by counsel. The PCC concluded that Dr. Austin violated the AANS' Code of Ethics and Expert Witness Guidelines in an "egregious manner" and recommended in its written report that Dr. Austin be suspended from AANS membership for a period of six months.

On April 26, 1996, the AANS' Board of Directors approved by secret ballot the PCC's recommendation to suspend Dr. Austin for a six-month period. As was his right under the AANS' Bylaws, Dr. Austin elected to appeal the suspension to the AANS' general membership ***3** at its next annual meeting on April 14, 1997. The AANS' general membership sustained the Board's suspension of Dr. Austin.

On December 1, 1998, Dr. Austin filed his complaint against the AANS, alleging that his suspension "was influenced by bias and prejudice and not made in good faith." Dr. Austin sought damages measured by the decline in his expert-witness income as a result of the suspension. In addition to monetary relief, Dr. Austin sought a mandatory injunction directing the AANS to expunge the record of the suspension.

The district court granted the AANS' motion for summary judgment, concluding that Dr. Austin failed to make a showing sufficient to warrant judicial interference in the internal affairs of a private association under Illinois law. The district court observed that under Illinois law, "the only bases for a court's power to interfere in the internal operations of a private association are violation of internal association rules, deprivation of due process, or bad faith." (Pet. App. 22.) As Dr. Austin failed to demonstrate violation of internal association rules,

deprivation of due process or bad faith, the district court determined that "he loses as a matter of law." (Pet. App. 22.)

The Seventh Circuit affirmed the entry of summary judgment by the district court. Writing for the court, Judge Posner observed that dismissal of the suit was correct because Dr. Austin failed to show that an important economic interest, as the term is defined under Illinois law, was at stake. The court noted that member-ship in the AANS is not a precondition to Dr. Austin's primary profession, the practice of neurosurgery. (Pet. App. 7.) The court flatly rejected Dr. Austin's argument ***4** that a decline in his expert-witness income constituted an important economic interest, stating that a decline in "moonlighting income" is not the kind of "professional body blow that the cases have in mind when they speak of an important economic interest jeopardized by the action of a voluntary association." (Pet. App. 8.)

The court of appeals also found that there was no basis for Dr. Austin's claim that the AANS only entertains complaints against members who testify on behalf of malpractice plaintiffs:

What is true is that to date all complaints (but there have been very few) have been against such members; but the reason is at once obvious and innocent. If a member of the Association is sued for malpractice and another member gives testimony for the plaintiff that the defendant believes is irresponsible, it is natural for the defendant to complain to the Association; a fellow member has irresponsibly labeled him negligent. If a member of the Association who testifies for a plaintiff happens to believe that the defendant's expert witness was irresponsible, he is much less likely to complain, because that expert (and fellow member of the Association) has not accused him of negligence or harmed him in his practice or forced him to stand trial or gotten him into trouble with his liability insurer. The asymmetry that Austin points to as evidence of bad faith is thus no evidence of bad faith at all; and he has no other evidence of bad faith.

(Pet. App. 8-9.) The court of appeals rejected Dr, Austin's argument that the AANS' Code of Ethics and Expert Witness Guidelines, as written and applied, impede the ***5** cause of justice and violate public policy. The court concluded that "professional self-regulation" or "policing of expert witnessing" serves to further rather than impede the cause of justice. (Pet. App. 9-11.)

MISSTATEMENTS IN THE PETITION

The Petition contains numerous misstatements of fact. In compliance with Supreme Court Rule 15.1, the AANS notes the following misstatements contained in the Petition:

1. Petitioner asserts that the AANS' Professional Conduct Committee found that his testimony in the malpractice action was "unsupported by literature or logic." (Pet. 2.) Petitioner misstates the PCC's findings. The PCC concluded as follows:

The Professional Conduct Committee has concluded that there is no convincing basis in either literature or logic for [Dr. Austin's] testimony that permanence of a recurrent laryngeal nerve injury establishes surgical negligence as its cause. Furthermore, the Committee feels Dr. Austin's assertion that this opinion is generally accepted by the neurosurgical community is entirely false. The Professional Conduct Committee believes that Dr. Austin is in violation of AANS Expert Witness Guidelines in that he failed to present to the court those opinions which represent the broad spectrum of neuro- surgical thought and practice; and, more specifically, in violation of 16(a)(2) in that his testimony revealed that he did not adequately review prior and current concepts related to standard ***6** neurosurgical practice in the matter at issue; and 16(a)(4) in that he falsely represented his own opinion as that of the profession generally. From Dr. Austin's testimony cited above, the Committee also concludes that Dr. Austin did not diligently and thoroughly prepare himself with the relative facts and did not provide the court with accurate and documentable opinions as to the matter of permanent injury of the recurrent laryngeal nerve in anteri-

or cervical fusions, in violation of Section V(B) of the AANS' Code of Ethics. The Committee believes that Dr. Austin's testimony in this case was a particularly egregious violation of AANS testimony guidelines.

(Report of the Professional Conduct Committee at 4-6.)

2. Petitioner asserts that "the only medical expert disclosed in pre-trial proceedings opined that Dr. Aus- tin's testimony was correct." (Pet. 2, n. 1.) In making such an assertion, Petitioner vastly overstates the opinion of his own expert witness, Dr. Robert L. McLaurin. Dr. McLaurin opined that "permanent paralysis *usually* results from severe traction, compression, or actual diversion of the nerve" and that the nerve injury in the underlying medical malpractice action "was the result of a moderately severe or severe injury to the nerve." (McLaurin Report) (emphasis added). Dr. McLaurin did not opine that the mere existence of permanent injury establishes surgical negligence as its cause.

3. Petitioner states that he has "never contended that the procedures the AANS followed were unfair or inadequate." (Pet. 2, n. 2.) However, in his sworn Answers to Interrogatories, Petitioner asserted that the AANS failed "to conduct a fair and unbiased hearing." Further, in his ***7** sworn Answers and Objections to the AANS' Second Set of Interrogatories, Petitioner charged that the Octo- ber 15, 1995 hearing before the PCC was biased and unfair. Petitioner failed to develop any such evidence of unfairness during the course of discovery and he has now abandoned that as an element of his case.

4. Petitioner asserts "that the district court was presented with unrebutted evidence that the Expert Witness Guidelines under which Dr. Austin was punished were established by the AANS for the purpose of manipulating the manner in which the judicial system was handling medical malpractice cases." (Pet. 3.) Petitioner failed to make such a showing to the district court or the court of appeals. The 1976 report of the AANS' Professional Liability Committee, upon which Dr. Austin bases his assertion, completely undermines his claim:

We would emphasize that the role of the expert witness is not to win the case for his client. That is the lawyers' role. The expert must confine his role to that of a technical resource, explaining and documenting the concerns, responsibilities and practices of a responsible neurosurgeon in the matter at issue. Slanting of testimony by an "expert" for either side is professionally abhorrent and the AANS has the duty, as the spokes-man for American neuro surgery, to be sure that its members do not engage in these practices.

(Report of the Professional Liability Committee at 244.)

5. The Petition implies that the AANS' Expert Witness Guidelines were enacted on the heels of the 1976 report of the Professional Liability Committee. (Pet. 3-4.) However, it is undisputed that the current Expert Witness***8** Guidelines were not adopted by the AANS' Board of Directors until December of 1983.

6. Petitioner asserts that "all prosecutions under the Expert Witness Guidelines" have been brought against members who testified on behalf of plaintiffs and that "[n]o defendant's expert has ever been charged." (Pet. 5.) However, Dr, Austin himself filed a charge of unprofessional conduct against a member he accused of giving improper expert testimony on behalf of a defendant surgeon. (Blackett Dep. at 20.)

7. Petitioner asserts that if an expert witness opinion cannot be found in the medical literature, the AANS' Code of Ethics prohibits its members from expressing that opinion in court. (Pet. 16.) Neither the AANS' Code of Ethics nor its Expert Witness Guidelines contain such language. The Code of Ethics mandates that a member who testifies as an expert shall "diligently and thoroughly prepare himself or herself with the relative facts" so as to provide the court with "accurate and documentable

opinions on the matters at hand." The Expert Witness Guidelines require that members who testify as expert witnesses must identify as such, "personal opinions not generally accepted by other neurosurgeons."

REASONS FOR DENYING THE WRIT

The Seventh Circuit's decision does not warrant review. The decision below is in accord with well-settled principles of Illinois law pertaining to judicial review of the internal affairs of a private association. The ruling is also consistent with decisions of this Court as well as many others regarding the ability of a professional association to discipline its members for failing to abide ***9** by the association's internal rules. Petitioner has stated no reasonable basis for review of the decision of the court of appeals and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I. THE DECISION BELOW DOES NOT CONFLICT WITH ILLINOIS LAW PERTAINING TO JUDICIAL REVD2W OF THE INTERNAL AFFAHtS OF A PRIVATE ASSOCIATION.

Dr. Austin's Petition does not warrant review by this Court because the Seventh Circuit decided the case in accordance with Illinois law relating to judicial review of the internal affairs of a private association. The court of appeals determined that the entry of summary judgment was appropriate because Petitioner failed to show that "an important economic interest" was at stake. (Pet. App. 7.) The court of appeals' holding is correct and is not at odds with Illinois law as it pertains to private associations.

Under Illinois law, private associations have great discretion when conducting their internal affairs, especially when their conduct relates to the interpretation and enforcement of association rules and regulations. *International Test and Balance, Inc. v. Associated Air and Balance Council*, No. 98 C 2553, 1999 WL 377849, at *7 (N.D. Ill. Jun. 7, 1999); *Engel v. Walsh*, 101 N.E. 222, 223-224 (Ill. 1913); *Lee v. Snyder*, 673 N.E.2d 1136, 1139 (Ill. App. Ct. 1996). Judicial intervention in the internal affairs of a voluntary association is only appropriate when: (1) the operation of the association significantly harms an important economic interest of the plaintiff belonging to the association when it acted; and (2) the association either (a) failed to act in accord with its own ***10** constitution and bylaws; (b) was influenced by bias, prejudice, or lacking in good faith; or (c) violated due process. *Van Daele v. Vinci*, 282 N.E.2d 728, 731-32 (Ill. 1972); *Finn v. Beverly Country Club*, 683 N.E.2d 1191, 1193 (Ill. App. Ct. 1997); *National Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1285 (7th Cir. 1985).

Applying the above standard, the court of appeals found that Petitioner's six-month suspension from the AANS did not constitute harm to "an important economic interest" as defined under Illinois law. (Pet. App. 7-8.) The court of appeals observed that membership in the AANS is not a precondition to the practice of neurosurgery and that Petitioner continued to practice neurosurgery notwithstanding his suspension and subsequent voluntary resignation from the AANS.[FN2] (Pet. App. 7.) Under Illinois law, where membership in an association is optional, suspension/expulsion or denial of admission is not deemed the invasion of an important economic interest. *Treister v. American Academy of Orthopaedic Surgeons*, 396 N.E.2d 1225, 1231-32 (Ill. App. Ct. 1979); *Finn*, 683 N.E.2d at 1193; *Lee*, 673 N.E.2d at 1139. *See also San Juan v. American Bd. of Psychiatry and Neurology, Inc.*, No. 93 C 5806, 1994 WL 66077, at *1 (N.D. Ill. 1994) (plaintiff does "not come close" to satisfying economic necessity requirement where membership merely improves professional opportunities); *Kaneria v. American Ed. of Psychiatry and Neurology, Inc.*, 832 F. Supp. 1226, 1230 (N.D. Ill. 1993) (benefits such as additional salary, career advancement, service as expert witness, and enhanced recognition, although economically***11** desirable, clearly do not rise to the level of economic neces-

sity).

> FN2. The Seventh Circuit also noted that the "AANS is not even the only association of such surgeons." (Pet. App. 7.)

Notably, the court of appeals rejected Petitioner's argument that the drop in his expert-witness income constituted an important economic interest jeopardized by the action of a voluntary association:

True, his income from testifying has fallen to 35 percent of what it was before the suspension, when it was more than $220,000 a year. Austin's brief describes this drop in income as "disastrous" and "catastrophic," but that is a hyperbolic characterization. Thirty-five percent of $220,000 is a healthy $77,000-and this is merely as it were Dr. Austin's moonlighting income, income from a sideline to his primary profession, which is that of a neurosurgeon, not an expert witness (he does not claim the dubious title of "professional expert witness"). That is not the kind of professional body blow that the cases have in mind when they speak of an "important economic interest" jeopardized by the action of a voluntary association.

(Pet. App. 7-8.) The court of appeals further noted that, at the very least, the "association's action must jeopardize the principal source of the professional's livelihood, and not a mere sideline." (Pet. App. 8.)

Petitioner does not challenge, let alone acknowledge, the court of appeals' ruling that he failed to show that membership in the AANS is an important economic interest. Without such a showing, a court is precluded from involving itself in the internal affairs of an association under Illinois law. *Kaneria*, 832 F. Supp. at 1230. ***12** Thus, further review by this Court is completely unwarranted.

II. THE DECISION BELOW IS CONSISTENT WITH COMMON LAW PRECEDENT REGARDING THE ABILITY OF A PROFESSIONAL ASSOCIATION TO DISCIPLINE A MEMBER FOR FAHJNG TO ABIDE BY THE ASSOCIATION'S INTERNAL RULES.

In a transparent attempt to give this case broader appeal, Petitioner argues that the court of appeals' decision departs from "300-year-old insights" which the common law has used to protect our judicial system from manipulation. Contrary to Petitioner's hyperbole, the decision below does not overturn any common law precedent as it relates to protecting witnesses from the threat of subsequent civil liability arising out of their testimony. Rather, the ruling properly reflects the distinction between civil liability and professional discipline and does not call for review by this Court.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court held that in initiating a prosecution and presenting a state's case, a prosecutor is immune from a civil suit for damages under 42 U.S.C. § 1983. However, the Court emphasized that the policy considerations which compel immunity from civil liability for prosecutors did not preclude professional discipline:

Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

***13** *Id.* at 429. Following this Court's lead, numerous other courts have distinguished professional discipline from civil liability and determined that the policies served by protecting witnesses from civil liability as a result of their testimony do not act as a bar to professional discipline.

For example, in *Deatherage v. State of Washington Examining Board of Psychology*, 948 P.2d 828 (Wash. 1997), the Washington Supreme Court held that the witness immunity doctrine did not bar a state licensing board from initiating professional disciplinary proceed- ings against an expert witness. In so holding, the court stated that a "disciplinary proceeding is not a civil suit against the expert, and the policies that underscore witness

immunity do not apply." *Id.* at 831. The court also stated that allowing a professional to be subjected to discipline for unprofessional conduct "serves to advance the court's goal of accurate testimony from expert witnesses, and furthers the disciplinary board's goal of protecting the public." *Id.* at 832. Reiving upon the principles enumerated in *Imbler*, the court noted that the threat of professional discipline is an appropriate check on individuals who are otherwise immune from civil liability. *Id.*

Similarly, in *Budwin v. American Psychological Ass'n*, 29 Cal. Rptr. 2d 453 (Cal. Ct. App. 1994), the California Appellate Court held that a professional association is not precluded by the litigation privilege from disciplining a member for making false representations in a judicial proceeding. *Id.* at 458. Drawing on this Court's discussion of amenability to professional discipline in *Imbler*, the California Appellate Court observed that the litigation privilege "has not been extended to preclude professional disciplinary liability." *Id.* at 457. The court also ***14** stated that "a perfectly legitimate objective of professional associations is to attempt to elevate professional standards." *Id.* at 459.[FN3]

> FN3. *See also Silberg v. Anderson*, 786 P.2d 365, 373 (Cal. 1990) (absolute immunity for attorney does not prohibit professional discipline); *Moses v. McWilliams*, 549 A.2d 950, 954 n.7 (Pa. Super. Ct. 1988) (absolute immunity for physician does not prohibit professional discipline).

After considering the relevant facts and the applicable law, the court of appeals properly determined that it was not against public policy for the AANS to discipline Petitioner for giving expert testimony that violated the Association's Code of Ethics and Expert Witness Guidelines. The court explained, "this kind of professional self-regulation rather furthers than impedes the cause of justice." (Pet. App. 9.) The court of appeals also observed that the AANS, as well as the community at large, have an interest in Dr. Austin "not being able to use his membership to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves." (Pet. App. 9.) The decision below is consistent with this Court's decision in *Imbler* as well the decisions of other courts that have had occasion to consider this issue. Accordingly, review by this Court is unnecessary.

Significantly, none of the cases relied upon by Petitioner support his claim that the litigation or testimonial privilege somehow acts as a bar to professional discipline. Petitioner's reliance on this Court's decision in *Briscoe v. LaHue*, 460 U.S. 325 (1983), is misplaced. In *Briscoe*, this Court held that 42 U.S.C. § 1983 does not authorize a convicted person to assert a damages claim against a police officer for giving perjured testimony at ***15** his criminal trial. *Id.* at 325-326. The Court observed that subjecting government officials such as police officers to damages liability under section 1983 would likely result in an increase in lawsuits and would serve to divert police officers from the effective performance of their public duties. *Id.* at 342-43. There is nothing in this Court's opinion in *Briscoe* which even remotely suggests that it intended to shield a paid expert witness like the Petitioner from professional discipline for giving improper testimony in a judicial proceeding.

Petitioner's reliance on *Konrod v. De Long*, 57 F.R.D. 123 (N.D. Ill. 1972), *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. Spec. App. 1978), and *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) is similarly misplaced. All of these cases are factually distinguishable as they involved threats of witness intimidation made during a pending case in which the witness was testifying. The AANS' policy is to refrain from even considering charges of unprofessional conduct until after the resolution of the underlying suit. (AANS Code of Ethics.)

Finally, Dr. Austin's invocation of the California Appellate Court's decision in *Bernstein v. Alameda Contra Costa Med. Ass'n*, 293 P.2d 862 (Cal. Ct. App. 1956), to support his Petition is flawed. In *Budwin v. American Psychological Ass'n*, the Cali-

fornia Appellate Court strictly limited *Bernstein* to its facts, stating as follows:

Furthermore, as the *Bernstein* court noted implicitly, the ethical rule at issue there prohibited any criticism of the preceding doctor, even if it were truthful and made in good faith. The *Bern-stein* court focused on the width of this ethical broad brush, and concluded that its application to disparaging statements made in the course of ***16** legal proceedings violated the public policy articulated in section 47(b). The court did not hold that section 47(b) precluded a voluntary, professional association from disciplining a member for misrepresentations made in the course of an official proceeding; no California court in nearly 40 years of *Bernstein's* existence has read the decision that way.

Budwin, 29 Cal. Rptr. 2d at 458. The *Bernstein* court's holding does not support Petitioner's claim that he is somehow immune from professional discipline and fails to provide a basis for this Court's review.

III. THE DECISION BELOW DOES NOT CONFLICT WITH *DAUBERT.*

In an attempt to create an issue worthy of writ consideration, Petitioner asserts that the Seventh Circuit's decision "effectively overruled *Daubert.*" (Pet. 18.) Petitioner argues that the decision below will allow medical societies such as the AANS to interfere with the "gate-keeping" function of the trial judge in determining the admissibility of expert testimony in judicial proceedings. Petitioner further argues that the AANS' standards governing expert testimony are inconsistent with *Daubert.* Both contentions are meritless.

A. The Decision Below Does Not Interfere With The District Court's Gate-Keeping Role.

In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court established a two-prong analysis for determining whether expert testimony is admissible under the Federal Rules of Evidence. The ***17** analysis requires the district court to perform a "gate-keeping" role. *Id.* at 595. First, the district court must determine whether the expert's testimony is based on scientific knowledge. *Id.* at 592. The Court identified four factors that the district court might consider in evaluating scientific validity: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the method's known or potential rate of error; and (4) whether the theory or technique finds general acceptance in the scientific community. *Id.* at 593-594. Under the second prong of the analysis, the district court must determine whether the proffered expert testimony "will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592.

Petitioner's argument that the decision below infringes upon the autonomy of the district court in performing its gate-keeping function is based on a tortured reading of the court of appeals' opinion. Nowhere in the opinion did the Seventh Circuit suggest that the AANS, or any other medical society, has the right or authority to decide the admissibility of expert testimony. Instead, the opinion makes clear that the *Daubert* analysis remains squarely within the exclusive province of the district court. The Seventh Circuit's ruling simply reflects its view that no conflict exists between the district court's gate-keeping function and the AANS' enforcement of its internal rules relating to the content of expert testimony.

Further, nothing in the AANS' rules themselves speaks of admissibility of expert testimony. The AANS' rules require that a member appearing as an expert witness testify "prudently" and "identify as such personal opinions not generally accepted by other neurosurgeons." The rules further require that a member testifying***18** as an expert witness "provide the court with accurate and documentable opinions on the matters at hand." The rules are absolutely devoid of any language relating to admissibility.

The AANS' enforcement of its Code of Ethics and

Expert Witness Guidelines also has no impact on the district court's gate-keeping function. The AANS' disciplinary process is an "after-the-fact" self-policing mechanism. The district court's gate-keeping role, on the other hand, involves a pre-testimony screening for reliability and relevance of an expert's opinions. Contrary to Petitioner's suggestion, the gate-keeping role of the district court set forth in *Daubert* in no way prohibits self-policing in the medical community.

B. The AANS' Standards Governing the Content of Expert Witness Testimony Are Not Inconsistent With *Daubert*.

Petitioner asserts that the AANS' standards preclude its members from expressing an expert opinion in court if the "opinion is not found in the medical literature" and that such a blanket rule is forbidden under *Daubert*. Petitioner's argument misstates the AANS' rules. Neither the AANS' Expert Witness Guidelines nor its Code of Ethics contain such a limitation.

The Expert Witness Guidelines require an expert witness to adequately review prior and current concepts related to standard neurosurgical practice in the matter at issue and to distinguish his or her own personal opinions from those generally accepted by other neurosurgeons. (Expert Witness Guidelines 16a(2) and (4).) The Code of Ethics requires an expert witness to "diligently ***19** and thoroughly prepare himself or herself with relative facts so that he or she can, to the best of his or her ability, provide the court with accurate documentable opinions on the matters at hand." (Code of Ethics V(B).) Contrary to Petitioner's assertion, neither standard can be read as a "blanket rule" requiring that an opinion be found in medical literature before it can be expressed in court.[FN4]

> FN4. By requiring thorough preparation and review of "prior and current concepts related to standard neurosurgical practice in the matter at issue," the AANS' standards are entirely consistent with the factors enumerated in *Daubert* for determining whether an expert's opinion is based on scientific knowledge. Similarly, the AANS' requirement that members serving as expert witnesses distinguish personal opinions from those generally accepted as the proper standard of care also correlates with the factors enumerated in *Daubert*.

Petitioner's characterization of the AANS standards as applicable only to plaintiffs' experts is likewise flawed. As the court of appeals observed, "[t]here is no basis for Austin's claim that the Association entertains only complaints against members who testify on behalf of malpractice plaintiffs." (Pet. App. 8.) The Expert Witness Guidelines apply to all members, regardless of whether they testify on behalf of plaintiffs or defendants. The decision below is in no way inconsistent with *Daubert* and does not warrant review by this Court.

IV. THIS CASE DOES NOT HAVE FAR-REACHING IM-PLICATIONS IN MEDICAL MALPRACTICE LITIGATION.

Petitioner argues that the court of appeals' decision will "quickly and dramatically" tilt the playing field in ***20** medical malpractice litigation "in favor of defendants." Indeed, he goes so far as to suggest that the court of appeals "effectively has given the AANS, and every other medical society, the power to control medical malpractice litigation against doctors."[FN5] Petitioner's argument greatly overstates the significance of the decision below and fails to create an issue worthy of writ consideration.

> FN5. Petitioner asserts that by filing an *amicus curiae* brief in support of the AANS, the American Medical Association, the Illinois State Medical Society and the American College of Surgeons demonstrated that "they, too, plan to implement similar rules." There is nothing in the record which supports Petitioner's baseless assertion.

Grasping at straws, Petitioner suggests that the AANS' Expert Witness Guidelines and Code of Ethics, as written and applied, are designed to punish and/or "silence" plaintiffs experts. Significantly, Petitioner fails to cite any section of the Expert Witness Guidelines or Code of Ethics that is inherently biased against members who choose to testify on behalf of plaintiffs in medical malpractice actions. The Expert Guidelines and Code of Ethics set forth guiding principles for the content of expert testimony. The provisions apply to the expert testimony of any member, regardless of whether the opinion testimony is rendered on behalf of a plaintiff or a defendant.[FN6]

> FN6. Although, as Petitioner points out, the majority of charges have been brought against members who testified on behalf of plaintiffs, there is nothing in the Expert Witness Guidelines or Code of Ethics that prevents a member from bringing a charge of unprofessional conduct against a member who testified for a defendant. Indeed, Petitioner himself filed a charge of unprofessional conduct against a member he accused of giving improper expert testimony on behalf of a defendant doctor. Petitioner subsequently elected not to prosecute the charge.

***21** Further, Petitioner's argument that the AANS' Expert Witness Guidelines will deter the great majority of surgeons from testifying as experts on behalf of plaintiffs is undermined by Petitioner's own behavior. As the court of appeals observed, Petitioner "continues to testify extensively as an expert witness in medical malpractice cases." (Pet. App. 7.) Thus, the perceived threat of "severe economic sanctions" certainly has not deterred Petitioner from testifying as an expert on behalf of plaintiffs.

Petitioner's argument is further undercut by the limited number of proceedings instituted under the Expert Witness Guidelines and the even fewer number of actions that resulted in suspension or expulsion from the AANS. Since the adoption of the Expert Witness Guidelines in 1983, a total of twenty disciplinary proceedings have been brought against members who were alleged to have provided improper testimony on behalf of a plaintiff. Of those twenty proceedings, four resulted in suspension of membership and one resulted in expulsion from the AANS. (Answer to Pl's Interrogs.) These are hardly the type of figures that will "quickly and dramatically" tilt the playing field in medical malpractice litigation. Simply stated, this case will have little to no impact on medical malpractice litigation and does not warrant this Court's review.

*22 CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 6th day of November, 2001.

Dr. Donald C. AUSTIN, Petitioner, v. AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, Respondent.
2001 WL 34115584 (U.S.) (Appellate Petition, Motion and Filing)

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Georgetown Journal of Legal Ethics
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Note

*217 EXPERT WITNESSES AT TRIAL: WHERE ARE THE ETHICS?

"Gentlemen of the jury, there are three kinds of liars: the common liar, the damned liar, and the scientific expert." [FN1]

Justin P. Murphy [FNa1]

INTRODUCTION

An expert is an individual who was not present when the "incident" occurred, but for a healthy fee will happily imagine what it was like and how it happened. [FN2] In today's litigation, expert witness testimony plays a crucial role. [FN3] Because of experts' important role in successful litigation, [FN4] attorneys actively "shop" for those willing to support their cause, [FN5] even at exorbitant prices. [FN6] Today, criticism of expert witnesses is widespread throughout the legal community. [FN7] One can find ***218** and hire an expert to testify on virtually any topic, [FN8] and even simple lawsuits often involve the testimony of an expert witness. [FN9] As a result, questions surface regarding the impartiality of expert testimony, [FN10] and concerns arise about the potential for ethical misconduct. [FN11]

Part I of this Note will explore the rules that govern expert testimony at trial. The *Federal Rules of Evidence* and the Supreme Court have prescribed the ***219** methods by which experts appear at trial, and this Note will discuss how these rules influence the ethics of testifying experts. Part II will offer an overview of the professional ethical standards that concern experts at trial. Legal ethics guidelines restrict the attorneys who hire the experts, but the experts themselves are bound by their own particular professional organizations. Guidelines promulgated by professional organizations are vague and broad and do little to enforce ethical conduct by experts. Finally, Part III will propose the creation of an organization to assist trial courts in obtaining unbiased, reliable, and valid expert witness testimony.

I. EXPERT TESTIMONY UNDER THE RULES

A. THE *FEDERAL RULES OF EVIDENCE*

In 1975, the *Federal Rules of Evidence* were adopted to promote the "growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." [FN12] Although experts are sometimes called mercenaries, prostitutes, hired guns, or witnesses whose opinions are sold to the highest bidder, [FN13] the *Federal Rules of Evidence* Rules 702 through 705 reflect a liberal standard in favor

of the admissibility of expert testimony. [FN14] These rules provide the framework by which every expert appears at trial and testifies before the trier of fact.

Rule 702, Testimony by Experts, addresses the admissibility of expert testimony by defining who may testify as an expert in court. The rule states that "[i]f 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." [FN15] The rule broadly defines an expert witness as any person with knowledge, skill, experience, training, or education. [FN16] The court must ask: Does this particular person possess enough specialized or skilled knowledge about the subject matter in question to enable him or her to assist the trier of fact?

"Assuming the witness is qualified, the question whether he may testify as an expert turns mostly on whether his testimony will help the trier of fact understand ***220** the evidence or determine a fact in issue." [FN17] This "helpfulness" standard may depend on the difficulty of the subject matter; a complicated or technical issue will necessitate a person with specialized training to explain the issue for a jury, whereas some subjects are within the comprehension and common sense of a typical juror. [FN18] Essentially, the rule's helpfulness standard "goes primarily to relevance," [FN19] and it is balanced by Rule 403's requirements that evidence possess probative value and not be prejudicial. [FN20] Furthermore, questions concerning the helpfulness of expert testimony are usually resolved in favor of admission. [FN21] In some instances, "the helpfulness standard for admissibility might be replaced or eroded by a 'let it all in' philosophy." [FN22] In general, opinions from experts will be excluded only when they "are unhelpful and therefore superfluous and a waste of time." [FN23]

Rule 703 of the *Federal Rules of Evidence* governs the sources on which experts may base their testimony. The rule provides that:

> 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. [FN24]

Rule 703's purpose is to "broaden the basis for expert opinions beyond that currently used in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court." [FN25] In addition to being able to testify from first-hand knowledge, experts can also rely on facts or other forms of information made available at trial. The rule permits hypothetical questions and expands the sources that experts can utilize to form their opinions by permitting reliance on materials that they would normally consult outside of ***221** the courtroom. [FN26] Finally, the second sentence permits experts to base opinions on information that would be inadmissible in court, as long as they would reasonably rely upon that information in their field of expertise. An assumption of the trustworthiness of the data in question is necessary for the expert's testimony to proceed. [FN27] Rule 703's "reasonableness" allowance facilitates the admissibility of expert testimony, reduces the need for awkward hypothetical questions, prevents an expert from being barred due to a lack of firsthand knowledge, and permits the introduction of hearsay evidence because of the expert's reliance upon it. [FN28] In essence, the expert may give an opinion, utilizing his or her research and clinical case experience, as to how individuals in his or her field would view the relevant facts in issue.

Rule 704 permits opinion testimony on the ultimate issue that the jury will decide. It provides that:

> a. Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise

admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

b. No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are for the trier of fact alone. [FN29]

The Rules Advisory Committee claimed that the disappearance of the common law ultimate issue rule would not lower the bar to permit all opinion evidence, as any opinion must be helpful to be admitted. [FN30] Therefore, although an expert using his or her "skills" to tell a jury how to decide would seem *very* helpful, the Advisory Committee believed that "[t]hese provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach." [FN31]

Finally, in another expansion of the scope of the expert witness' testimony, Rule 705 permits the expert to testify as to his or her opinion without disclosing any underlying facts or data. [FN32] Under Rule 705, "[t]he expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the ***222** 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." [FN33] This rule destroys the need for the hypothetical question, as counsel no longer is required to raise relevant facts of a case or any scientific data. [FN34] Subject to the court's discretion, the examining lawyer can decide how or whether to reveal the expert's opinions. [FN35] Essentially, Rule 705 permits a qualified expert who has examined a party to go directly to the heart of the issue and state his or her conclusion before revealing any other information. [FN36]

The *Federal Rules of Evidence* have expanded the limits of permissible expert testimony. [FN37] In addition, some commentators have argued that the *Federal Rules* are one of the primary reasons for the high value placed on experts and their testimony and for their increasing use in litigation. [FN38] However, the full force of these rules was not felt until 1993, when the landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [FN39] was decided by the Supreme Court.

B. SCIENTIFIC EXPERT TESTIMONY

Prior to 1993, two cases set the validity standards for scientific evidence: *Frye v. United States* [FN40] and *United States v. Downing*. [FN41] In *Frye*, the court held that only scientific evidence that was "general[ly] accept[ed] in the particular field in which it belongs" could be admitted. [FN42] Under *Frye*, courts deferred to the relevant scientific community (not judges or lawyers) to decide whether or not ***223** the scientific evidence proffered was accepted in that particular scientific community. [FN43] Critics of the "general acceptance" test noted that novelty did not equal unreliability, especially since every scientific technique is new at some point in time. [FN44] The *Frye* test was used to prevent various types of expert testimony, including hypnotically induced testimony, psychological stress evaluations, and voiceprints. [FN45]

In *Downing*, the Third Circuit modified *Frye* using a three-factor validity standard. The court recognized the "helpfulness" test of Rule 702, noting that "some scientific evidence can assist the trier of fact in reaching an accurate determination of facts in issue even though the principles underlying the evidence have not become 'generally accepted' in the field to which they belong." [FN46] The court proposed a three-factor preliminary inquiry to determine the admissibility of novel scientific evidence:

> (1) the soundness and reliability of the process or technique used in generating the evidence; (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury; and (3) the

proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case. [FN47]

Under *Downing*, a new scientific theory that had not yet received widespread acceptance in the relevant scientific community could survive at trial, provided that other factors supported reliability of the evidence. [FN48]

In 1993, the Supreme Court rejected *Frye*'s general admissibility standard in favor of a more flexible inquiry and then set forth two requirements for scientific evidence to be admitted in federal court: reliability and validity. [FN49] First, *Daubert* found a reliability requirement implicit within Rule 702's promise that the "subject of an expert's testimony must be 'scientific ... knowledge.'" [FN50] "Scientific" requires a basis in the methods and procedures of science, and ***224** "knowledge connotes more than subjective belief or unsupported speculation." [FN51] According to the Court, these two concepts would ensure a standard of evidentiary reliability. [FN52] Second, the expert evidence being offered must be valid; it must "fit" the case as the type of "evidence or testimony [that would] 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" [FN53] The Court focused its inquiry on the fit of the experts' "principles and methodology" rather than on the conclusions they generate. [FN54] Together, these two requirements establish reliability and validity as a precondition to the admissability of expert testimony.

In addition, the Supreme Court entrusted the trial court judge with a more active role in screening expert testimony. As a gatekeeper, the trial judge must make "a preliminary assessment of whether the reasoning or methodology ... properly can be applied to the facts in issue." [FN55] The issue for the trial judge is not whether the testimony is correct, but whether the science supporting the testimony is reliable enough to be considered valid. [FN56]

Furthermore, the *Daubert* court outlined several nonexclusive factors for the trial court to utilize in making its preliminary assessment of reliability and validity. [FN57] First, the trial court should ask whether the theory or technique can be or has been tested. [FN58] Second, a court should consider whether the theory or technique has been subjected to peer review and publication. [FN59] "Submission to the scrutiny of the scientific community is a component of 'good science' in part because it increases the likelihood that substantive flaws in methodology will be detected." [FN60] Third, it is important for the court to consider a method's potential rate of error in order to evaluate the expert's conclusions. [FN61] The more errors that occur when applying the methodology or technique, the less likely the expert's testimony can be deemed reliable. Finally, the *Frye* "general acceptance" test can be a factor used by a trial court. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which ***225** has been able to attract only minimal support within the community' may be properly viewed with skepticism." [FN62]

Although *Daubert* failed to mention any additional factors for a trial judge to consider when determining the admissibility of expert scientific evidence, the factors suggested in *Downing* may offer further guidance. [FN63] For instance, a court could consider the novelty of the new technique, asking how it relates to more established modes of science. [FN64] The existence of specialized literature concerning the technique and its exposure to critical scientific scrutiny would enhance *Daubert's* inquiry as to whether a technique has been subjected to peer review and publication. [FN65] Likewise, independent research resulting from established procedures that generates specialized literature would facilitate reliability determination.

In addition, a court should closely examine the qualifications and expertise of the expert witness. [FN66] A court should ask: Does the purported expert possess expertise in the specific area in which he or she is offering an opinion? Does the expert have a focused background in the area in question, or is he simply masquerading as

a specialist to offer his expert testimony for the right price? Finally, a court could question the scientific technique's prior acceptance in other courts. [FN67] In how many other cases has a particular theory or science been advanced? A court should take "notice of expert testimony that has been offered in earlier cases to support or dispute the merits of a particular scientific procedure." [FN68]

After *Daubert*, courts have many factors at their disposal to determine whether or not to admit expert scientific evidence. However, the Ninth Circuit, considering *Daubert* on remand, recognized the difficult task that trial judges now face in applying these factors:

> Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before. The judge's task under *Frye* is relatively simple ... [u]nder *Daubert*, we must engage in a difficult, two-part analysis .... The first prong of *Daubert* [whether the experts' testimony reflects scientific knowledge] puts federal judges in an uncomfortable position. The question of admissibility only arises if it is first established that the individuals whose testimony is being proffered are experts in a particular field .... Yet something doesn't become "scientific knowledge" just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were "derived by the scientific method" be deemed ***226** conclusive .... [T] herefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method." [FN69]

The Ninth Circuit also noted the challenge judges face when a case concerns a new, cutting-edge science, where reasonable (and ethical) scientists can have sincere disagreements as to which techniques are acceptable and proper and whether or not the testimony would be reliable. [FN70] The court concluded by noting that "we take a deep breath and proceed with this heady task." [FN71]

In a recent decision, the Supreme Court ruled that the *Daubert* reliability requirement is not limited solely to scientific evidence, but to all Rule 702 testimony. In *Kumho Tire Company v. Carmichael*, [FN72] the Court addressed the issue of how *Daubert* should apply to the "testimony of engineers and other experts who are not scientists." [FN73] The Court held that *Daubert's* "general holding — setting forth the trial judge's general 'gatekeeping' obligation — applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." [FN74] Justice Breyer reasoned that it would be very difficult for a trial court to differentiate between scientific evidence and technical or other types of specialized testimony. [FN75] Furthermore, the Court saw no reason to create such a distinction, as experts "of all kinds tie observations to conclusions through the use of what Judge Learned Hand called 'general truths derived from ... specialized experience.'" [FN76]

Several difficulties relating to expert testimony emerge from *Daubert* and its progeny. First, despite the fact that *Daubert* appeared to provide a more liberal balancing test for admissibility, the exact opposite has occurred. [FN77] *Daubert* serves to both limit *and* facilitate the admissibility of evidence. New and novel scientific techniques that are not generally accepted (i.e. not mainstream) can be admissible ***227** under *Daubert*. [FN78] However, the "gatekeeping" judge must "scrutinize carefully the proffered scientific evidence and keep out what is not good science," [FN79] and courts are "less willing to draw unsupportable inferences from existing evidence ... [and] are less willing to admit marginal expert testimony." [FN80] As a result, depending on the activism, experience, and knowledge of the "gatekeeper," the amount of science, technical issues, and expert testimony admitted at trial may actually fluctuate from courtroom to courtroom.

Second, questions remain regarding the reliability and validity of expert witness testimony. One commentator has recently suggested that the Court has given "reliability" two meanings at the same time. [FN81] First, reliability ensures that the expert's "explanative theory" works and results in a truthful or valid conclusion. [FN82] Second, it also describes a type of evidence "meriting confidence worthy of dependence or reliance" by the trier of fact. [FN83] This leaves a gatekeeper to decide either whether to determine if the theory actually works or whether there are adequate assurances that it works so the trier of fact can utilize this information or testimony in their decision.

The determination of reliability can present a significant burden for trial court judges. Trial court judges are asked under Rule 702 to be "better equipped than an honestly-testifying expert to know whether the expert's opinion is reliable. That is an unlikely premise." [FN84] Therefore, a trial court under *Daubert* should decide whether each expert opinion has a sufficient basis to merit reliability and whether it is relevant to the issue at hand, rather than determining which opinion has the *best* foundation; that task is left for the trier of fact. [FN85]

Furthermore, although an expert's theory may be reliable, it does not necessarily follow that it is valid. Rule 403 can assist the trier of fact in instances such as these. Two examples illustrate this potential problem. First, suppose that the defendant's mother is asked to testify to a specific issue in court. [FN86] While her ***228** testimony may be reliable, it may not be valid because of her bias towards the defendant. This situation would not pose great difficulty for a trier of fact, as the mother's relationship with the defendant is obvious on its face and any layperson could accordingly determine how much weight to attribute to her testimony.

However, a second example with a testifying expert could present enormous difficulty for a trier of fact trying to weigh the evidence. If there are 1000 experts in a specific field, and 995 subscribe to one view of an issue, and the other five hold a different view, it is likely that the two experts who appear in court will possess opposing views if litigation surrounds that particular issue. [FN87] In this situation, the fact-finder may have no way of knowing the distribution of opinion among experts in the field, especially since "both sides tend to call a similar number of witnesses, and from the layperson's perspective they all appear well credentialed." [FN88] At this point, the importance of Rule 403 becomes apparent. The trial court judge can utilize Rule 403 and prevent the trier of fact from being swayed or misled by an expert's impressive credentials rather than the true value of the probative data or testimony. In situations such as the one described, the danger of unfair prejudice to the opposing party is enormous and judges must actively utilize Rule 403 under *Daubert* to prevent unreliable, invalid, and biased testimony from swaying fact-finders.

II. ETHICAL STANDARDS INFLUENCING (OR NOT) EXPERT TESTIMONY

We do not live in a world where expert witnesses present only unbiased, specialized, and technical expertise to a jury. Today experts, like the attorneys who hire them, bring their biases (in addition to the biases of the attorneys and clients) to court in favor of the parties who have retained their services. [FN89] The ABA's *Model Rules of Professional Conduct* [FN90] ("*Model Rules*"), the ABA's *Model Code of Professional Responsibility* [FN91] ("*Model Code*"), and ethical rules governing professional organizations and specialties are not sufficient to curb unreliable expert testimony in favor of one party. Furthermore, as there is no single source to offer a definitive statement of expert witness ethics, individuals must draw their "ethics" from various expert communities. [FN92] This section will discuss the impact that legal ethical guidelines can have on expert testimony and ***229** will sample the generalized ethical guidelines of several medical organizations [FN93] to determine their influence on their members' testimony. [FN94] Furthermore, as the American Psychological Association

("APA") has promulgated the most comprehensive expert witness guidelines of any professional organization, their standards will be analyzed in greater detail.

A. THE *MODEL CODE* AND THE *MODEL RULES*

Both the *Model Rules* and the *Model Code* contain provisions limiting the fees that experts can receive for their services. *Model Rules* Rule 3.4(b)'s comment states that unlike other witnesses who can only be reimbursed for their expenses, an expert may be permitted to receive a fee for preparation and for testimony in court. [FN95] However, it "is improper to pay an expert witness a contingent fee" for his services. [FN96] The *Model Code* also prevents payment to an expert on a contingency basis and permits "a reasonable fee for the professional services of an expert witness." [FN97] Furthermore, *Model Code* EC 7-28 reiterates the ban on contingency payments and adds that "[w] itnesses should always testify truthfully ***230** and should be free from any financial inducements that might tempt them to do otherwise." [FN98] Although these legal guidelines put a damper on possible unethical expert witness behavior regarding fees, they still leave the burden on the attorney utilizing the expert; it is the attorney who is subject to the ethical guidelines, not the expert.

In addition, the American Bar Association ("ABA") has stated that, unlike attorneys, expert witnesses do not owe a duty of loyalty to their clients. [FN99] An expert must remain independent from his or her "client" and not become the client's advocate. In essence, an expert must analyze, explain, and offer an accurate opinion of the relevant issue before the court, not strive to advocate and persuade the fact-finder of a certain point of view. The expert's main duty to provide truthful and accurate information comes from the court and the ethical guidelines of his professional organization, if any. [FN100]

Finally, *Model Rules* Rule 3.4 prevents a lawyer from falsifying evidence or assisting a witness in false testimony. [FN101] This could affect expert testimony in two ways. First, it forbids an attorney to permit an expert witness to testify as an expert in an area that is not scientifically valid. Second, it forbids the lawyer to coax opinions from the expert that are beyond the realm of the expert's specialized knowledge. Such coaxing would result in unreliable testimony (from the false claim of expertise), as the expert would be testifying in an area in which he or she possesses no expertise.

B. ETHICAL RULES GOVERNING PROFESSIONAL ORGANIZATIONS

In addition to the *Model Rules* and *Model Code*, many professional organizations have their own ethical codes to guide their members in areas such as interaction with patients, objectivity, role in society, fees, solicitation, independence, and contractual relationships. One recent survey of the ethical codes of thirty-five professional organizations revealed that the content of the ethical guidelines can influence a court's decision to admit expert testimony. [FN102] Since ethical rules addressing advertising and an individual's type of practice have little impact on the resulting expert testimony, the survey found that violations of those rules had a very small impact on admissibility. [FN103] But where the ethical rules discussed integrity, diligence, or care, the influence on professional opinions was ***231** greater, and therefore violations of these rules had a significant impact on admissibility. [FN104] The more restrictive and specific the ethical rules, the greater the impact in curbing unethical expert testimony. However, "[u]nless membership in the professional organization is a condition of practice, professional sanctions are only effective in precluding unethical expert witness behavior if legal actors give them due regard." [FN105]

1. THE AMERICAN MEDICAL ASSOCIATION

Although the Hippocratic Oath is commonly thought of as the foundation of medical ethics, the American Medical Association ("AMA") has supplemented it with a written code of ethics, *Principles of Medical Ethics*, to "set forth the basic moral tenets for the medical profession." [FN106] The AMA's policy on expert witness testimony sets forth five recommendations and concerns regarding physician testimony: 1) the physician is a professional with special training and experience, and has an ethical obligation to assist the administration of justice; 2) the physician may not become partisan during the legal proceeding; 3) the medical witness should testify truthfully and should be adequately prepared; 4) the physician must make the attorney calling him or her aware of favorable and unfavorable information uncovered in the physician's assessment of the case; and 5) the physician may not accept a contingency fee. [FN107]

In addition, several other provisions speak directly to the ethical constraints of testifying medical doctors. First, the AMA's Council on Ethical and Judicial Affairs has issued an opinion concerning the relation of law and ethics in an effort to clarify their relationship. [FN108] The opinion states that while ethical and legal principles are intertwined, ethical obligations exceed legal duties. [FN109] Second, the Council has opined that contingent fees are not acceptable and condemned any type of fee that does not relate to the value of the medical service. [FN110] The Council noted that when a physician's fees are contingent upon the successful outcome of a claim, "there is the ever-present danger that the physician may become less of a healer and more of an advocate or partisan in the proceedings." [FN111]

Third, the *Principles of Medical Ethics* themselves have implications for testifying physicians. Principles I and II require that a physician provide ***232** competent medical service, deal honestly in his or her profession, and seek to expose other physicians who commit fraud or are lacking in character. [FN112] To meet the reliability and validity standard at trial, a testifying medical expert must be competent and deal honestly within his profession. Principle III states that the physician must "respect the law." [FN113] A physician who respects the law would enter a courtroom and testify truthfully as to his or her specialized knowledge. Finally, Principle V requires the physician to maintain and advance his or her scientific knowledge and to make relevant information available to society. [FN114] This necessitates that physicians remain current with the "scientific knowledge" and make themselves available to peer review and publication.

The AMA also sets goals for itself in dealing with its members. In 1998, the AMA proposed eight guidelines that it would strive to follow concerning expert witness testimony. [FN115] Among these guidelines was a provision encouraging the AMA to work with local licensing boards to provide "effective disciplinary measures for physicians who provide fraudulent testimony." [FN116] Other provisions suggested the continued education of expert witnesses regarding their ethical responsibilities, and encouraged state "expert witness committee programs" to combat the difficulties faced with monitoring expert testimony. [FN117] However, as is evident from the various AMA principles and guidelines, in many instances the responsibility falls squarely upon the individual physicians to police themselves and their ethical (or unethical) behavior.

2. THE AMERICAN PSYCHOLOGICAL ASSOCIATION

For psychologists, the most broadly accepted set of guidelines governing their conduct as experts can be found in the American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct.* [FN118] These guidelines, while not exhaustive, offer the most comprehensive regulations of any professional organization and specifically devote an entire section to forensic activities. Furthermore, these ethical standards

are enforceable rules for the conduct of psychologists. [FN119] Members of the APA are bound to the *Ethics Code* and the rules ***233** that may be used to implement it. [FN120] In addition, the *Ethics Code* applies only to psychologists' "work-related activities, that is, activities that are part of the psychologists' scientific and professional functions or that are psychological in nature." [FN121]

There are several standards in the APA's *Ethics Code* that apply to psychologists' expert testimony and are supported by the Court's decision in *Daubert*. First, the *Ethics Code* requires that there be a basis for scientific and professional judgments. [FN122] When testifying in a legal proceeding (or when engaged in scholarly or other "professional endeavors"), psychologists must rely upon "scientifically and professionally derived knowledge when making scientific or professional judgments." [FN123] Second, when selecting assessment techniques or instruments, psychologists must do so in an "appropriate" manner that considers the relevant issue and previous research on the proper "application of the techniques." [FN124] Furthermore, psychologists are instructed to strive to prevent the misuse of these assessment techniques and instruments. [FN125]

Another *Ethics Code* standard cautions psychologists about the limitations of assessment devices. A psychologist utilizing assessment techniques must be familiar with their reliability, validity, and proper application. [FN126] Next, and crucial to expert courtroom testimony, psychologists must "recognize limits to the certainty with which diagnoses, judgments, or predictions can be made about individuals." [FN127] Fourth, a standard instructs psychologists on interpreting their assessment results. Psychologists must reveal any reservations they have or may have regarding the accuracy or limitations of the tests they performed. [FN128] Finally, psychologists are prevented from utilizing obsolete tests or outdated results as a basis for their assessments and opinions. [FN129] This helps to protect the validity and reliability of their test results and expert testimony.

Several additional *Ethics Code* standards could play an important role in expert testimony. First, psychologists must only provide service and conduct research within the confines of their competence and ability. [FN130] In addition, when psychologists wish to participate in a new area or new technique, they must first qualify themselves with appropriate study, research, and/or "consultation from ***234** persons who are competent in those areas or techniques." [FN131] In a legal context, this protects opposing parties from experts who might otherwise be tempted to testify freely in an area in which they have little or no experience. Second, psychologists are cautioned to avoid false or deceptive statements regarding their findings, experience (academic and professional), and "scientific or clinical basis for, or results or degree of success of, their services." [FN132]

Finally, section seven of the *Ethics Code*, governing "forensic activities," proscribes several important rules for the psychological expert to follow. This section provides the most comprehensive ethical guidelines for expert witness testimony of any professional organization. Standard 7.01 clearly states that psychologists who perform assessments and provide expert testimony *must* comply with all provisions of the *Ethics Code*, and they must base their "work on appropriate knowledge of and competence in the areas underlying such work, including specialized knowledge." [FN133] All assessments, reports, and recommendations must be based on information and techniques (especially interviews of the individual) generating enough evidence to substantiate their findings. [FN134] The *Ethics Code* goes even further: a psychologist may only provide written or oral testimony regarding the psychological characteristics of an individual after he or she has "conducted an examination of the individual adequate to support their statements of conclusions." [FN135] If a psychologist is unable to examine an individual ("despite reasonable efforts"), then the psychologist is required to clarify the impact on the validity and reliability of their expert testimony and "appropriately limit the nature and extent of their conclusions and recommendations." [FN136] Finally, a testifying psychologist must be truthful and candid in his or her testimony and reports. [FN137] This is more than an oath, such as *Federal Rules of Evidence* Rule 603; this requires

that the testimony be consistent with applicable legal procedures and fairly describe the basis and support for the psychologist's statements and conclusions.

C. ETHICAL DIFFICULTIES IN EXPERT TESTIMONY

Despite the professional guidelines described above, problems still exist with expert witness testimony in the court. First, there are "inherent conflicts between ***235** the goals of attorneys and the goals of scientists/experts." [FN138] Attorneys work in an adversarial system and look to sway the trier of fact with the most "articulate, understandable, presentable, and persuasive expert rather than the best scientist." [FN139] In contrast, science requires that the expert focus solely on the evidence without the influence of the parties' goals. [FN140] As a result, *Daubert* and the APA's forensic guidelines force experts to choose between complete impartiality and responsible advocacy.

On one hand, the expert may appear in the role of "impartial educator," whose sole purpose is to help the fact-finder understand a fact in issue. [FN141] To provide reliable and valid testimony under *Daubert*, the expert has the "ethical responsibility to present a complete and unbiased picture of the ... research relevant to the case at hand." [FN142] Others argue that it is not possible to impartially educate in an adversarial system because of pressures from hiring attorneys and because "of a strong tendency to identify with the side for which one is working." [FN143] Therefore, the expert should accept the position they have been placed in and act as a "responsible advocate." [FN144] Ethical problems surface once an expert decides to advocate for one side, as the expert "must consider how to draw the line between using research to argue one side of an issue fairly, and distorting and misrepresenting the available research." [FN145] However, *Daubert* cautions that if the expert falsifies, distorts, or misrepresents the evidence while advocating his or her position, it will not be deemed reliable or valid.

Finally, enforcement of any professional organization's ethical guidelines may be difficult. The principles can only be enforced against members of the organization, and if the expert chooses to withdraw from the organization, then there is no way to enforce the guidelines. [FN146] In addition, without specific organizational bodies designed to oversee and comment upon current expert testimony standards or transgressions within a particular field, it can be difficult ***236** to identify and investigate violations within a profession or appraise its members of acceptable scientific assessment methods and theories.

As a result, even the most specific guidelines, such as section seven of the APA *Ethics Code*, are as unenforceable as the broad restrictions established by the AMA. This is because specific guidelines still rely heavily on self-reflection of the witness to evaluate how - or if - he or she will participate in any given case. [FN147] They also fail to ensure a superior quality of expert testimony, as they "only institutionalize the minimum level of acceptable performance - competence." [FN148] Therefore, it is necessary to look beyond the broad professional organization guidelines and create a system in which the trial court has a specific option to eliminate bias and manipulation from expert witness testimony.

III. A PROPOSAL TO ENSURE THAT COURTS ACTUALLY GET "EXPERT" TESTIMONY

This Note seeks to enhance the reliability and validity of expert witness testimony in the courtroom and increase accountability among testifying professionals. It is necessary to assist the judiciary in its "gatekeeping" role so that it is better equipped to combat runaway experts. Therefore, this Note proposes the creation of a per-

manent organization to provide courts with experienced, respected, and impartial experts in various specialized fields. [FN149]

The experts for the organization would be selected through a screening process, at which time their education, experience, and other relevant credentials would be evaluated. Judges would appoint experts using their broad Rule 706 discretion. [FN150] These experts would then cater to the courts, rather than one of the parties in the litigation, thus providing impartial testimony. A judge would have the ability to decide whether or not to use the expert simply to advise or familiarize the court on the specialized matter or have the individual testify before the jury. This organization would provide all of the necessary resources for the expert to effectively assess the issue in question and would assist courts in locating experts with the proper specialty from within their "database." [FN151]

***237** Once in place, this organization could serve a variety of goals. First, it would allow judges who did not possess scientific expertise to fully comprehend evolving scientific techniques with the assistance of an expert who has no stake or interest in the case before the court. The expert could facilitate a decision by assisting the court in understanding complicated scientific or technical issues. By allowing the court to become objectively informed on issues critical to the litigation, the court will be more familiar with the relevant technical "terms" used to describe the theory and better able to make a reasoned decision. [FN152]

Second, an issue could arise in court where the parties' experts were unable to clarify or provide reliable or credible testimony. In a case such as this, an appointed expert could educate the trier of fact on the important issues necessary to render a decision. Furthermore, as experts removed from the adversarial process, they will provide impartial testimony regarding the litigation, rather than providing one side with an advantage or forcing juries to determine cases based on diametrically opposed party experts. [FN153] This also evens the playing field. No longer would a party be guaranteed of a courtroom victory because it can afford to assemble the most formable expert witness team.

Third, these experts could advise courts on the admissibility of parties' experts. This could happen in several ways. The expert will be able to identify crucial issues that will likely require expert testimony. By educating the court as to the relevant intricacies of the scientific or technical field, the expert would place the judge in a better position to determine whether the parties' experts would pass the *Daubert* reliability and validity test. In addition, the expert could aid the court in drafting questions to ask the parties' witnesses during pre-trial hearings to determine whether or not they will be qualified as experts for trial. Finally, an appointed expert could examine the methodology and supporting research used by the parties' experts to form their opinions. [FN154]

***238** Undoubtedly, arguments that have been advanced in the past against court-appointed experts under Rule 706 will surface to criticize this proposal. First and foremost, critics will question whether any neutral, independent, or objective expert actually exists, as "every expert comes to the court with an axe to grind." [FN155] Individual experts' education, culture, and the agenda of research funding entities all influence scientists and technical experts. [FN156] In addition, the organization's funding sources could possibly influence the proposed organization's experts, even further limiting their "neutrality." Finally, some will argue that these court-appointed experts will undermine our adversarial process. [FN157] Decision-makers may give undue deference to the disinterested conclusions made by "objective" experts, thereby ignoring their duty to sort out the evidence and witnesses as presented and contested by the opposing parties. [FN158]

While acknowledging the validity of these concerns, this Note maintains that the proposed organization can

secure and provide the courts with "neutral" experts who will not detract from our adversarial system. The crucial factor of this proposal is that the organization will be providing courts with easy access [FN159] to experts who do not have a stake in the claim before the court. The trial court will supervise and control the use of the court-appointed experts, rather than leaving the selection of the experts and control of their use and testimonial content in the hands of the parties. [FN160] Since the court will control the expert, any potential influence from the organizations' financial supporters will be minimized. By disconnecting the expert from the adverse parties, it allows him or her to be free from the burden of pleasing an attorney or litigant whose plan is generally to exploit the expert's bias. [FN161] This permits the expert to focus solely on his or her true purpose in the litigation: utilizing his or her expertise to analyze and explain the relevant issues to the fact-finder without pressure from a client paying the expert's fees. [FN162]

***239** In addition, there is no need to rely solely on the "'purifying fire' of the adversarial process to bring forth the truth." [FN163] This proposal will not undermine the adversarial system, and it recognizes the importance of fairness to all parties. If a court utilized an expert in pre-trial assessments or hearings, the information gathered would be exchanged or shared with the parties. If the expert were to testify at trial, the parties would have an opportunity to examine the witness. By providing decision-makers with another source of expertise that is not financially responsible to a client, the proposal would encourage decisions based on the *merits* of claims, rather than on parties' successful muddling of the issues or underlying scientific theory. When the judge or jury understands the unbiased scientific evidence at issue in a case, they will be better equipped to render a more reasoned decision. This proposal will only complicate matters for parties that litigate based on "questionable" scientific or technical evidence, and, as a result, their claims will be forced to face reliable and proven techniques.

CONCLUSION

The potential ethical conflicts surrounding expert witness testimony play a critical role in today's litigation. With the liberal thrust of the *Federal Rules of Evidence*, the limits of admissibility for expert testimony has been stretched further than ever before. Although the *Model Rules, Model Code*, and various professional organizations have established ethical rules that influence experts, none have succeeded in eliminating impartial and biased expert testimony. The creation of a permanent organization to assist courts with expert testimony and/or expert advice would encourage the elimination of biased testimony and prevent "'jukebox experts' ... who sing the tunes they're paid for." [FN164] As a result, verdicts and settlements would be based on the merits of cases, rather than parties who have the ability to create a formable expert witness team.

[FN1]. William L. Foster, *Expert Testimony: Prevalent Complaints and Proposed Remedies*, 11 HARV. L. REV. 169, 169 (1897).

[FNa1]. J.D. Georgetown University Law Center, May 2001 (expected).

[FN2]. *See The Use and Misuse of Expert Evidence in the Courts*, 77 JUDICATURE 68, 69 (1993).

[FN3]. *See* Randall K. Hanson, *Witness Immunity Under Attack: Disarming "Hired Guns,"* 31 WAKE FOREST L. REV. 497, 497 (1996) (stating that experts are available on every imaginable topic, and experts are even involved in ordinary lawsuits); Michael Mason, *Trial and Error: Courtroom Experts May Have All the Answers, But That Doesn't Mean They're Telling True*, S.F. CHRON., Feb. 20, 1994, at 5Z1 (quoting Georgetown Pro-

fessor of Law Paul Rothstein: "There's not a piece of litigation that doesn't have one involved somehow.").

[FN4]. *See* Carol Garcia, *Expert Witness Malpractice: A Solution to the Problem of the Negligent Expert Witness*, 12 MISS. C.L. REV. 39, 45 (1991) ("Seventy-percent of judges and lawyers indicate that juries attribute more credibility to scientific evidence than other evidence, and seventy-five percent believe that judges find scientific evidence more credible. Jurors tend to give undue weight to expert opinions because 'we're all taught to believe science is infallible.'") (citations omitted); Carol Henderson Garcia, *Expert Witnesses Found Credible by Most Jurors*, NAT'L L.J., Feb. 22, 1993, at S4 (stating that a large majority of jurors claimed expert testimony was credible and influential in the outcome of the case).

[FN5]. *See* Stephanie Simon, *Boom in Expert Witness Field Unfazed by Cynicism; Courts: Simpson, Menendez Cases Raise Credibility Issue*, L.A. TIMES, Apr. 15, 1996, at Metro 1 (discussing how attorneys want to work with experts who support their case and are willing to shop around for the most favorable witness); Mason, *supra* note 3, at 5Z1 (quoting one lawyer who said "you shop around 'til you find someone who's going to support your case.").

[FN6]. *See* Maureen Harrington, *To Tell the Truth Expert Witness a Strong Force in the Courtroom*, DENVER POST, Jan. 1, 1997, at G1 (explaining that one can spend $50,000 to $75,000 for experts in one whole case); Mason, *supra* note 3, at 5Z1 (stating that experts generally make $85 to $500 per hour and up to $4,000 per day at trial); Florence Shinkle, *Expert Witnesses Run Up the Bill*, ST. LOUIS POST-DISPATCH, Oct. 6, 1996, at 12C (stating that experts will charge $250 to $500 just to review records to see if a case is viable); Simon, *supra* note 5, at Metro 1 (top experts can make $350 an hour).

[FN7]. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1390 (1995) (noting that the "disdain for experts comes from all quarters: judges, lawyers, commentators, politicians, the media, and even experts themselves") (citations omitted). *But see* Charles Patrick Ewing, *Expert Witnesses: Can Psychiatrists Give Reliable Testimony in Criminal Trials? Yes: Good Lawyering Can Weed Out Unscientific Testimony*, 83 A.B.A.J. 76 (Apr. 1997) (arguing that "hired guns" are few in number and limited in influence, and where they do succeed, it is through the fault of lawyers and judges).

[FN8]. The wide availability of experts willing to testify is due in part to the proliferation of the internet in recent years. A routine search for expert witnesses will turn up numerous internet sites dedicated solely to linking attorneys with the expert witness of their choice in the field of their choice. It is now possible to browse through hundreds of areas of expertise, and view the credentials of the experts within each field. A sampling of the current internet sites includes: *Expert4law.com: The Legal Marketplace*, at http:// www.expert4law.org (last visited May 4, 2000) (offering hundreds of categories from which to select an expert); *ExpertLaw.com*, at http://www.ExpertLaw.com (last visited May 4, 2000) (the internet's "premier" free resource for locating experts that also offers litigation support services and free legal information); *Expertpages.com*, at http://www.ExpertPages.com (last visited May 3, 2000) (where the experts themselves sing their praises, saying how quickly their services have been obtained since advertising on the site); *Experts.com*, at http://www.experts.com (visited May 4, 2000) (stating that they are an award winning "Experts Internet Directory"); *The Expert Witness Network*, at http:// www.witness.net (last visited May 4, 2000) (boasting thousands of full length expert curriculum vitaes ("CVs")); *Freereferral.com*, at http:// www.freereferral.com (last visited May 4, 2000) (providing free referrals to attorneys, insurance companies and private parties seeking forensic expert witnesses). To illustrate the point of the saturation of experts on the internet, a simple search on the Alta Vista search engine using "expert witness" returned 66,561 hits. *See also* MARGARET HAGEN, WHORES OF

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*465 EXPERT WITNESSES: ETHICS AND PROFESSIONALISM

Steven Lubet [FNa1]

INTRODUCTION

This Article surveys the undeveloped field of expert witness ethics and professionalism. It is common in modern litigation to call individuals from a vast array of professions to testify as expert witnesses. [FN1] Experts may be retained in commercial cases to interpret complex financial data, [FN2] in tort cases to explain the nature of injuries, [FN3] or in criminal cases to translate underworld "gang codes" into everyday language. [FN4] Properly qualified, an expert can be asked to peer into the past, as when an accident reconstructionist re-creates the scene of an automobile collision. Other experts may predict the future, as when an economist projects the expected life earnings of a deceased plaintiff in a wrongful death case. One recent survey of California civil jury trials determined that at least one expert testified in eight-six percent of all cases, with two or more opposing experts testifying in fifty-seven percent of the trials. [FN5]

What are expert witnesses' ethical obligations? This Article will attempt to provide some answers by addressing the interrelated concepts of "professional ethics" and "professionalism." The term "professional ethics" typically refers to the distinct, mandatory responsibilities undertaken by individuals in the course of practicing a trade or calling. Breaches of professional ethics may result in discipline, fee forfeiture, or other adverse consequences. In contrast, the term "professionalism" is often used to identify admirable, model, or ideal conduct *466 that is generally expected within a given profession--but not absolutely required.

For example, professional ethics compel a physician to maintain a patient's confidences; [FN6] violating confidences may result in censure or worse. A sense of professionalism entails courtesy, clear communication, and punctuality; abandoning these standards may result in a loss of confidence or respect. The two concepts are not wholly distinct. Both are aspirational. Most professionals certainly do not adhere to ethical standards simply as a means of avoiding discipline or liability.

Many professional obligations are identical to personal ethics or moral standards. Outright lying, for example, would commonly be understood as both a moral fault and a violation of professional standards. In many circumstances, however, professional ethics may be quite different from personal ethics. While most citizens believe it their duty to report crimes, lawyers usually must maintain confidences even when the clients have revealed serious criminal behavior. [FN7] Conversely, physicians and social workers, among others, are expected to contact the authorities in cases of suspected child abuse, even in fairly minor situations where ordinary citizens might be justified in remaining uninvolved. [FN8] The comparison of personal and professional ethics is sometimes referred to as "role differentiation," because ethical requirements vary according to the role one has assumed. [FN9]

Of course, all expert witnesses are governed by personal ethics, and all must obey the rules of the courts in which

they appear. Still, there is no single source that we can look to for a definitive statement of expert witnesses' professional *467 ethics. A few organizations have attempted to draft codes of conduct for expert witnesses, [FN10] but none have achieved broad acceptance.

Experts may be drawn from virtually any field or calling, from aviation to zoology. In some cases the expert's own profession may have a well developed code of ethics, as with accounting, [FN11] medicine, [FN12] law, [FN13] and psychotherapy. [FN14] Such experts certainly must adhere to the standards of their own fields concerning matters such as confidentiality and conflicts of interest. They may even be subject to professional regulation or discipline for their conduct as witnesses.

Other professions are unlicensed or unregulated. A musician or composer, for example, might be called as a witness in a copyright case; economists are frequently called to testify in antitrust or tort cases. Neither profession has promulgated a code of ethics, and there are no generally recognized standards governing their conduct in forensic matters. The same is true of "human factors" experts, demographers, political scientists, penologists, journalists, and many others who are frequently called upon to testify in court.

The absence of an enacted code of conduct does not at all imply an absence of content-related professional standards. Academic and industrial scientists, for example, are expected to adhere to strict requirements of objectivity and to follow precise methods of investigation.

This Article deals with the topic of "role differentiated" ethics for expert witnesses. It covers questions that may not arise, or that may arise differentially, in the course of the expert's ordinary, non-forensic work. Specifically, this Article will explore the issues of independence, confidentiality, conflicts of interest, fees, and conduct during trial and discovery.

I. INDEPENDENCE AND OBJECTIVITY

The single most important obligation of an expert witness is to approach every question with independence and objectivity. Expert testimony is only allowed if the expert's "specialized knowledge will assist the trier of fact to understand the evidence." [FN15] The expert's opinion, in turn, cannot assist the fact finder's understanding unless that opinion is candidly and frankly based upon the witness's own investigation, research, and understanding.

An objective expert views the facts and data dispassionately, without regard to the consequences for the client. An independent expert is not affected by the goals *468 of the party for which she was retained, and is not reticent to arrive at an opinion that fails to support the client's legal position.

A. COPING WITH LAWYERS

It will probably come as no surprise that there are lawyers who will attempt to influence the content of an expert's testimony. [FN16] After all, advocates want to retain experts for one reason only: to help win the case. Given the effort and expense involved, some lawyers will be tempted to see the expert as simply another member of the litigation team. While expert witnesses will obviously have to work closely with the lawyers who engage them, it is important to maintain a sharp distinction between their roles.

As an advocate in the adversary system, it is a lawyer's job to make the best possible argument in support of her client. A lawyer will often find herself advancing a position in the hope that it will work, without necessarily believing that the view is correct. Lawyers do not testify under oath. While they must be truthful concerning facts and accurate in their

representations about the content of the law, [FN17] their opinions and arguments must always be adapted to the needs of their clients. In the classic formulation of the advocate's duty, Boswell reported that Samuel Johnson did not hesitate to raise arguments that he knew to be weak, saying, "... you do not know it to be good or bad till the judge determines it.... An argument which does not convince yourself, may convince the judge to whom you urge it: and if it does convince him, why, then Sir, you are wrong and he is right." [FN18]

Experts, however, have no such latitude. As a witness testifying under oath, an expert is not entitled to state a position "which does not convince yourself" in the hope that it may convince the judge or jury. The entire system of expert testimony rests upon the assumption that expert witnesses are independent of retaining counsel, and that they testify sincerely.

Most lawyers understand and accept this on an intellectual level. Still, in the heat of adversary battle, it is not unknown for lawyers to seek to "extend" or "expand" an expert's opinion in just the right direction. This is wrong. It is no more acceptable for a lawyer to attempt to persuade an expert to alter her opinion than it would be to convince an eyewitness to change his account of the facts.

*469 B. WORKING WITH LAWYERS

The need for independence and objectivity does not prevent experts from working closely with the lawyers who retain them. Litigation is a complex process, and it is important that attorneys be able to communicate with the experts working on the case. The lawyers will invariably have important information, and perhaps suggestions, that will facilitate the experts' work. Lawyers may also need constant input from the experts as the case proceeds, so that they may adjust their goals and strategies in light of the experts' findings.

It is entirely legitimate for expert witnesses to cooperate closely with retaining counsel, so long as the relationship remains independent and professional roles are not blurred.

1. Information and Assumptions

To one degree or another, all experts depend upon retaining counsel for the information necessary to do their work. At a minimum, the attorney will have to provide the expert with an explanation of the case, a description of the questions to be addressed by the expert, and the documents or other sources necessary to the expert's assignment. This will ordinarily be an interactive process, with the expert and the lawyer exchanging questions and information.

In many cases the lawyer will also have to inform the expert of the precise legal standard that must be addressed. Of course, some scientific or technical questions may seem purely descriptive: What is the composition of a chemical compound? What caused a stress fracture? What is the standard maintenance schedule for the mechanical part in question? But, even in these situations, the expert may need to be aware of certain legal standards. The test for admissibility of an expert's opinion may vary from state to state. Thus, it is essential that the expert be aware of the relevant test followed in the particular jurisdiction. [FN19] This information can only come from retaining counsel. Moreover, it is certainly permissible for the expert to work with the attorney in order to make sure that her opinion is formed in a manner that will be admissible in court.

In other circumstances there may be legal rules that govern the necessary content of the expert's opinion. A psychologist, for example, may need to *470 understand a jurisdiction's legal test for insanity. It is entirely proper for the expert to obtain direction on such matters from the retaining attorneys.

An expert's opinion will often be dependent or contingent upon facts that must be provided by other witnesses. Such facts may or may not be readily accessible, and they will sometimes be hotly disputed between the parties. Counsel may therefore ask the witness to "assume" certain facts, rather than have the witness undertake an independent investigation. This is an appropriate way to proceed, so long as the assumptions are reasonable and clearly identified.

Conversely, not every fact in a case will eventually be allowed into evidence at trial. A lawyer may therefore ask an expert to disregard certain information, on the theory that it is legally irrelevant or inadmissible. An expert may ethically comply with such a request, since the admissibility of evidence is not within the witness' purview.

For example, suppose that an economist has been retained by the defendant in a "wrongful discharge from employment" case. The expert's task is to determine the plaintiff's damages in the event that liability is established. Depending upon the jurisdiction, the elements of such a damage claim might possibly include back pay, future pay, and increments due to imputed promotions. A competent economist could calculate damages in all three categories, but would have no way of knowing which ones would be recognized by the court. Thus, the witness may rely on directions from counsel in determining which components to consider.

2. Suggestions and Questions

In addition to providing information and assumptions, a lawyer may also make suggestions to, or ask questions of, the retained expert. When done properly, this is simply part of the intellectual exchange between two professionals. There may be evident gaps in the expert's analysis, or the reasoning may not appear to support clearly the conclusions. The expert may not have adverted to all of the relevant factors. It is fair and appropriate for the lawyer to ask the expert to reconsider a conclusion in light of additional information. The retaining lawyer may ask pointed questions to make sure that the expert's position is thorough and valid. The attorney may suggest ways in which the opinion could be strengthened or supported.

On the other hand, it is unacceptable for a lawyer to attempt to pressure a witness into changing her opinion. A lawyer must ultimately be willing to take the bad news with the good, and to realize that an expert's opinion may be unfavorable to, or not fully supportive of, the client's position.

A lawyer with integrity will normally accept a negative opinion, or even appreciate it, since that may help counsel and client formulate a settlement strategy rather than take a losing case to trial.

***471** 3. Trial Preparation

It is not unethical for a lawyer to assist an expert to prepare for trial or deposition. Counsel may inform the witness of the questions to be asked on direct examination, and may alert the witness to potential cross-examination. The lawyer may describe the deposition process to the witness and caution the expert about the risks of volubility. Counsel may likewise tell the witness if her answers seem confusing, unclear, or misleading, or if they are likely to be misinterpreted or misconstrued. An expert may be advised to use powerful language, to avoid jargon, to use analogies, to refrain from long narratives, or to use other means that will help her convey her opinion accurately.

Needless to say, a lawyer absolutely may not instruct a witness how to testify. [FN20]

4. Scope of Expertise

It is not unknown for an attorney to try to stretch a witness's expertise, either as a cost saving measure or in an effort to broaden the impact of the testimony. For counsel, the engagement of expert witnesses can be time consuming and expensive, therefore there is a natural impulse to see if the witness can do "double duty."

The situation is usually resolved simply by an appropriate inquiry. Either the witness is legitimately able to opine on the subject, in which case the engagement proceeds on that basis, or the witness lacks the necessary skills or qualification, in which case the subject is dropped.

More troubling is the possibility that some lawyers might try to induce or inveigle an expert to offer opinions that are truly beyond the scope of her expertise. Such testimony, if given, puts the witness out on a limb that may be sawed off during cross-examination. [FN21] Tactics aside, experts must be both qualified and independent. It is therefore unethical for a lawyer to tamper with the independence of an expert's views by attempting to persuade her to exaggerate her qualifications to give opinions outside her expertise.

Honorable experts will not allow attorneys to overstate the scope of their opinions, and honorable counsel will respect this position.

II. CONFIDENTIALITY

Professional obligations of confidentiality are well recognized. Lawyers, physicians, psychotherapists, clergy, and accountants all operate under various duties of secrecy. It is important for professionals acting as expert witnesses to ***472** understand that these duties generally do not apply in situations where they have been retained for the purpose of testifying in court. [FN22]

Notwithstanding the usually privileged nature of their professional communications, expert witnesses may be expected, and even compelled, to reveal conversations that would otherwise be inviolate. The reason for this distinction should be obvious. Forensic evaluation and testimony do not fall within the ordinary practice of most professions. Communications made to a retained witness, for the purpose of facilitating testimony in court, do not fall within the "zone of privacy" necessary for the invocation of an evidentiary privilege. [FN23] Of course, many professionals--engineers, architects, economists, chemists, and others--do not ordinarily enjoy a privilege of confidentiality. Consequently, expert witnesses should assume that all of their communications, with either the client or retaining counsel, may be subject to disclosure through the process of discovery. Additionally, the witness' research files, work papers, notes, drafts, correspondence, and similar materials may have to be revealed to the attorneys for opposing parties. [FN24] In some jurisdictions it is possible that some items may be protected from discovery, but prudence dictates that the witness presume that her entire file will be an open book.

This is not to say, however, that the expert has no obligations of confidentiality to the client. Even in the absence of a separate ethical duty, principles of agency law require that an expert take reasonable steps to safeguard client confidences, [FN25] and refrain from using confidential information for self-enrichment [FN26] or other improper purposes. [FN27]

***473** One recurrent issue involves the efforts of lawyers to contact opposing expert witnesses outside the processes of formal discovery. [FN28] Several courts have held that access to experts is limited by the discovery rules, and that all interviews must take place via deposition. [FN29] In a few jurisdictions, however, extramural interviews have been found permissible. [FN30] But even in jurisdictions where the lawyer is permitted to contact the expert, there is no obligation that the expert respond. Most experts would consider it unprofessional, at the very least, to hold *ex parte* discussions with

opposing counsel in the absence of notice to the retaining lawyer. At the extreme, unauthorized contact with an adverse party's expert may be considered witness tampering, perhaps leading to disqualification of the lawyer or witness, or other sanctions. [FN31]

Because of the complex interplay among professional ethics standards, rules of evidence, discovery, and other law, it is best to clarify expectations of confidentiality at the outset of every engagement. According to the ABA Standing Committee on Professional Conduct, a retention letter "should define the relationship, including its scope and limitations, and should outline the responsibilities*474 of the testifying expert, especially regarding the disclosure of client confidences." [FN32]

III. LOYALTY AND CONFLICTS OF INTEREST

For expert witnesses, issues of loyalty and conflicts of interest raise two different questions. First, if asked to opine in two unrelated cases, may a witness accept concurrent engagements for and against the same party or law firm? Second, may an expert switch sides in litigation?

A. UNRELATED ENGAGEMENTS

It is a well established rule of legal ethics that alawyer may not engage in representation "directly averse" to a current client. [FN33] Thus, even in completely unrelated cases, a lawyer may not simultaneously sue and defend the same party. [FN34] This rule is based upon the principle of attorney loyalty, which must never be diluted by undertaking obligations to adverse parties.

Expert witnesses, on the other hand, do not owe that sort of loyalty to their clients. An expert is not the client's "champion," pledged faithfully to seek the client's goals. Indeed, in many ways the expert's role is precisely the opposite. She must remain independent of the client and detached, if not wholly aloof, from the client's goals. [FN35] There is no reason that an objective expert could not conclude--and explain--that a party is correct in one case and wrong in another. Consequently, there is no general ethical principle that prevents an expert from accepting concurrent engagements both for and adverse to the same party. [FN36]

By the same token, it follows that an expert may concurrently work with and against a lawyer or law firm, testifying for the law firm's client in one case and against the firm in another. Since there is no rule against accepting concurrent adverse engagements, there is also no general restriction on testifying adversely to a former client or against a law firm that previously retained the expert.

The expert's freedom of action, however, is not absolute. As noted in the previous section, the law of agency imposes an obligation to refrain from exploiting a client's confidences for the benefit of another. [FN37] Thus, an expert should not accept conflicting engagements, either concurrently or successively, *475 that are factually related, since this could risk exploitation or betrayal of a client's confidences. [FN38]

There is a further constraint on the acceptance of engagements, though it is difficult to quantify. It will surely cause a law firm or client great discomfort to see their expert turn up on the opposite side of another lawsuit. Though the matters may be unrelated, posing no threat to client confidences, the expert's dual position places counsel in the troublesome position of having to extol the expert's opinion in one case while attacking it in another. Needless to say, most lawyers would find this situation damaging to the expert's credibility in case one, damaging to the client's position in case two, or both. No doubt, the retaining lawyer would prefer to avoid this dilemma if possible, even if there is no ethical bar to the

expert's actions.

As a matter of courtesy and professionalism, it is best to resolve this issue at the outset of every case. A lawyer may reasonably request that the expert refrain from accepting potentially adverse engagements, at least for the duration of the retention. The expert may accept or decline the proposed restriction, or may suggest other terms. The absence of an ethics rule does not prevent the attorney and expert from negotiating a mutually agreeable resolution to what could perhaps become a sticky problem. In any event, a forthright discussion of terms and conditions can prevent the development of an awkward situation down the road.

B. SWITCHING SIDES

Imagine that an expert has been retained by the plaintiff in a lawsuit. The expert conducts her research and arrives at an opinion that is quite unfavorable to the plaintiff, who then discharges the witness. May the expert subsequently testify for the defendant, whose position is supported by the expert's work?

There is no *per se* rule that prohibits an expert witness from switching sides in a lawsuit. Since the expert's job is to arrive at an independent opinion, it cannot be disloyal for the witness to begin working for one party and end up working for the other. On a case by case basis, however, considerations of confidentiality and privilege will often operate to prevent an expert from switching sides. [FN39]

The answer to the question will ultimately depend upon the nature and extent ***476** of the relationship between the expert and the original client. In brief, an expert may not switch sides, even following discharge or release, if that would violate the original client's reasonable expectation of confidentiality. [FN40] This in turn will depend on a number of factors. How extensive was the communication between the expert and the client or the client's counsel? Was the expert provided with non-public or privileged information? Did the expert participate in strategy discussions with counsel, or otherwise learn of the client's decision-making strategy?

While the courts have used a variety of tests to weigh these factors, it is fair to say that the touchstone has invariably been access to confidential information. [FN41] Hence, an expert who only participated in a short preliminary discussion with one attorney would be free to accept retention from the other side. [FN42] Conversely, an expert who had performed an extensive fact investigation, working closely with counsel, would more likely be barred from switching sides. [FN43]

A further distinction should be made between a witness who is discharged (or who initially declined an engagement) and a witness who defects. There are few cases dealing with this phenomenon, no doubt because it seldom concerns. Nonetheless, a witness who deliberately sets out to switch sides, or who is lured away by opposing counsel, may well find herself disqualified from testifying in the case. Not only is such a witness likely to have compromised confidences, but a defecting witness also creates the appearance of chicanery. A court may bar the witness on the ground that her conduct (or counsel's) has been "prejudicial to the administration of justice."

Again, most difficulties can be avoided if there is frank discussion at the outset ***477** of the engagement. A well-drafted retention letter will spell out the expert's duties and the client's expectations concerning confidential information, as well as the expert's options in the event of discharge or release. [FN44]

IV. FEES

Unlike other witnesses who can be reimbursed for only expenses, an expert may be paid a fee for preparing and testifying in court. [FN45] A variety of ethics issues arise in the context of experts' possible fee arrangements, including contingency fees, fee structures other than hourly billing, and non-refundable fees.

A. CONTINGENCY FEES

It is considered unethical in virtually every jurisdiction to pay an expert witness a contingency fee, [FN46] meaning a fee that is "contingent upon the content of [the] testimony or the outcome of the case." [FN47] Such fees are prohibited because they create an unacceptable incentive for the expert to tailor her opinion to the needs or interests of the retaining party. In other words, the expert's independence and objectivity become impaired when payment hinges on the success of the litigation.

A similar though not identical problem may be raised by other fee structures. Consider, for example, the practice of "value billing," which has increasingly been used by lawyers and consultants. [FN48] In value billing, the fee is eventually determined by the value or benefit conferred by the work, rather than by the number of hours devoted to the task. For expert witnesses, however, value billing can come uncomfortably close to charging on the basis of the content of the testimony.

***478** For example, imagine that an expert follows a policy of rebating or returning fees in the event that her opinion cannot be used by the retaining party. While the expert might justify this approach as an effort to avoid excessive billing for unproductive work, it clearly results in additional compensation when the expert's opinion is favorable to the client. The same result occurs when the expert's hourly rate is adjusted (up or down) following the initial research or evaluation.

In order to avoid any suggestion of a "contingency," most experts bill at a constant hourly rate. [FN49] Of course, even in these circumstances, a favorable initial evaluation may presumably lead to further hours spent on preparation, deposition, and perhaps trial testimony. While this additional work will obviously result in greater total compensation, it is not considered a contingent fee.

B. FLAT FEES, MINIMUMS, AND ADVANCES

In addition to hourly billing, other fee structures may include or combine flat fees, minimums, or retainers. Unless they are excessive, none of these devices present ethical problems.

A flat fee compensates the expert in a set amount for all, or some defined portion, of the work. For example, a flat fee could cover the entire engagement all the way through testimony at trial, or it could be determined in stages--perhaps one amount for the initial research and work-up, another if a written report becomes necessary, and a final amount for deposition and trial time. A minimum fee, usually used in conjunction with an hourly rate, ensures that the expert will be compensated at a certain level regardless of the amount of work ultimately involved in the case. An advance, sometimes also called a retainer, provides the witness with some or all of her payment at the outset of the engagement, rather than billing exclusively as work is performed.

To one degree or another, each of these fee structures provides additional security to the expert. In that sense, minimums, flat fees, and advances may be seen as the "flip side" of contingent fees. In each case, guaranteed payment becomes entirely disengaged from the content of the expert's opinion.

C. LOCK-UP FEES

Some expert witnesses insist upon the payment of a nonrefundable "lock-up" fee at the outset of every engagement. The amount may be small or large, but in either case the purpose of the fee is to compensate the witness for agreeing to forego retention by the other parties in the litigation.

***479** As noted earlier, an expert who has received significant confidences from one party may not thereafter accept retention by the other side. [FN50] Thus, there is some financial risk, especially in the case of a prominent individual, when an expert agrees to begin working on a case. It may be only a few hours until the expert reaches an opinion adverse to the retaining client, yet the expert might then be precluded from doing further work, and billing numerous hours, for another party in the litigation. The lock-up fee resolves this dilemma by, in essence, providing the expert with a "signing bonus" in exchange for agreeing to work exclusively with one client in the matter.

When received by lawyers, particularly in criminal and divorce cases, nonrefundable retainers have been criticized as oppressive and exploitative. [FN51] A number of jurisdictions have either banned or sharply curtailed their use by attorneys. [FN52]

In this regard, however, expert witnesses do not operate under the same restraints as lawyers. The chief objection to the attorney's nonrefundable retainer is that the forfeiture of the retainer creates a defacto impediment to firing the lawyer. In turn, this chills the client's unfettered right to discharge counsel at any time without cost or penalty. But the same considerations do not apply to experts. To be sure, the client is always free to fire an expert witness, but no comparable public policy is served by ensuring that there is no financial loss to the client who does so. [FN53] Consequently, lock-up fees should not be considered unethical when used by expert witnesses.

V. DISCOVERY

Discovery is the formal process by which lawyers are able to gain facts and information about the opposing party's case. A number of ethics issues also arise out of the discovery process, including communicating with adverse counsel, production of documents, and behavior during depositions.

***480** A. COMMUNICATING WITH ADVERSE COUNSEL

The Federal Rules of Civil Procedure, and the corresponding provisions in most states, place limits on the right of a lawyer to contact opposing counsel's experts. In brief, experts are divided into two categories: those who have been identified as "testifying experts"; and those who have been consulted but who have not (or not yet) been listed as witnesses. The later group of experts are sometimes called either "consulting experts" or "non-testifying experts." Although there are limited exceptions, only testifying experts are broadly subject to discovery. Purely consulting experts, other than in extreme circumstances, are exempt from discovery. [FN54]

As noted above, [FN55] an enterprising lawyer may occasionally seek an extracurricular interview with the opposing party's expert. Although the courts are somewhat divided on the propriety of this tactic, the majority view is that such contacts are prohibited in the case of both testifying and non-testifying experts.

While the discovery rules probably do not constrain the witnesses themselves, agency principles require reasonable steps to maintain a client's confidences. A responsible expert, therefore, should notify retaining counsel in the event that she is approached for substantive information by the attorney for an adverse party.

B. PRODUCTION OF DOCUMENTS

As we have seen, a testifying expert's entire file will usually be subject to full disclosure to the adverse party. On the other hand, a non-testifying expert's materials are only discoverable under very unusual circumstances. Of course, discoverability is a legal question, to be resolved by the lawyers and court. Experts are neither expected nor allowed to decide on their own which materials should and should not be disclosed.

Discovery requests to experts are channeled through retaining counsel. Typically, the attorney will ask the expert for a described set of materials (perhaps "everything") and the expert will either copy the materials or turn over the originals. The lawyer will then decide which items must be produced to the other side. In some situations, especially in criminal cases, materials may be sought directly from the witness via subpoena.

It is unethical, and perhaps even criminal, to conceal or destroy material that has been subpoenaed or requested in discovery. [FN56] Of course, disclosure may be ***481** resisted. There can be objections to discovery and subpoenas may be quashed. But that process nonetheless requires good faith compliance, or at least acknowledgement of the existence of the requested items.

An expert may ordinarily rely upon the decisions of retaining counsel with regard to discoverability. It is not unusual for a lawyer to advise a witness that certain documents must be produced while others need not be. In either case, however, the witness must forthrightly answer questions about the existence and location of documents or physical objects relevant to the expert's work.

Most important, an expert should never destroy any item, document, object, photograph, or record for the purpose of concealing it from discovery or obstructing another party's access to evidence. Of course, papers and objects may be discarded in the course of "housekeeping," but any item that has been requested in discovery must be preserved until the request has been complied with by the expert or disallowed by a court.

C. DEPOSITIONS

A deposition is pretrial testimony, taken under oath for the purpose of discovering what the witness has to say. Depositions generally proceed in a lawyer's office. There is no judge present, and consequently there is no one there to resolve disputes between the attorneys or to instruct the witness how to proceed. There are relatively few ethics problems exclusive to depositions, though all of the standard issues such as confidentiality, coaching, and candor certainly can and do arise. In addition, the fact that no judge is present during the testimony raises one unique question.

From time to time in the course of almost every deposition, lawyers are inclined to confer with their witnesses. Sometimes the conference occurs "off the record," either in whispers at the table, or during a formal recess. Other times the lawyer speaks directly to the witness "on the record," with all counsel present and the court reporter busily transcribing everyone's remarks. On-record comments often come in the form of instructions or advice to the witness. Either circumstance can quickly become uncomfortable for an expert, especially if the witness is unfamiliar with local procedures.

1. Conferring Off the Record

Jurisdictions differ widely, one is almost tempted to say wildly, about the acceptability of conferences between lawyer and witness in the course of a ***482** deposition. It was once considered routine almost everywhere for lawyers to pull aside their witnesses so long as there was no question pending at that particular moment. While most such conferences

were no doubt conducted in good faith to clarify a point, to preserve a confidence, or to calm down a nervous witness, they were also the occasion of much abuse. Too many lawyers used off-record conferences to obstruct the deposition, coach the witness, or worse.

In a predictable reaction, courts in many jurisdictions have now issued rules or orders that significantly limit a lawyer's right to confer with a witness during deposition. The most drastic restrictions prohibit all conferences, other than those necessary to determine the applicability of an evidentiary privilege. [FN57]

Though the clear trend is toward regulation, if not outright elimination of witness conferences, it has not taken hold everywhere. Consequently, expert witnesses may face a great variety of environments, and may not always be able to count on the lawyers for clear or knowledgeable directions. [FN58] What is a witness to do?

The rules of deposition procedure are aimed primarily at counsel, and lawyers are expected to understand and follow the rules. Consequently, experts may generally rely on counsel's representations concerning the acceptability of off-record conferences. Certainly, if the deposing lawyer does not object, the witness has little reason to be concerned about the propriety of the conference.

On the other hand, the deposing lawyer may well object. The following scenario places the witness in an extremely awkward position.

RETAINING LAWYER:	Excuse me, but I need to confer with the witness for a moment before you ask the next question. Let's go off the record.
DEPOSING LAWYER:	Off-record conferences are not permitted in this jurisdiction, especially with expert witnesses. Let's proceed.
RETAINING LAWYER:	You're wrong about that. We're going off the record.
DEPOSING LAWYER:	I object. If you insist on conferring off the record you will be putting yourself and the witness at risk of contempt of court. I will seek a protective order and I intend to enforce it.
RETAINING LAWYER:	Bunk. I'm taking my witness out of the room. I'll tell you when we are ready to reconvene. (Speaking to the witness) Let's get out of here.

It is not the witness's job to resolve this squabble between the attorneys. While ***483** there must be an answer to the controversy--the conference is either allowed or it is not--the witness ordinarily has no way of knowing which lawyer is correct.

Unless the witness has reliable independent knowledge of the jurisdiction's rule, the best approach to this problem is probably to follow the directions of the retaining lawyer. Recall that an expert has specific professional obligations to the client, including a duty to take reasonable steps to protect certain confidences. It is the retaining lawyer who speaks for

the client, and it is the retaining lawyer who is most knowledgeable about the effect of the deposition upon the client's confidences. Hence, the prudent path is usually to accept the retaining lawyer's understanding of the rules.

Nonetheless, experts should be aware that retaining counsel is not infallible. An expert should never violate or disregard a court order, no matter how many assurances are forthcoming from retaining counsel. Even where conferencing is freely allowed, an expert should likewise never permit retaining counsel to dictate or alter the content of her testimony. In extreme or extraordinary circumstances, the expert should consider whether she needs to consult her own attorney.

2. Instructions or Directions

From time to time, retaining counsel may interrupt a deposition by giving instructions directly to the witness. For example, if the lawyer believes that a particular question is improper, or that it seeks privileged information, the witness may be directed not to answer. Such instructions generally occur on the record, often attended by spirited argument between the lawyers. The following colloquy is typical, including the ultimate challenge to the witness.

RETAINING LAWYER:	I object to that question since it calls for "work product." I instruct the witness not to answer.
DEPOSING LAWYER:	You waived work product when you designated the witness as a testifying expert. The question stands.
RETAINING LAWYER:	You can ask what you want, but the witness is not going to respond. If you want an answer you'll have to take it before the judge.
DEPOSING LAWYER:	This witness is not your client. You can object, but you cannot give her any instructions. I am going to ask the question one more time. If the witness refuses to answer we will have no choice but to certify the question and get a court order compelling her to answer. (Speaking to the witness) Are you going to follow your lawyer's instructions and refuse to answer my question?

***484** The witness is now in a bind. Retaining counsel has instructed her not to answer a question but the deposing lawyer insists threatening court action if she refuses. Which lawyer is right? Which one should the witness believe? Most important, how should the witness respond?

As is often the case, it turns out that each lawyer is partially correct, and each is partially wrong. It is imperative that the retaining lawyer take the necessary steps to protect privileged information, including so-called "work product." [FN59] Those steps may well include preventing an expert witness from disclosing otherwise undiscoverable information during a deposition. The deposing lawyer is accurate, however, in pointing out that the retaining lawyer does not represent the witness and cannot give her instructions. Although this might seem to confuse the matter, it actually suggests a clear course of conduct for the expert.

The witness must always be sensitive to the need to shield privileged information. Once information has been revealed, it may lose its protected nature even if the deposing lawyer was never entitled to it in the first place. [FN60] This "cat out of the bag" rule requires extreme caution in responding to questions that have drawn objections. And while it is true that retaining counsel cannot instruct an expert to refrain from answering, that does not mean that the witness must answer.

Here is the solution. If the witness improperly declines to answer, the information can always be provided later. Thus, there is relatively little harm in refusing to answer a particular question, pending resolution by the lawyers or a ruling by the court. On the other hand, information can never be retrieved once it has been disclosed. Great damage can be done by ignoring an objection and by proceeding to reply.

Thus, in the absence of other factors, the best approach for a witness is to decline to answer questions once retaining counsel has objected on the basis of privilege or confidentiality. [FN61] A polite refusal to answer will preserve the objection so that it may, if necessary, be brought before the court, as in the following example.

DEPOSING LAWYER:	Are you going to follow your lawyer's instructions and refuse to answer my question?
EXPERT WITNESS:	I am not following anyone's instructions, but I decline to answer that question. It is not my job to resolve disputes between counsel about privilege or discoverability.

***485** One last point. Note that the deposing attorney made a sly reference to "your lawyer's instruction." Retaining counsel is not the witness's lawyer. Expert witnesses are almost never represented by counsel at a deposition. The expert is there to provide an independent analysis and opinion. Since the expert is not a party to the case, the expert is not represented by either of the attorneys.

VI. TRIAL CONDUCT

As with discovery, the basic principles of professional ethics govern an expert witness's conduct at trial. In addition, the expert must be aware of the following "trial specific" issues, including *ex parte* communication, third party communication, and excluded evidence.

A. EX PARTE COMMUNICATION

1. Judges

Ex parte communications are those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter. [FN62] During trial, it is normally prohibited for the judge to participate in a conversation that includes only one side of the case. Of course, the judge can engage in pleasantries with a single lawyer, and certain matters may legitimately be heard without all parties present. [FN63] But on matters related to the case at hand, the general rule is that all communication with the court must take place in the presence of all attorneys.

Thus, expert witnesses should avoid engaging in private conversations with the court. Should the expert incidentally come in contact with the judge, perhaps in the hall or away from the courthouse entirely, care should be taken not to discuss the substance of the case or the content of the witness's testimony.

It occasionally occurs that an *ex parte* interview between the court and a witness is either authorized by law or agreed to by the parties. In those ***486** circumstances, the witness may (and should) communicate candidly with the judge.

Unfortunately, it also occurs that judges seek out witnesses even without legal justification. [FN64] Perhaps the judge is curious, incautious, or simply unaware of the extent of the rule against *ex parte* communication. Whatever the reason, such contact can obviously cause much discomfort for the witness. Most witnesses would never presume to question the judge's knowledge of law or ethics. And, of course, the judge is the judge, perhaps the interview is permitted under the circumstances of the case?

Unless the circumstances are clearly improper, it may be extremely difficult for an expert witness to refuse a judge's request for a private interview. In all situations, however, the occurrence of such an interview should immediately be reported to all counsel in the case.

2. Jurors

All communication between an expert witness and the jurors must take place from the witness stand. It is never permissible for a witness to engage in private discussion with a juror. When encountering jurors in the courthouse hallway or cafeteria, contact should be limited to a polite smile or greeting. Under no circumstances should a witness ever discuss a case with a sitting juror.

B. THIRD PARTY COMMUNICATION

Once a trial has begun, and particularly after the witness has taken the stand, there are significant limits on the propriety of a witness's communications with others, including other witnesses, counsel, and members of the press.

1. Other Witnesses

Many courts follow a policy of excluding witnesses from the courtroom while other witnesses are testifying. [FN65] Experts are often excepted from such orders, but that is not always the case. Thus, an expert witness should always check with retaining counsel before attending the trial as an observer.

Equally important, experts must understand that the exclusion of witnesses is meant to prevent them from gaining knowledge of other witnesses' testimony; it is not merely a prohibition against sitting in the courtroom. Thus, an expert ***487** should not debrief another witness who has already testified and should not read the transcript of earlier testimony, other than at the direction of trial counsel.

2. Counsel

Once a witness has taken the stand, what matters may she discuss with retaining counsel during breaks and recesses? There is no single answer to this question, as the rules vary considerably from jurisdiction to jurisdiction.

In some courts it is considered improper for a witness who has already taken the stand to have any contact whatsoever with any of the attorneys in the matter. In other jurisdictions, witnesses may speak with counsel, but not about the substance of the case. In yet other jurisdictions, the witness and the lawyer may speak freely, but the content of any discussion may be explored on cross-examination.

Complicating matters further, there is no unanimity as to when the various restrictions begin to apply. Thus, some states allow continuing lawyer-witness contact until the end of the direct examination, barring only once the witness has been "tendered for cross." In other courts, the ban on communication begins as soon as the witness is placed under oath.

Needless to say, expert witnesses should determine the applicable rule for the court in question. Whatever the rule, the witness should comply.

3. The Press

In the absence of a gag order or secrecy statute, witnesses are free to speak with the press about the trials in which they have participated.

A sense of professionalism, however, may well counsel restraint. Ordinarily, a party to litigation does not retain an expert for the purpose of speaking to the press. The party may not want the case publicized and may not want to risk the exposure of confidences. In this regard, experts should take their cue from retaining counsel.

C. EXCLUDED EVIDENCE

With or without the expert's knowledge, certain evidence may have been ruled inadmissible by the court. While judges most often make evidentiary rulings in response to objections at trial, they may also rule on motions *in limine* before the expert ever takes the stand. Once evidence has been ruled inadmissible, either during or before the witness's testimony, it is unethical to sneak it in "through the back door." [FN66] Thus, if an expert has been instructed to refrain from testifying ***488** about certain facts or on certain issues, the witness should not attempt to blurt out the proscribed information on the pretext of answering an unrelated question.

VII. POSSIBLE LIABILITY FOR NEGLIGENCE

While the doctrine of witness immunity has traditionally protected experts from litigation arising out of their forensic work, [FN67] a theory of expert witness negligence may be emerging. [FN68] The term "theory" is apropos; to date no such standard has been firmly established. [FN69] Nonetheless, some argue for its inception, [FN70] and a hand-full of courts have warmed to the notion. [FN71]

CONCLUSION

As modern litigation continues its march toward increasing technical complexity, it will become more important to define and understand issues of ethics and professionalism as they relate to expert witnesses. This Article was intended as a first step in that direction. While it may not have answered all of the most important questions, perhaps it has succeeded in raising the right issues.

[FNa1]. Professor of Law, Northwestern University. Thanks are due to Jill Trumbull-Harris, Northwestern University School of Law class of 2000, for research assistance. This Article is adapted from STEVEN LUBET, EXPERT TESTIMONY: A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM (1998).

[FN1]. See Michael A. Graham, *Expert Witness Testimony and the Federal Rule of Evidence: Insuring Adequate Assurance of Trustworthiness,* 1986 U. ILL. L. REV. 43, 45 (1986) (noting that practicing lawyers can locate quickly and easily an expert witness to testify in nearly every sort of case); *see also Defendants File Expert List with Texas District Court,* 11 MEALEY'S LITIG. REP.: TOBACCO (Mealey) No. 5 (July 3, 1997) (listing the 101 proposed expert witnesses for the defense in Texas' Medicaid recovery action against the American Tobacco Company).

[FN2]. *See, e.g.,* Lazy Oil v. Witco Corp., 1997 U.S. Dist. LEXIS 21397 (W.D. Pa. 1997) (discussing issues relevant to the settlement of an antitrust class action suit).

[FN3]. See, e.g., GE v. Joiner, 522 U.S. 136 (1997) (discussing the appropriateness of certain witnesses in testifying about the nature of injuries).

[FN4]. *See, e.g.,* United States v. Williams, 81 F.3d 1434, 1441 (7th Cir. 1996) (finding the designation of a gang member defendant as an expert appropriate where his "specialized knowledge" enabled him to translate "gang codes" for the jury).

[FN5]. Samuel R. Gross, *Expert Evidence,* 1991 WIS. L. REV. 1113, 1119-20.

[FN6]. PRINCIPLES OF MEDICAL ETHICS V (Am. Med. Ass'n 1996).

[FN7]. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996) [hereinafter MODEL RULES].

[FN8]. ARK. CODE ANN. § 12-12-504(a) (Michie 1987); 325 ILL. COMP. STAT. 5/4 (West 1994); MINN. STAT. ANN. § 626.556 (West 1992). Note also that in most states the duty to report supersedes any privilege of confidentiality. *See* Jaffee v. Redmond, 518 U.S. 1 (1996) (discussing Supreme Court recognition of both a psychotherapist-client and social worker-client privilege and noting that all 50 states and the District of Columbia already recognize some form of a psychotherapist-client privilege and the vast majority of states extend that privilege to licensed social workers); *see also id.* at 28 n.19 (noting "we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist"); United States v. Burtrum, 17 F.3d 1299, 1302 (10th Cir. 1994) (discussing how child abuse is generally an exception to these privileges since it "occur[s] in a clandestine manner and victimize[s] a vulnerable segment of society" and declining to recognize a psychotherapist/client privilege in a criminal child sexual abuse case and commenting that "moreover, minor victims often are intimidated by the legal system and may have difficulty testifying" and recommending special trial procedures for child victims); Thomas R. Malia, Annotation, *Validity, Construction, and Application of Statute Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect,* 44 A.L.R.4th 649 (1987) (listing and discussing cases).

[FN9]. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); DAVID LUBAN, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 38-39 (1983); Gerald Postema, *Moral Responsibility in Professional Ethics,* 55 N.Y.U. L. REV. 63 (1980).

[FN10]. *See, e.g.,* ETHICAL GUIDELINES FOR OCCUPATIONAL AND ENVIRONMENTAL MEDICINE EXPERT WITNESSES (Am. College of Occupational & Envtl. Med. 1997); ETHICAL PRINCIPLES AND CODE OF CON-

DUCT § 7 (Am. Psychological Ass'n 1992).

[FN11]. *See, e.g.*, CODE OF PROFESSIONAL CONDUCT (Am. Inst. of Certified Pub. Acct. 1997).

[FN12]. *See, e.g.*, PRINCIPLES OF MEDICAL ETHICS (Am. Med. Ass'n 1996).

[FN13]. *See, e.g.*, MODEL RULES.

[FN14]. *See, e.g.*, Am. Psychological Ass'n, *supra* note 10.

[FN15]. FED. R. EVID. 702.

[FN16]. *See* Lester Brickman & Ronald Rotunda, *When Witnesses Are Told What to Say*, WASH. POST, Jan. 13, 1998, at A15 (noting that lawyers may overstep and put their words in the mouths of witnesses); Jan Crawford Greenburg, *The Whole Truth ... and Nothing But; The Line Between Coaching Witnesses and Obstructing Justice Is a Lot Fuzzier Than You Would Think*, CHI. TRIB., June 7, 1998, at C1 (noting that even prosecutors can "improperly shape witness' testimony"); Larry Tye, *Boom in Experts For Hire Worries Trial Observers*, BOSTON GLOBE, Oct. 26, 1997, at A1 (commenting that lawyers may influence testimony by limiting questions asked).

[FN17]. MODEL RULES Rule 4.1.

[FN18]. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 47 (1887).

[FN19]. The current standard for admitting expert scientific testimony in federal trials was set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the court stated that the trial judge must determine at the outset whether the expert is proposing to testify to "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id* at 592. The Court stated that in order to "qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." *Id.* at 590. The Court noted four nonexhaustive factors that would bear on this inquiry: (1) falsifiability, (2) peer review, (3) rate of error, and (4) general acceptance. *Id.* at 593-94. In *Kumho Tire Co. v. Carmichael*, the court applied the same four factors to non-scientific expert testimony. 119 S. Ct. 1167 (1999). *See also* GE v. Joiner, 522 U.S. 136 (1997) (holding that appellate courts reviewing a trial court's decision to admit or exclude expert testimony should apply the abuse of discretion standard).

[FN20]. MODEL RULES Rule 3.1 cmt. 1.

[FN21]. *See* STEVEN LUBET, MODERN TRIAL ADVOCACY 244-45 (2d ed. 1997) (listing techniques for cross-examining expert witnesses).

[FN22]. Even where the witness was not retained for the purpose of testimony, as in the case of a treating physician, most professional privileges are waived once the witness is called to testify. Gross, *supra* note 5, at 1223.

[FN23]. *See* FED. R. CIV. P. 26(a)(2)(B) (declaring that discovery disclosures include the expert's written report, which "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions ..."). The accompanying commentary states that "[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions-- whether or not ultimately relied upon by the expert-- are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." *Id.*

[FN24]. Some courts have gone even further. In *Herrick Co. v. Vetta Sports, Inc.*, the judge ordered an ethics expert to turn over to plaintiffs the records of 18 unrelated matters on which he had consulted with the defendant law firm. No. 94 Civ. 0905, 1998 U.S. Dist. LEXIS 14544 (S.D.N.Y. Sept. 14, 1998). In fact, the disclosure order extended to nine matters in which the content of the expert's opinion had not previously been disclosed to third parties. Though such information "would normally be shielded by the work product doctrine or attorney-client privilege," the court held that these protections were waived once the expert was designated as a potential witness. *Id.*

[FN25]. *See* RESTATEMENT (SECOND) OF AGENCY § 395 (1958) ("Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency ...").

[FN26]. *See id.* § 388 ("Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.").

[FN27]. Other law may also limit the expert's use of confidential information. For example, an economics expert may obtain "insider information" concerning a publicly traded corporation. The use of this information for investment purposes could constitute a crime under the federal Securities Exchange Act.

[FN28]. *See* FED. R. CIV. P. 26(b)(4)(A) (1993) (allowing parties to depose "any person who has been identified as an expert whose opinions may be presented at trial"); *see also id.* 26(b)(4)(B) (declaring, in part, that "a party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial").

[FN29]. *See* Erickson v. Newmar Corp., 87 F.3d 298, 302-03 (9th Cir. 1996) (finding an attorney guilty of "misconduct" that was "prejudicial to the administration of justice" following an *ex parte* meeting with opposing counsel's witness); Campbell Indus. v. M/V Gemini, 619 F.2d 24, 26 (9th Cir. 1980) (finding that an attorney commits a "flagrant violation" of federal rule of civil procedure 26(b)(4)(A) if she makes *ex parte* contact with an opposing party's expert witness); Heyde v. Xtraman, Inc., 404 S.E.2d 607, 611 (Ga. Ct. App. 1991) (holding that an attorney who does not follow the proper discovery procedures regarding expert witnesses "should not now be allowed to circumvent them by engaging in *ex parte* communications with the opposing party's expert"); *see also* GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 3.4, at 402 (2d ed. Supp. 1994) (concluding that, "Since existing rules of civil procedure carefully provide for limited and controlled discovery of an opposing party's expert witnesses, all other forms of contact are impliedly prohibited"). Although the *Model Rules* do not squarely address this issue, the ABA Committee on Ethics and Professional Responsibility declared that "a lawyer who engages in such contacts may violate *Model Rule* 3.4(c)." ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 93-378 (1993). This applies only if "the matter is pending in federal court or in a jurisdiction that has adopted an expert-discovery rule patterned after Federal Rule of Civil Procedure 26(b)(4)(A). *Id. Model Rule* 3.4(c) states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." MODEL RULES Rule 3.4(c).

[FN30]. *See* Brown v. Hamid, 856 S.W.2d 51, 54-55 (Mo. 1993) (holding that the trial court did not err in failing to sanction improper *ex parte* contact because prejudice to the complaining party was not shown); *see also* Brandt v. Pelican, 856 S.W.2d 658, 661 (Mo. 1993) (finding no grounds for a new trial where an expert medical witness had also served as plaintiff's treating physician).

[FN31]. *See Erickson,* 87 F.3d at 300 (denying plaintiff's motion for judgment against the defendant for tampering with a

material witness when defense counsel asked the plaintiff's expert witness to evaluate evidence in an unrelated case).

[FN32]. ABA Standing Comm. on Prof. Conduct, Formal Op. 97-407 (1997).

[FN33]. MODEL RULES Rule 7.1.

[FN34]. *See id.* Rule 1.7(a) (stating that a lawyer may engage in such representation only if each client consents following disclosure).

[FN35]. "A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert." ABA Standing Comm. on Prof. Conduct, Formal Op. 97-407 (1997).

[FN36]. There is authority that one person may testify for both sides (on different issues) in the same lawsuit. *Id.*

[FN37]. *See supra* notes 20-21 and accompanying text.

[FN38]. *See, e.g.,* Theriot v. Parish of Jefferson, 1996 U.S. Dist. LEXIS 9713 (E.D. La. 1996) (disqualifying an expert where a case amounted to "an outgrowth of ... prior litigation" in which expert was consulted by, and testified for, the adverse party). Note that the affected clients could consent.

[FN39]. Courts have developed the following test for determining whether an expert should be disqualified for switching sides. "First, was it objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed? Second, was any confidential or privileged information disclosed by the first party to the expert?" Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1178, 1181 (5th Cir. 1996). If a negative answer is given to either prong, "disqualification is likely inappropriate." Wang Lab., Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1248 (E.D. Va. 1991). Additionally, "many lower courts have considered a third element: the public interest in allowing or not allowing an expert to testify." *Koch,* 85 F.3d at 1181. The party seeking disqualification bears the burden of proving these elements. Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 580 (D.N.J. 1994).

[FN40]. "[N]o one would seriously contend that a court should permit a consultant to serve as one party's expert where it is undisputed that the consultant was previously retained as an expert by the adverse party in the same litigation and had received confidential information from the adverse party pursuant to the earlier retention. This is a clear case for disqualification." *Toshiba,* 762 F. Supp. at 1248. Note that both elements of the test must be proven in order to disqualify the expert; even if a confidential relationship exists, disqualification is inappropriate unless some privileged or confidential information passed. If this were not the rule, then a lawyer could potentially disqualify an expert merely by retaining him, with no intention of actually using the expert's services, to disable his opponent from using the expert for himself. *Id.*

[FN41]. *See* Hansen v. Umtech Industrieservice Und Spedition, No. CIV.A.95-516 MMS, 1996 U.S. Dist. LEXIS 10949, 20 (D. Del. July 3, 1996) (noting that "the most important consideration in expert disqualification cases ... is the preservation of confidentiality").

[FN42]. *See, e.g.,* English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498 (D. Colo. 1993) (refusing to disqualify an expert on the grounds that no confidential information had been given to the expert); Mayer v. Dell, 139 F.R.D. 1 (D.D.C. 1991) (refusing to disqualify an expert where no confidential relationship was found with an original client).

[FN43]. *See, e.g., Toshiba,* 762 F. Supp. at 1248 (disqualifying an expert who was given a detailed memorandum containing a patent file history and potential defenses to the lawsuit, both of which were protected confidential work

products); Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271 (S.D. Ohio 1988) (disqualifying an expert who switched sides after having extensive involvement with the original client, including a retainer agreement and compensation, reviewing case material, and preparing an oral report).

[FN44]. *See infra* Section IV.C. (concerning the relationship between preclusion and fee arrangements).

[FN45]. MODEL RULES Rule 3.4(b) cmt. *See also,* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) (1980) [hereinafter MODEL CODE].

[FN46]. MODEL RULES Rule 3.4(b) cmt. *See also* Tagatz v. Marquette University, 861 F.2d 1040 (7th Cir. 1988) (discussing ethical problems with contingent fees); Swafford v. Harris, 967 S.W.2d 319 (Tenn. 1998) (holding a contingency fee void as against public policy). *But see* David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases,* 41 HASTINGS L.J. 281 (1990) (discussing the importance of expert witnesses to indigent defendants); Reed E. Schaper, *The Contingent Compensation of Expert Witnesses in Civil Litigation,* 52 IND. L.J. 671 (1977) (arguing in favor of an impartial expert to help satisfy the needs of less affluent litigants); Note, *Contingent Fees for Expert Witnesses in Civil Litigation,* 86 YALE L.J. 1680 (1977) (arguing that indigents should be able to contract on a contingent basis with expert witnesses); Jeffrey Parker, Note, *Contingent Expert Witness Fees: Access and Legitimacy,* 64 S. CAL. L. REV. 1363 (1991) (examining current expert witness compensation schemes and proposing alternatives).

[FN47]. MODEL CODE DR 7-109(C). The *Model Code* has been superseded in most states by the *Model Rules,* but the definitions of "contingent fee" remain accurate. *See, e.g.,* ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(15).

[FN48]. *See* Mike Francet, *Clock's Running on Billable Hours,* NAT'L L.J. Dec. 19, 1994, at C1 (noting how value billing, among other alternative billing methods, is "becoming increasingly commonplace"); David H. Maister, *The New Value Billing,* AM. LAW., May 1994, at 40 (describing value billing schemes including holdback and guarantee billing systems).

[FN49]. Some experts bill at a higher (or "premium") rate for time spent in deposition or trial, on the theory that such time is more taxing or arduous. In the same vein, many lawyers charge more for trial time and physicians charge more for surgery than they do for office visits. "Premium time" billing is not regarded as unethical, though the practice is not widespread.

[FN50]. *See supra* Section III.B.

[FN51]. Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law,* 57 FORDHAM L. REV. 149 (1988). *See also,* P.S. Kunen, *No Leg To Stand On: The General Retainer Exception To the Ban on Nonrefundable Retainers Must Fall,* 17 CARDOZO L. REV. 719 (1996) (arguing that an attorney should not be permitted to retain a fee simply because it is paid as a part of a general retainer, if the representation terminates prematurely).

[FN52]. *See, e.g.,* Federal Sav. & Loan Ins. Corp. v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir. 1988) (holding that a firm was not entitled to fees for services performed after the date of firing); Wong v. Michael Kennedy, P.C., 853 F. Supp. 73 (E.D.N.Y. 1994) (noting that a nonrefundable retainer agreement is a per se violation of public policy and is unenforceable); *In re* Comstock, 664 N.E.2d 1165 (Ind. 1996) (suspending an attorney for charging an unreasonable fee); *In re* Cooperman, 633 N.E.2d 1069 (N.Y. 1994) (holding that use of nonrefundable fee arrangements warrants a two-year suspension).

[FN53]. For an extended discussion of the use of nonrefundable retainers by certain expert witnesses, see Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited,* 72 N.C. L. REV. 1 (1993) (arguing against the use of nonrefundable retainers by lawyer "ethics experts"); Steven Lubet, *The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers,* 73 N.C. L. REV. 271 (1994) (demonstrating that use of nonrefundable retainers by expert witnesses is ethically acceptable); Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban,* 64 U. CIN. L. REV. 11 (1995) (relenting);

[FN54]. FED. R. CIV. P. 26(b)(4).

[FN55]. *Supra* Section IV.C.

[FN56]. *See* 18 U.S.C. §§ 1501-1515 (1996) (providing criminal penalties for those who obstruct justice by tampering with evidence); *see also* Phoebe L. McGlynn, Note, *Spoliation in the Product Liability Context,* 27 MEM. ST. U.L. REV. 663, 664 (1997) (discussing criminal and civil liability for the destruction of evidence). *Cf.* Margaret O'Mara Frossard & Neal S. Gainsberg, *Spoliation of Evidence in Illinois: The Law After Boyd v. Traveler's Insurance Co.,* 28 LOY. U. CHI. L.J. 685, 686 (1997) (discussing how some states now recognize spoliation of evidence as a tort); Eric Marshall Wilson, Note, *The Alabama Supreme Court Sidesteps a Definitive Ruling in Christian v. Kenneth Chandler Construction Co.: Should Alabama Adopt the Independent Tort of Spoliation?,* 47 ALA. L. REV. 971, 977-78 (1996) (observing that a number of states now recognize spoliation of evidence as a tort).

[FN57]. *See* DAVID M. MALONE & PETER T. HOFFMAN, THE EFFECTIVE DEPOSITION (2d ed. 1996) (discussing the invocation of privilege at depositions).

[FN58]. *Id.*

[FN59]. An attorney's "work product," including documents and tangible things "prepared in anticipation of litigation or for trial," is generally protected from discovery by the opposing party. FED. R. CIV. P. 26(b)(3).

[FN60]. "Generally ... if a party voluntarily discloses privileged information to anyone other than his or her attorney, the party completely waives the protection afforded by both the attorney-client privilege and the work-product doctrine." Janet Hall, *"Limited Waiver" of Protection Afforded by the Attorney-Client Privilege and the Work-Product Doctrine,* 1993 U. ILL. L. REV. 981, 981 (citing federal rule of civil procedure 26(b)(3) and federal rule of evidence 501).

[FN61]. Not all objections require refusal to answer. Lawyers will often say something on the order of, "Objection, the witness may answer." Experts need not concern themselves with the rules of evidence or other procedural complexities that create this situation. MALONE & HOFFMAN, *supra* note 57.

[FN62]. JEFFREY M. SHAMAN, STEVEN LUBET, & JAMES ALIFINI, JUDICIAL CONDUCT AND ETHICS 149 (2d ed. 1995).

[FN63]. The legality of *ex parte* proceedings is beyond the scope of this Article.

[FN64]. *See* SHAMAN ET AL., *supra* note 62, at 162.

[FN65]. This is sometimes called "Invoking the Rule." FED. R. EVID. 615. "Few trials begin without at least one of the parties asking that the judge invoke the rule." Gregory M. Taube, *The Rule of Sequestration in Alabama: A Proposal for Application Beyond the Courtroom,* 47 ALA. L. REV. 177, 177 (1995). "The rule is the rule of sequestration which has been adopted by most modern rules of evidence." *Id.* at n.1.

[FN66]. *See* LUBET, *supra* note 21, at 81. Note, however, that federal rule of evidence 703 permits an expert to rely on inadmissible evidence in forming an opinion, if the inadmissible evidence is of a type reasonably relied upon by other experts in the field.

[FN67]. Such conduct, though otherwise actionable, escapes liability because the expert "is acting in furtherance of some interest of social importance ...." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 114, at 815 (5th ed. 1984). If the social interest is deemed to be of special importance, absolute immunity may be afforded. *Id.* at 816. If, on the other hand, the interest is deemed to be less important but the expert has acted reasonably and in good faith, qualified immunity may be applied. *Id.* Expert witnesses have traditionally received absolute immunity for words spoken or written in the course of a judicial proceeding. Leslie R. Masterson, Note, *Witness Immunity or Malpractice Liability for Professionals Hired as Experts?,* 17 REV. LITIG. 393, 399 (1998) (citing KEETON, *supra,* § 114, at 816-17); *see also* Christopher M. McDowell, Note, *Authorizing the Expert Witness to Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness,* 28 MEM. ST. U.L. REV. 239, 241-42 (1997) (noting that when "experts are hired by a party, either to testify or to provide litigation support, the expert is cloaked with the shield of absolute immunity so long as the statements made by the witness are relevant to the proceeding").

[FN68]. Masterson, *supra* note 67, at 394; s*ee also* Douglas R. Richmond, *The Emerging Theory of Expert Witness Malpractice,* 22 CAP. U. L. REV. 693 (1993).

[FN69]. *See* Masterson, *supra* note 67, at 418 (concluding that "professionals who appear as expert witnesses at trial are protected from liability for their testimony by the doctrine of witness immunity").

[FN70]. Randall K. Hanson, *Witness Immunity Under Attack: Disarming "Hired Guns,"* 31 WAKE FOREST L. REV. 497, 497 (1996); Eric G. Jensen, Note, *When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness,* 62 UMKC L. REV. 185, 185 (1993).

[FN71]. *See, e.g.,* Levine v. Wiss & Co., 487 A.2d 397 (N.J. 1984) (holding immunity unavailable to shield a "friendly" accountant's malpractice, even though the professional was hired to prepare an appraisal for a judicial proceeding); James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982) (finding that while adverse doctors forensic misdiagnoses are not actionable under a claim of defamation, "the diagnoses themselves may be actionable on other grounds ... [[[the Plaintiff] is not prevented from recovering from the doctors for negligent misdiagnosis-medical malpractice merely because their diagnoses were later communicated to a court in the due course of judicial proceedings"); Bruce v. Byrne-Stevens & Assocs. Eng'rs, 776 P.2d 666 (Wash. 1989) (Pearson, J., dissenting) (arguing that the purpose of absolute witness immunity is not to shield an expert from otherwise actionable professional malpractice); Mattco Forge, Inc. v. Arthur Young & Co., 52 Cal. App. 4th 820 (Cal. Ct. App. 1997) (holding that immunity was unavailable to shield a claim against a "friendly" accounting firm for expert witness negligence); Murphy v. A.A. Mathews, 841 S.W.2d 671 (Mo. 1992) (holding that witness immunity does not protect an expert who provided negligent litigation support).
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THE COURT 71 (1997) (discussing the use of the world wide web by expert witnesses).

[FN9]. Hanson, *supra* note 3, at 497.

[FN10]. *See* Richard Epstein, *A New Regime for Expert Witnesses*, 26 VAL. U. L. REV. 757, 759 (1992) (pointing out that experts who "win" cases will likely receive a larger fee in the next case); Samuel Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1132 (1991) (stating that experts whose income depends on testimony must learn to satisfy the consumers who purchase their testimony, and those who fail to do that will not get hired); Eric G. Jensen, *When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 UMKC L. REV. 185, 192 (1993) (quoting a famous tort lawyer as saying "If I got myself an impartial witness, I'd think I was wasting my money.") (citation omitted); Daniel Shuman & Elizabeth Whitaker, *An Empirical Examination of the Use of Expert Witnesses in the Courts*, 34 JURIMETRICS J. 193, 202 (1994) (stating that seventy-nine percent of judges believed that expert witnesses are not impartial) (citations omitted).

[FN11]. It is not difficult to find ethically questionable behavior by experts in court; in fact, it could almost turn into a "parade of horribles." *See* In the Matter of an Investigation of the W. Va. State Police Crime Lab., 438 S.E.2d 501 (W. Va. 1993) (where a former officer in the Serology Division was found to have deliberately falsified evidence in criminal prosecutions); Geoffrey Campbell, *Erdmann Faces New Legal Woes: Pathologist Indicted for Perjury in Texas Murder Trial*, 81 A.B.A.J. 32 (Nov. 1995) (describing how a former Texas pathologist faked autopsies to aid in convictions, including in one instance switching tissue slides of a seventy two-year-old woman with a twenty nine-year-old man to prove that the woman was healthy when she died); Bill Miller, *D.C. Police Expert Admits Perjury; Top Witness in Narcotics Cases Pleads Guilty to Lying About His Credentials*, WASH. POST, Feb. 11, 2000, at B3 (describing how Johnny St. Valentine Brown, the District of Columbia's leading narcotics expert for twenty years, lied about his pharmacology degree and offered no explanation for his dishonest actions); Benjamin Weiser, *An Expert Witness Courts Disaster; Stretching Credentials May Have Shattered D.C. Surgeon's Credibility*, WASH. POST, Aug. 19, 1994, at A1 (where a judge discovered that a leading plaintiff's expert in lawsuits and workers compensation claims had falsified his educational background, where he had trained, where he had practiced medicine, and where he possessed medical privileges).

[FN12]. FED. R. EVID. 102.

[FN13]. *See* Leslie R. Masterson, *Witness Immunity or Malpractice Liability for Professionals Hired as Experts ?*, 17 REV. LITIG. 393, 395 (1998).

[FN14]. *See id.* at 195; Jensen, *supra* note 10, at 189; Perrin, *supra* note 7, at 1394; Daniel Shuman & Stuart Greenberg, *The Role of Ethical Norms in the Admissibility of Expert Testimony*, 37 (NO. 1) JUDGES J. 4, 6 (1998).

[FN15]. FED. R. EVID. 702.

[FN16]. *Id.* advisory committee's note; *see also* CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE § 7.5 (1995); Perrin, *supra* note 7, at 1395.

[FN17]. MUELLER & KIRKPATRICK, *supra* note 16, at § 7.6. In addition, the court under Rule 104(a) must determine whether the witness possesses the expertise necessary to help the trier of fact. FED. R. EVID. 104(a).

[FN18]. *Compare* FED. R. EVID. 702 advisory committee's note ("An intelligent evaluation of facts is often dif-

FEDERAL RULES OF CIVIL PROCEDURE
TITLE V. DISCLOSURES AND DISCOVERY

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Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures--In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures--For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*.

(B) Witnesses Who Must Provide a Written Report. 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:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data 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 10 years;

(v) a list of all other cases in which, during the previous 4 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.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) 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:

(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) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under *Federal Rule of Evidence 402* or *403*--is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) *Limitations on Frequency and Extent.*

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) *Trial Preparation: Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure

of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

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

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

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

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court

where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Sequence.* Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the

parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

HISTORY:

(Amended March 19, 1948; July 1, 1963; July 1, 1966; July 1, 1970; Aug. 1, 1980; Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993; Dec. 1, 2000; Dec. 1, 2006; Dec. 1, 2007.)

(As amended Dec. 1, 2010.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements--sometimes called "clawback agreements"--that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

Notes of Advisory Committee on 2007 amendments. The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

Notes of Advisory Committee on 2010 amendments. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than "data or other information," as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions--communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including--for many experts--an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts--one for purposes of consultation and another to testify at trial--because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Note to Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all "facts or data considered by the witness in forming" the opinions to be offered, rather than the "data or other information" disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Note to Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Note to Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Note to Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); *see* Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993),* and related cases.

The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert's study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party's attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii)--that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert's testimony. A party's failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

NOTES:

Related Statutes & Rules:

Depositions before action or pending appeal, *USCS Rules of Civil Procedure, Rule 27.*
Persons before whom depositions may be taken, *USCS Rules of Civil Procedure, Rule 28.*
Stipulations regarding taking depositions, *USCS Rules of Civil Procedure, Rule 29.*
Certification and filing of depositions, *USCS Rules of Civil Procedure, Rule 30.*
Failure to attend or serve subpoena, expenses, *USCS Rules of Civil Procedure, Rule 30.*
Motion to terminate or limit examination, *USCS Rules of Civil Procedure, Rule 30.*
Notice for taking deposition, *USCS Rules of Civil Procedure, Rule 30.*
Orders for protection of parties and deponents, *USCS Rules of Civil Procedure, Rule 30.*
Record of examination, *USCS Rules of Civil Procedure, Rule 30.*
Time and place for depositions, *USCS Rules of Civil Procedure, Rules 30, 45.*
Depositions of witnesses upon written interrogatories, *USCS Rules of Civil Procedure, Rule 31.*
Effect of errors and irregularities in depositions, *USCS Rules of Civil Procedure, Rule 32.*
Objections to admissibility of depositions, *USCS Rules of Civil Procedure, Rule 32.*
Written interrogatories of party, *USCS Rules of Civil Procedure, Rule 33.*
Consequences of refusal to appear for deposition, *USCS Rules of Civil Procedure, Rule 37.*
Order compelling answer to question propounded upon oral examination, *USCS Rules of Civil Procedure, Rule 37.*
Examination and cross-examination of deponents, *USCS Rules of Civil Procedure, Rule 43.*
Subpoena for taking depositions, *USCS Rules of Civil Procedure, Rule 45.*
Depositions opposing motion for summary judgment, *USCS Rules of Civil Procedure, Rule 56.*
Continuance to procure depositions opposing motion for summary judgment, *USCS Rules of Civil Procedure, Rule 56.*

Research Guide:

Federal Procedure:

1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 1, Scope and Purpose § 1.06.
1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 3, Commencing an Action § 3.04.
1 Moore's Federal Practice (Matthew Bender 3d ed.), ch 5, Service and Filing of Pleadings and Other Papers § 5.33.
2 Moore's Federal Practice (Matthew Bender 3d ed.), ch 7, Pleadings Allowed; Form of Motions and Other Papers §§ 7.03, 7.04.
2 Moore's Federal Practice (Matthew Bender 3d ed.), ch 8, General Rules of Pleading § 8.04.
3 Moore's Federal Practice (Matthew Bender 3d ed.), ch 16, Pretrial Conferences; Scheduling; Management §§ 16.10-16.13, 16.32, 16.33, 16.35, 16.36, 16.72-16.74, 16.77, 16.78, 16.90, 16.92, 16.94.
5 Moore's Federal Practice (Matthew Bender 3d ed.), ch 23, Class Actions § 23.85.
6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 26, Duty to Disclose; General Provisions Governing Discovery §§ 26.02 et seq.
6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 27, Depositions to Perpetuate Testimony §§ 27.03, 27.13, 27.16.
6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 28, Persons Before Whom Depositions May Be Taken § 28.12.
6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 29, Stipulations About Discovery Procedure § 29.04.

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Managing Editor
Jim Donovan

Law Clerks
Austin Booth
Elizabeth Gailey

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Expert Witnesses

In This Issue

Researching Expert Witnesses Online: Resources and Strategies

Jennifer L. McMahan
Chief Librarian for the Civil, Criminal, and Civil Rights Division
Justice Management Division

I. Introduction

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

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

II. Licensure and professional status

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

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

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

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

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

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

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

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

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

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

III. Legal proceedings

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

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

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

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

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

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

IV. Publication and conference proceedings

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

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

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

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

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

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

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

V. Web searching

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

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

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

VI. Conclusion

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

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

ABOUT THE AUTHOR

❑ **Jennifer L. McMahan** has been with the Justice Libraries for over 10 years and currently serves as the head librarian for the Civil, Criminal, and Civil Rights Divisions. She has given numerous presentations in Washington, D.C., and at the National Advocacy Center on expert witnesses, public records research, and searching the Web.✠

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

Michele Masias
Law Librarian
Justice Libraries

I. Introduction

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

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

II. Legal proceeding search tools

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

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

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

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

III. Academia search tools

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

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

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

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

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

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

IV. Literature search tools

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

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

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

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

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

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

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

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

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

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

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

V. Directory search tools

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

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

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

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

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

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

VI. Professional association tools

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

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

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

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

VII. Fee-based sites

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

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

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

ABOUT THE AUTHOR

❑ Michele Masias was a Law Librarian with the Department of Justice Libraries for 4 years at the Patrick Henry Branch Library where she provided reference assistance for the Environment, Civil Rights, and Civil Frauds Divisions. Prior to her position at the Department of Justice, she worked for the Defense Technical Information Center where she served as the corporate librarian for the DTIC staff. She is now a Law Librarian at the Executive Office of the President.✠

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Remarks

*449 JUNK SCIENCE--THE LAWYER'S ETHICAL RESPONSIBILITIES

Dick Thornburgh [FNa1]

The following offers some observations designed to advance the cause of resolving the dilemma presented to judges and lawyers alike by the escalating concern over "junk science" in our nation's courtrooms.

Nowhere has this phenomenon been more starkly, or sadly, described than in a recent New York Times review of a television documentary on women affected by breast cancer:

> They are convinced that they were poisoned by their toxic environment. . . . Are crops sprayed with pesticides? Well, then of course pesticides caused breast cancer. Do we use electricity? Well, of course electromagnetic fields caused breast cancer. How about those plastics we use with such abandon? Once again, the women hear, those plastics contain chemicals that can cause breast cancer. [FN1]

The reviewer described the women interviewed as "far removed from the universe of scientists and others who make distinctions between hypotheses and evidence, who believe that speculation is not proof and that when evidence fails to support a hypothesis, the hypothesis should be abandoned." [FN2]

Broadly speaking, I hold that "junk science" in the courtroom emanates from testimony by expert witnesses hired not for their scientific expertise, but for their willingness, for a price, to say whatever is needed to make the client's case. Put simply, I believe that it is unethical lawyers who are largely to blame for introducing, or, in settlement negotiations, threatening to introduce this so-called "expert" testimony. As one commentator noted, "lawyers casting about for new theories to use to sue manufacturers of *450 drugs, medical devices and other products create a limitless demand for junk science." [FN3]

A recent example of this phenomenon was reported on the front page of the New York Law Journal in September 1997. [FN4] Within days of the withdrawal of weight reduction medications Fen-Phen and Redux from the market, lawyers across the country were in court seeking damages and simultaneously placing ads in newspapers in search of plaintiffs. [FN5] By mid-November, at least three nationwide and more than two dozen statewide class action suits, as well as hundreds of individual cases and a shareholder suit were pending. [FN6]

As the litigation explosion expands in this country, junk science is producing "junk law" that is pervading our courtrooms. The ultimate victims are America's workers and consumers through the increased costs, diminished innovation opportunities, and foregone product availabilities imposed on enterprises engaged in scientific research and development and product manufacturing.

As pointed out in the recent best-seller, Science on Trial, by Dr. Marcia Angell, the Executive Editor of the

New England Journal of Medicine, breast implant litigation, threatening the existence of breast implant manufacturers and other suppliers, is but the most prominent of the abounding examples of this phenomenon. [FN7] In 1992 the Food and Drug Administration ("FDA") imposed a moratorium***451** on the sale of silicone gel breast implants and subsequently restricted the sale and use of the implants. Deluged with lawsuits, Dow Corning, the implant makers, entered into bankruptcy in 1995. Reliable epidemiological data, however, has since demonstrated that silicone breast implants do not cause the maladies they were alleged to cause in the myriad lawsuits brought by women implanted with them. [FN8] In her book, Dr. Angell argues that the breast implant litigation has threatened the entire industry of medical devices, as well as an important area of medical research-- epidemiological studies. [FN9]

The classic example of this phenomenon was the Bendectin litigation. [FN10] Faced with claims that the anti-nausea drug Bendectin caused defects in fetuses, Merrell Dow Pharmaceuticals was forced to withdraw this drug from the market despite the lack of evidence demonstrating such a causal connection. Indeed, although Bendectin litigation had been pending in the courts for over a decade, the United States Court of Appeals for the Ninth Circuit noted:

> the only review plaintiffs' experts work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of the federal and state reporters. . . . Despite the many years the controversy has been brewing, no one in the scientific community-- except defendant's experts--has deemed these studies worthy of verification, refutation, or even commentary. It's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation. [FN11]

Another recent target of junk science litigation is the contraceptive device Norplant. An avalanche of lawsuits has been brought by many of the same lawyers who engaged the makers of silicone breast implants. [FN12] In addition, many of the same medical "experts" and laboratories that prospered from the breast implant litigation are assisting these lawyers in bringing suits against the makers of Norplant. [FN13] Norplant entered the United States market in 1991, after thirty years of development and testing, and has been used by ***452** about one million American women. [FN14] Approximately 50,000 women have sued the company's manufacturer, alleging that it failed adequately to warn users of side effects like headaches, weight gain, ovarian cysts, and depression. [FN15] A total of 2800 lawsuits are now pending in just one federal court in Texas. [FN16]

The Texas Supreme Court was obliged to delay lawsuits that were set for trial while it ruled on defendant's motion to disqualify plaintiffs' lawyers for hiring a paralegal who used to work for the defense and for paying an expert $10,000 to switch sides. [FN17] Despite extensive litigation and media coverage, the FDA and physician groups still insist the product is safe. Sales, nonetheless, have dropped dramatically--from $141 million in its first full year on the market to $3.7 million last year. [FN18]

Junk science is made possible in part by so-called "experts" who will testify to any theory the lawyer wants for a price. A look at the classified section of any legal publication will produce samples of a whole industry of "experts" advertising their abilities to provide a wide range of expert testimony. Many of them get right to the point, highlighting jury awards or settlement amounts gained as a result of their testimony. One of the largest expert witness referral services maintains a list of 24,000 experts in 5500 fields. Their business is litigation, not science. Their motivation raises serious questions about the use of expert testimony generally. Are these experts really seeking to assist the trier of fact, or are they hired guns aiming at a pre-determined result?

At the turn of the century, Judge Learned Hand was among the first to raise issues regarding the role of ex-

pert testimony, questioning an expert's ability to give an unbiased opinion when he is being liberally paid to defend one side to a dispute. [FN19] Judge Hand also questioned a jury's ability to decipher and resolve conflicting expert testimony. As he observed, "the whole object of the expert is to tell the jury, not facts, . . . but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience admittedly foreign in kind to their own? It is just because they are incompetent for such ***453** a task that the expert is necessary at all." [FN20] No better example of this quandary is presented than in Daubert, where the defense expert pointed out that none of the published literature examining a potential causal relationship between prenatal ingestion of Bendectin and birth defects found the product to cause birth defects. [FN21] In response, plaintiffs presented eight experts who concluded that Bendectin can cause birth defects on the basis of animal studies, in vitro experiments, chemical structure analysis, and "re-analysis" of previously published studies. [FN22] How is the ordinary lay juror to handle these diametrically opposed conclusions?

How, we might better ask, has this challenge been handled by the courts?

I. Judicial Responses to Expert Testimony

For the most part, judicially-administered evidentiary standards have been the only means--albeit highly imperfect ones--of excluding junk science from the courtroom. The standard of admissibility for expert testimony was first formulated over seventy years ago in Frye v. United States. [FN23] Frye was the first case to hold that scientific evidence should be treated differently from any other evidence. [FN24] The case involved a criminal matter, where a defendant charged with murder wanted to introduce the use of a new systolic blood pressure test to show that he was telling the truth. [FN25] The court excluded the evidence, finding that the expert testimony was based on a principle not "sufficiently established to have gained general acceptance in the particular field in which it belongs." [FN26] The Frye rule, in what has come to be known as the "general acceptance" standard, required expert testimony based on novel scientific evidence to have gained "general acceptance" by a large scientific group. [FN27]

***454** In 1975, Congress enacted the Federal Rules of Evidence. [FN28] Rule 702 governs the admission of expert testimony and, in sharp contrast to the Frye rule, provided that: "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." [FN29] The Rules do not make any specific mention of Frye, and, in light of their more permissive attitude toward the admission of evidence generally, courts and scholars alike questioned whether the strict Frye test still survived. [FN30] Under this new standard, some courts undertook to consider whether particular expert testimony was reliable. Others just questioned its relevance. And still others continued to apply Frye. [FN31] Critics complained that some judges were imposing "no meaningful check on science in the courtroom" and were permitting experts "to testify to almost any claim regardless of the weight of contrary opinion," thus, increasingly relying on "junk science." [FN32]

The United States Supreme Court granted certiorari in Daubert v. Merrell Dow Pharmaceuticals to resolve some of the issues regarding the judicial standard for admission of scientific evidence. [FN33] As noted, the plaintiffs in this case were children who were born with birth defects and whose mothers had taken the anti-nausea drug Bendectin during their pregnancies. Plaintiffs sought to admit scientific evidence to support their claim that the drug caused the children's birth defects. The district court and the Ninth Circuit Court of Appeals excluded plaintiffs' expert's testimony because it did not satisfy the Frye test and granted summary judgment in

favor of the defendant manufacturer. [FN34]

The Supreme Court reversed and held that the general acceptance test in Frye was at odds with the "liberal thrust" of the Federal Rules of Evidence, and had thus been superseded. [FN35] Instead, the Court explained, Rule 702 required federal trial judges to make ***455** a "preliminary assessment" as to both the reliability and relevance of the scientific testimony offered. [FN36] To satisfy the reliability prong, the Court explained that a trial judge must find the subject of the expert's testimony to be "scientific knowledge." The Court offered a list of four, non-exhaustive factors or "general observations" for the trial judge to consider in determining whether the testimony was reliable scientific knowledge: (1) whether the theory or technique can be, or has been, tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the degree to which the theory or technique is widely accepted in the scientific community. [FN37]

On remand in Daubert, the Ninth Circuit added a further consideration of its own: Was the evidence proffered by experts developed independent of the litigation, or was it developed solely for purposes of litigation and therefore potentially biased? [FN38]

Daubert was heralded as the case that would resolve the "junk science" debate. [FN39] To date, the case has been cited in at least 730 federal cases, 325 state decisions, and over 1000 law review articles. [FN40] A quick review of some of these materials, however, makes it clear that the "junk science" debate, and indeed the application of the Daubert case itself, is far from settled.

Chief Justice Rehnquist and Justice Stevens warned of such difficulties in their concurrence in Daubert. [FN41] They agreed that Frye had been superseded by the enactment of the Federal Rules of Evidence, but criticized the majority for providing a list of "general observations" to further guide district courts. [FN42] Because the Court was not applying these factors to decide whether any particular evidence was admissible, the concurrence argued that the list would give little more than "vague and abstract" guidelines to the district courts. [FN43] They also criticized the way in which the majority required that trial judges make a preliminary assessment as to whether scientific evidence is reliable: "Questions arise simply from reading this part of the Court's opinion, and countless more ***456** questions will arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony." [FN44]

Finally, the concurrence questioned the extent to which federal judges would now, under the dictates of Daubert, be faced with "either the obligation or the authority to become amateur scientists." [FN45]

II. Review of the Law Under Daubert

Just as the Daubert concurrence predicted, federal courts have been confronted with seemingly endless questions as they struggle to determine what evidence is admissible under the rules articulated in Daubert. [FN46]

Consider, for example, the question of whether courts should hold hearings (under Federal Rule of Evidence 104(a)) as part of their "preliminary assessment" of the proffered evidence. [FN47] Any such hearing, as one commentator noted, is really a "win-win" situation for defendants since extended hearings can drain plaintiffs' resources and result in plaintiffs' loss of a key expert. [FN48] The Ninth Circuit has held that district courts are not required to hold such hearings. [FN49] That Court also requires a party challenging scientific evidence to make a prima facie case showing that the expert failed to follow accepted scientific methodology or reasoning before it will proceed with any kind of Rule 104(a) hearing. [FN50] The Third Circuit, on the other hand, has

created something of a "cottage ***457** industry" out of Daubert hearings. [FN51] In one case, for example, a court in that circuit scheduled most of one month and part of two other months for the preliminary assessment alone. [FN52]

Consider, also, the extent to which judges are indeed becoming "amateur scientists," as the Daubert concurrence predicted. Different circuits seem to look differently at how deeply they should probe in determining whether an expert's testimony is admissible under Daubert. [FN53] Must a court, after Daubert, simply consider the type of scientific data and methodology used by the expert? Or must the court go further and inquire into the reliability of specific data or procedures used by the expert? Must a court now reject expert testimony if it finds that the data or implementation of the methodology in that particular instance was unreliable?

The Third Circuit says yes. [FN54] In the Paoli II litigation, where plaintiffs who lived near a rail yard alleged that they were exposed to and injured by PCBs [FN55], the district court engaged in a five-day hearing and extensive analysis to determine the admissibility of certain evidence. That court added three criteria in addition to the four proposed in Daubert and left open the possibility that other factors could be relevant. [FN56] As part of its inquiry, the Third Circuit considered whether the methodology used was scientific and whether that methodology was used in an unobjectionable manner. [FN57] It excluded some testimony because it determined that certain***458** protocol and quality control techniques had not been undertaken by the laboratory. [FN58]

Other circuits would answer the question differently. The Second Circuit, for example, has held that disputes about whether an expert correctly employed a particular scientific methodology should be left to the jury. [FN59] These disputes, and others concerning the strength of an expert's credentials or the lack of textual authority for an expert's opinion, should (according to the Second Circuit) be "explored on cross-examination" because those issues go to the weight or credibility of the expert's testimony, not its admissibility. [FN60] The Eleventh Circuit interpreted Daubert as "loosen[ing] the strictures of Frye and mak[ing] it easier to present legitimate conflicting views of experts for the jury's consideration." [FN61]

The Supreme Court recently reversed the Eleventh Circuit's decision in Joiner v. General Electric Company, resolving a split in the circuit courts of appeal regarding the appropriate standard of review for expert testimony. [FN62] In Joiner, the Eleventh Circuit overruled a district court's exclusion of expert testimony and restored plaintiff's claim that his exposure to PCBs and other chemicals caused or helped to "promote" his lung cancer. (The plaintiff had been a smoker for eight years, his parents had both been smokers, and his family had a history of lung cancer.) [FN63] Applying what it described as "Daubert's lower threshold" and a "particularly stringent" standard of review, the court emphasized the limited nature of its "gatekeeping role." [FN64] The circuit court explained that the role of the gatekeeper was only to "guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically based expert opinion. It is not intended to turn judges into jurors or surrogate scientists." [FN65] The court further opined that the ***459** trial court should leave it to the jury "to decide the correctness of competing expert opinions." [FN66]

The Supreme Court reversed, applying the abuse of discretion standard in reviewing the trial court's decision and concluding that the trial court did not abuse its discretion in excluding the expert testimony. [FN67] The Court ruled that "[t]he [animal] studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them." [FN68] The Court also upheld the district court's conclusion that "the four epidemiological studies on which respondent relied were not a sufficient basis for the experts' opinions." [FN69]

Citing Daubert's language that the "focus . . . must be solely on principles and methodology, not on the conclusions that they generate," the respondent argued that the district court erred in focusing on the conclusions of the experts rather than the methodology. [FN70] The Court in Daubert, however, did not provide much guidance regarding the distinction to be made between methodology and conclusion. In Joiner, the Court stated,

> But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. [FN71]

In other words, trial courts may focus on the conclusions of the experts in determining whether the data actually supports the conclusion. Thus, the ambiguity in Daubert, which on the one hand stressed the gatekeeping role of the trial judge, and on the other hand the "liberal thrust" of the evidentiary rules and the call for juries to resolve evidentiary disputes, [FN72] was clarified in Joiner. The Court in Joiner reemphasized the importance of the trial judge's role as gatekeeper.

***460** Presently, there are bills pending in Congress that propose amendments to Federal Rule of Evidence 702 relating to the admissibility of scientific evidence. [FN73] These proposals would add a presumption of inadmissibility of such evidence, and, incidentally, would disqualify an expert witness whose compensation is contingent on the outcome of the case, a most salutary suggestion.

Critics, like Judge Ralph K. Winter of the Court of Appeals for the Second Circuit, complain that the bills do not accurately codify the decision in Daubert. [FN74] Another commentator remarked that the amendment would improperly take away the jury's responsibility to decide right and wrong, scientific truth and scientific falsity, and gives it "to a handful of government officials appointed for life." [FN75] This critic further observed that the attempted codification, captioned, felicitously, the "Honesty in Evidence Act," would "be a wonderful lawyers' full employment act for lawyers paid by the hour who will litigate for the next ten years over whether or not Congress was codifying the Daubert opinion." [FN76] One supporter praises the bill for ensuring "that the science that jurors and judges hear in a courtroom is not inferior to the science that scientists and researchers hear at their professional meetings." [FN77] He also notes that it is unlikely that the average juror will comprehend weaknesses in expert testimony brought out during cross examination. [FN78]

***461** This review of the law under Daubert, and most recently Joiner, is certainly not intended to be exhaustive, but is meant to highlight the types of questions that courts continue to face when confronted with proffers of expert testimony. This analysis is also to dispel any notion that Daubert really did decide the junk science debate.

III. The Lawyer's Role

It is abundantly clear that lawyers cannot hide behind the guise of Daubert and contend that there is no need for further thought or debate about the proper use and role of junk science in our courtrooms. Instead, I suggest that it is time for lawyers to confront their own obligations in bringing this "expert" testimony to the courts in the first place.

We have discussed the role of the expert, the jury, the judge; but what is, or what should be, the lawyer's role? Daubert may provide some guidance as to what expert testimony will or will not be accepted by courts,

but it surely does not provide all the answers. Consider the following example, the facts of which are taken from an actual case in the Sixth Circuit. Plaintiff alleged that use of the drug Ritodrine caused plaintiff's cardiomyopathy. [FN79] One year before trial, plaintiff's only causation expert opined that it was "least likely and least provable from a scientific standpoint" that the cardiomyopathy was caused by use of Ritodrine. [FN80] On the eve of his testimony, however, the same expert informed plaintiff's counsel that he had "moved up" his hypothesis to a more likely explanation based on subsequently discovered literature. The expert informed the lawyer that he was now prepared to testify that Ritodrine had a direct toxic effect on the plaintiff's heart condition. [FN81]

Should plaintiff's lawyer have proceeded with the case knowing, up until the eve of testimony, that his own "expert" believed that it was "least likely and least provable" that the drug caused the heart ailments? If so, how should the lawyer have proceeded when the expert suddenly changed his opinion? It turned out, in this (pre-Daubert) case, that the district court and the Sixth Circuit rejected defendant's claim that the expert's testimony was "junk science" and, surprisingly, allowed the testimony. [FN82] This sort of result only ***462** compounds the lawyer's dilemma: should he, as a zealous advocate, simply try to introduce any evidence that would advance his client's claims? In short, what, if any, obligation does the lawyer have to scrutinize the expert testimony he seeks to admit?

It is clear that the lawyer does have a duty to determine whether he believes expert testimony will be admissible before trying to introduce such evidence in court. [FN83] This duty arises both out of the lawyer's ethical obligation to represent a client zealously and his obligation to represent a client within the bounds of the law. [FN84] To be an effective advocate, the lawyer must vigorously prepare for the presentation of facts and law and, in doing so, needs to test the accuracy and reliability of any testimony, including expert testimony, he wishes to introduce. At the same time, as an officer of the court, the lawyer has a duty to the adversarial system of justice not to introduce frivolous or unreliable expert testimony.

As the Model Code of Professional Responsibility declares,

> the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law. [FN85]

The partisan striving of an advocate is not compromised by a lawyer's duty of complete candor and loyalty to the legal system. The Supreme Court of the State of Washington recognized this notion in stating: "Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyer will live with the rules that govern the system." [FN86] Essentially, under this court's analysis, a lawyer's duty to scrutinize (and perhaps withhold) his own expert's testimony goes hand-in-hand with other obligations the lawyer owes to his client.

In this light, my thesis--that a lawyer has an ethical duty not to introduce junk science--may not seem so controversial. Ethical issues arise with regard to all strategic decisions made by the advocate in preparing a case for trial, and in conducting a trial. Charles ***463** Wolfram notes in his treatise on legal ethics that "an assumption that underlies the adversarial system is that the mutually contentious strivings of relatively equal advocates will make truth and justice apparent to the judge and, if different, the fact finder." [FN87]

But the lawyer's ethical duty is immeasurably more complex when scientific expert testimony is at issue. The ethical rules recognize that the law is ambiguous, but require that a lawyer must insure there is a good faith basis for the admissibility of evidence prior to introducing such evidence. [FN88] When scientific evidence is at issue, the lawyer himself must first gain a comprehensive understanding of technical scientific data and methodology in order to make this determination in good faith. The Supreme Court observed in Daubert that, the law must "resolve disputes finally and quickly," while "scientific conclusions are subject to perpetual revision." [FN89] Science is also, as the Supreme Court recognized, furthered by "broad and wide-ranging consideration of a multitude of hypotheses." [FN90] Such conjectures, which are a part of the scientific process, are of little use to a lawyer who needs to reach a relatively quick, final decision regarding admissibility. [FN91] In the face of this uncertainty, a lawyer must decide, before he seeks to introduce scientific testimony into evidence, that there is a good faith basis to believe that evidence is reliable scientific evidence.

The Daubert standards do not make this job any easier. District and circuit courts have had trouble applying the Supreme Court's standards or "general observations" in determining what is valid, reliable scientific knowledge. [FN92] The decision in Joiner has clarified some of the ambiguities in Daubert, but it leaves the question of admissibility up to each trial judge's discretion. This will likely lead to varying standards of admissibility. As yet, there is certainly no consensus among the courts as to what scientific testimony should pass muster under Daubert. Even the Supreme Court in Daubert admitted that, under the standard it established for admissibility, "shaky" scientific evidence could still be admissible. [FN93]

*464 IV. The Lawyer's Obligations to the Client

Lawyers, therefore, have no clear guidelines on what will, or will not, be deemed admissible scientific expert testimony. If the courts set no clear standards, how, then, should a lawyer define "junk science"? If Daubert acknowledges that "shaky" evidence may be admissible, does this mean that an attorney may, under the good faith standard embodied in the ethical rules, introduce "shaky" scientific evidence? How much time must the lawyer spend in determining whether the evidence constitutes junk science, and who is to be billed for this time?

Judges have acknowledged the daunting task they behold in deciding the admissibility of expert testimony. One judge bluntly stated:

> Our responsibility, then, unless we badly misread the Supreme Court's opinion [in Daubert], is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not 'good science,' and occasionally to reject such expert testimony because it was not 'derived by the scientific method.'" [FN94]

Finally, if, as noted above, the federal courts are applying Daubert differently, it is certain that individual attorneys will also have different interpretations of what constitutes junk science. Will an ethical lawyer who goes up against a less scrupulous advocate be at a disadvantage? [FN95] If lawyers now undertake the task of screening out junk science, will their clients be deprived of a level playing field? In today's competitive legal market, will lawyers hold fast to their ethical obligations at the risk of losing business? [FN96]

Clients should not be underestimated regarding their responsiveness to advice with respect to the long-term costs a particular legal tactic may produce. A relevant ethical obligation of the attorney is to:

> exert his best efforts to insure that decisions of his clients are made only after the client has been informed of relevant considerations. . . . In assisting his client to reach a proper decision, it is often desir-

able for a lawyer to point out those factors which may ***465** lead to a decision that is morally just as well as legally permissible. [FN97]

The report of the Joint Conference on Professional Responsibility remarked, in 1958, that:

> [t]he most effective realization of the law's aims often takes place in the attorney's office . . . . Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose. [FN98]

It has often been noted that a lawyer's role as advisor to the client is equally important as his role as advocate. The lawyer's ethical obligation would require him or her to counsel the client regarding the dangers of offering junk science into evidence, and the long term costs of such a tactic both to the client's case and to the legal system.

One retort to the proposition that a lawyer has an ethical obligation to refrain from introducing junk science is that the adversary system is designed to weed out unreliable evidence. As noted, the Supreme Court reiterated this observation in Daubert, in stating that "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of preventing the consideration of junk science. [FN99] Aren't motions in limine, objections, and cross-examination sufficient to protect the court process from junk science? Why should the lawyer advocating the position have to do his adversary's job by refraining from introducing evidence which is questionably reliable? Similar questions have been raised by Judge Sam Pointer, who has been charged with supervising the thousands of nationwide silicone breast implant lawsuits. In remarking on the judge's role as gatekeeper, Judge Pointer commented that, in the absence of a sufficiently strong basis or argument by an objecting party to the expert's opinion, trial judges should not be required to ***466** automatically resolve issues regarding the admissibility of scientific evidence. [FN100]

There are certain problems with this argument in the context of a lawyer's obligations. One major problem with relying on the protections of the adversary system is that many times discussions take place during settlement negotiations, where the natural boundaries of the adversary system are not present. Lawyers can gain bargaining power by threatening to introduce junk science through qualified expert testimony. Take the example of the breast implant litigation. Dow Corning, the breast implant maker, agreed to a $4.25 billion class action settlement in 1994 (including $1 billion earmarked for lawyers) and filed for bankruptcy a year later. The manufacturer agreed to these concessions even though there had been no scientific evidence showing a causal connection between immune system disorder and silicone gel implants. [FN101] Some say that the settlement has fallen apart, however, because Dow Corning has been winning lawsuits in the wake of the Daubert decision. [FN102] If such is so, in the settlement context, the adversary system is not sufficient to protect against the consideration of junk science. A lawyer's adherence to his ethical obligations, however, would help to prevent junk science from being improperly used as a sword in settlement negotiations.

Another issue to consider is whether the lawyer, as a gatekeeper of sorts, can help to prevent junk science from pervading our courtrooms. And here we are not talking just about claims bottomed on theories of astrology, numerology, or phrenology. Assume you are faced with a highly qualified expert with excellent credentials who is willing to testify in support of the proposition you are advocating. In your investigation, you discover that the vast weight of authority runs contrary to your expert's testimony. You have a good faith basis to believe it could be admissible, however, based on the expert's qualifications. Do your ethical obligations require you to refrain from introducing this evidence? At least one ethics expert has said "no." Professor Geoffrey Haz-

ard has opined that, even if an attorney is aware that an expert's views are not respected by his *467 or her colleagues in the field, hiring such an expert is not unethical. [FN103]

Taking this hypothetical case further, assume that the evidence is admitted and you win the case. What if you later discover that the "scientific expert" whose testimony you introduced was actually a charlatan who testified to nothing more than junk science? Just as a criminal defense lawyer who learns after a trial that his client lied on the stand must report the perjury to the tribunal, a lawyer who later discovers his expert was a quack should report this information to the court. [FN104] The disciplinary rules require that a lawyer promptly disclose instances where "[a] person other than the [[[lawyer's] client has perpetrated a fraud upon a tribunal." [FN105]

In this hypothetical case, an attorney's ethical obligations would not be enough to prevent the admission of junk science. If, in addition to acting as gatekeeper, an attorney were to be held accountable for introducing evidence that later turns out to be junk science, attorneys would be less likely to risk the introduction of junk science. To the extent that it is discovered before the conclusion of proceedings that certain evidence presented was, in fact, junk science, the offering attorney could be sanctioned pursuant to Rule 11. [FN106] In this regard, one observer goes so far as to suggest that "[i]f the individual scientist in fact presents views that have not *468 been derived, shared or checked by other scientists, there is a subtle but serious problem of misrepresentation." [FN107] There are bills pending in Congress pushing amendments to Rule 11, proposing that its sanctions be made mandatory. [FN108]

V. Solutions

Are there other alternatives? Judge Hand, who as you may recall had great distrust about the jury's ability to sort through complex and conflicting expert testimony, [FN109] proposed that a court-appointed board of experts or advisory tribunal hear the expert evidence and then advise the jury. [FN110] A similar suggestion is made by Dr. Marcia Angell, a non-lawyer and the author of the book Science on Trial, [FN111] which discusses the clash of medical evidence and the law in the breast implant case. Judge Pointer, as part of his supervision of the breast implant suits, has recently followed Judge Hand's advice and has convened a panel of four independent experts to evaluate the current evidence regarding the causal connection between silicone and immune system disorder. [FN112] In so doing, Judge Pointer is seen as "turning over science decisions to the scientists." [FN113] Is he providing an easy out for attorneys, or does his answer just beg the question as to the lawyer's own ethical obligations?

Justice Stephen Breyer, in his concurring opinion in Joiner, makes the case for this approach, citing Federal Rule of Evidence 706 and the availability of expert assistance from organizations such as the National Academy of Sciences and the American Association for the Advancement of Science.

Given the current state of the law, there may be no pat answer for today's litigators. It is no longer sufficient to cite the advice of that great New York lawyer, Elihu Root, who once opined: About *469 half of the practice of the decent lawyer consists in telling would-be clients that they are damned fools and should stop. [FN114] The rush of science and technology and post-Daubert confusion in the courts have robbed this admonition of much of its worth when it comes to claims based on scientific evidence.

I am bold to suggest, however, that there is a workable tripartite framework within which to approach the dilemma of the attorney in dealing with his obligations to the court and to his client in such cases. First, is the full

recognition of the lawyer's professional obligation to carefully scrutinize the integrity of his own expert's proposed testimony within the limits of his capacity and resources? Second, is the concern legitimate that his opponent will perform a similar examination of the proposed evidence, keeping in mind the availability of Rule 11 sanctions as an inducement to oblige that he present only bona fide expert scientific theories in his case? Finally, as a cap to this process, the court should always reserve the right to refer disputes over alleged "junk science" to an independent panel of experts, not to decide the question in controversy, but to assess the quality of the expertise as required under the "gatekeeping" regimen of Daubert.

My own view, I must admit, is more tilted toward the solutions put forward by Judge Hand and Dr. Angell, but I recognize the commitment, long a part of our jurisprudence, to the sanctity of the jury, not the expert, as the ultimate finder of fact. This task is not eased by the following notation by the Supreme Court in Daubert: "There are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly." [FN115]

What is required, I suggest, to best fulfill this task is that lawyers from both sides of a particular case, the judge and the experts, begin to take their obligations to juries and to the legal system, within which they all operate, much more seriously. In an era of vast and rapid scientific and technological advances, this is a necessary burden to be borne by all involved in advancing and preserving the rule of law.

[FNa1]. Former Attorney General of the United States; Counsel, Kirkpatrick & Lockhart LLP. This article is based on an address given at Fordham University School of Law on Tuesday, October 21, 1997.

[FN1]. Gina Kolata, Seeking Something to Blame When Breast Cancer Strikes, N.Y. Times, Oct. 1, 1997, at E1.

[FN2]. Id.

[FN3]. Joseph M. Price & Gretchen Gates Kelly, Junk Science in the Courtroom: Causes, Effects and Controls, 19 Hamline L. Rev. 395, 396 (1996) [[[hereinafter Junk Science].

[FN4]. Daniel Wise, Tort, Securities Suits Over Diet Pills Abound - Local Lawyers Seek Damages, Monitoring, N.Y. L.J. Sept. 29, 1997 at 1.

[FN5]. See id.

[FN6]. Mark Hansen, Fen-phenomenal Tort Battle Brewing, 84 A.B.A. J., Jan. 1998, at 24. This issue of the ABA Journal also reports on law suits by health care workers against the latex glove industry. Mark Hansen, Wheeze, Sneeze ... 'Scalpel, Please': Health Care Workers Allege Latex Gloves Cause Severe Allergic Reaction, 84 A.B.A. J., Jan. 1998, at 25. As of mid-November 1996, more than 200 lawsuits relating to latex allergies had been filed in state and federal court and have been consolidated for discovery purposes in United States District Court in Philadelphia. See id. The plaintiffs, nurses and doctors, allege that they have developed a "severe allergic reaction" to latex due to continued exposure through use of latex gloves. Id. They further allege that the latex glove makers were aware that continued exposure would cause such severe allergies, yet they did nothing to make a safer glove. See id. The latest research, an epidemiological study conducted by the National Center for Health Statistics, shows that there is no causal connection between working in the health care industry and latex sensitivity. Id. The National Center for Health is a federal, nonpartisan agency and the study is the largest epi-

demiological study on the subject ever done. See id. This is yet another apparent example of junk science litigation.

[FN7]. Marcia Angell, Science on Trial 69-89 (1996).

[FN8]. See id. at 99-103, 110, 195-96; see also Junk Science, supra note 3 at 398.

[FN9]. See id. at 84-87.

[FN10]. Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993).

[FN11]. Daubert v. Merrell Dow Pharm. Inc., 43 F.3d 1311, 1318 (9th Cir. 1995).

[FN12]. See Junk Science, supra note 3, at 399; see also Gina Kolata, Litigation: Side Effect of Contraceptive Norplant, Orlando Sentinel, June 4, 1995, at G4.

[FN13]. Junk Science, supra note 3, at 399; see also, Gina Kolala, Will Lawyers Kill Off Norplant, N.Y. Times, May 28, 1995, § 3 at 1.

[FN14]. Court Delays Trial's Start in Norplant Case, Hous. Chron., Aug. 9, 1997, at 35.

[FN15]. See id.

[FN16]. See id.

[FN17]. See id.

[FN18]. See id.; see also Naomi Freundlich, Science & Technology: Contraceptives, Bus. Wk., June 16, 1997, at 142.

[FN19]. See Billings Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 53-54 (1901).

[FN20]. Id. at 54.

[FN21]. See Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 583-84 (1993).

[FN22]. See Daubert, 509 U.S. at 583-84.

[FN23]. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[FN24]. See Note, Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence, 110 Harv. L. Rev. 941, 942 (1997) [hereinafter Improving Judicial Gatekeeping].

[FN25]. See Frye, 293 F. at 1013-14.

[FN26]. Id. at 1014.

[FN27]. See Nancy S. Farrell, Congressional Action to Amend Federal Rule of Evidence 702: A Mischievous Attempt to Codify Daubert v. Merrell Dow Pharmaceuticals, 13 J. Contemp. Health L. & Pol'y 523, 526-27

(1997) [[[hereinafter Congressional Action to Amend Rule 702].

[FN28]. See id. at 528.

[FN29]. Fed. R. Evid. 702.

[FN30]. See Congressional Action to Amend Rule 702, supra note 27, at 529-30.

[FN31]. See id.; see also Improving Judicial Gatekeeping, supra note 24, at 944; Congressional Action to Amend Rule 702, supra note 27, at 529-30.

[FN32]. Improving Judicial Gatekeeping, supra note 24, at 944.

[FN33]. See Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579, 582 (1993).

[FN34]. See Daubert v. Merrell Dow Pharm. Inc., 727 F. Supp. 570, 576 (S.D. Cal. 1989), aff'd, 951 F.2d 1128 (9th Cir. 1991), rev'd, 509 U.S. 579 (1993).

[FN35]. See Daubert, 509 U.S. at 588.

[FN36]. See id. at 592-93.

[FN37]. Id. at 593-94.

[FN38]. See Daubert v. Merrell Dow Pharm. Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

[FN39]. See Anthony Z. Roisman, Emerging Law: The Expert Witness in Toxic Tort Litigation, SB52 ALI-ABA 375, 390-91 (1997) [hereinafter Emerging Law]; see also Jay P. Kesan, A Critical Examination of the Post Daubert Scientific Evidence Landscape, 52 Food & Drug L.J. 225, 227 (1997) [hereinafter Critical Examination].

[FN40]. See Critical Examination, supra note 39, at 227.

[FN41]. See Daubert, 509 U.S. at 598.

[FN42]. Id.

[FN43]. Id.

[FN44]. Id. at 600.

[FN45]. Id. at 600-01.

[FN46]. See District Judge Takes Issue With Circuit Court's Application of Gatekeeping Role, Federal Discovery News, Aug. 1997, at 4 (discussing Hon. Sam C. Pointer, Jr.'s comments on Daubert at a July ALI-ABA conference) [[[hereinafter Federal Discovery News].

[FN47]. Federal Rule of Evidence 104 (a) provides:

Questions of admissibility generally: Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, sub-

ject to the provisions (b). In making its determination it is not bound by the rules of evidence except those with respect to privilege.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit upon it, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of conditions.

[FN48]. See Emerging Law, supra note 39, at 390-91.

[FN49]. See Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1124 (9th Cir. 1994), cert. denied, 513 U.S. 1082 (1995).

[FN50]. See Hopkins, 33 F.3d at 1124.

[FN51]. See Emerging Law, supra note 39, at 388-89 (discussing In re Paoli R.R. Yard PCB Litigation II, 35 F.3d 717 (3d Cir. 1994), cert. denied, 513 U.S. 1190 (1995) and subsequent district court holdings in that circuit). The author states that "in effect, the courts in the Third Circuit now appear to be creating a second trial, complete with witnesses and cross-examination, and lasting sometimes for weeks, just to decide the question of whether experts should be allowed to testify at the real trial." Id. at 389.

[FN52]. See id.

[FN53]. See id. at 394-408.

[FN54]. See id.

[FN55]. PCBs is an acronym for polychlorinated biphenyls.

[FN56]. See In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 742 & n.8 (3d Cir. 1994) (ruling that district courts should take into account factors set forth in United States v. Downing, 753 F.2d 1224, 1238-39 (3d Cir. 1985), in addition to factors set forth in Daubert), cert. denied, 513 U.S. 1190 (1995). The court advised that factors deemed important by Daubert and Downing include the following:

(1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; (8) the non-judicial uses to which the method has been put.

Paoli, 35 F.3d at 742 n.8.

[FN57]. See id. at 777-78.

[FN58]. See id.

[FN59]. See McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1043-44 (2d Cir. 1995).

[FN60]. Id. at 1043.

[FN61]. See Joiner v. General Elec. Co., 78 F.3d 524 (11th Cir. 1996), cert. granted, 117 S. Ct. 1243, 137 L. Ed. 2d 325, 65 U.S.L.W. 3619 (U.S. Mar. 17, 1997) rev'd, 118 S. Ct. 512, 139 L. Ed. 2d 508, 66 U.S.L.W. 4036 (U.S. Ga. Dec. 15, 1997).

[FN62]. Six circuits apply a "manifestly erroneous" standard; four circuits apply an abuse-of-discretion standard; and two circuits apply the "particularly stringent" standard discussed in Joiner, 78 F.3d at 529 (11th Cir. 1996), rev'd, 118 S. Ct. 512 (1997). See David L. Faigman et al., 1 Modern Scientific Evidence § 1-3.5 (1997).

[FN63]. See General Elec. Co. v. Joiner, 118 S. Ct. 512, 516 (1997).

[FN64]. See Joiner, 78 F.3d at 529-30.

[FN65]. Id. at 530.

[FN66]. Id. at 533.

[FN67]. See Joiner, 118 S. Ct. at 516.

[FN68]. Id. at 518.

[FN69]. Id.

[FN70]. See id. at 519 (quoting Daubert v. Merrell Dow Pharm., 509 U.S. 579, 595 (1993)).

[FN71]. Id.

[FN72]. See Daubert, 509 U.S. at 588, 597.

[FN73]. See Crime Prevention Act of 1997, S. 488, 105th Cong. § 203 (1997); Alternative Dispute Resolution and Settlement Encouragement Act, H.R. 903, 105th Cong. § 4 (1997); Civil Justice Fairness Act of 1997, S. 79, 105th Cong. § 302 (1997).

[FN74]. See H.R. 988, 104th Cong., 1st Sess.; S. 79., 105th Cong., 1st Sess.; H.R. 10, 104th Cong., 1st Sess. Section 102 of H.R. 10, entitled Honesty in Evidence provides in pertinent part:

Rule 702 of the Federal Rules of Evidence is amended ... by adding at the end the following: (b) Adequate basis for opinion. Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion is - (1) based on scientifically valid reasoning; and (2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403. (c) Disqualification. Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if such witness is entitled to receive any compensation contingent on the legal deposition of any claim with respect to which such testimony is offered.

[FN75]. See Attorney Accountability: Hearings on H.R. 10 Before the Subcomm. on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, 104th Cong. 146, 160 (1995) (statement of Anthony Z. Roisman).

[FN76]. Id.

[FN77]. See Attorney Accountability Hearings on H.R. 10 Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, House of Representatives, 104th Cong. 146, 155, 159 (1995) (statement of Robert Charrow).

[FN78]. See id.

[FN79]. See Tobin v. Astra Pharm. Prod., Inc., 993 F.2d 528 (6th Cir. 1993) cert. denied sub nom., 510 U.S. 914, 114 S. Ct. 304 (1993).

[FN80]. Id. at 540.

[FN81]. See id.

[FN82]. Id. at 533-34.

[FN83]. See Model Code of Professional Responsibility DR 7-102 (1981).

[FN84]. See Model Code of Professional Responsibility Canon 7 (1981).

[FN85]. Model Code of Professional Responsibility EC 7-19 (1981).

[FN86]. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1084 (Wash. 1993) (en banc).

[FN87]. See Charles W. Wolfram, Modern Legal Ethics 619 (1986).

[FN88]. See Model Rules of Professional Conduct, Rule 3.1 (1983).

[FN89]. Daubert v. Merrell Dow Pharm., 509 U.S. 579, 597 (1993).

[FN90]. Id.

[FN91]. See id. But see In re Breast Implant Cases, 942 F. Supp. 958, 960 (E.D.N.Y., S.D.N.Y. 1996), wherein Judge Weinstein has decided to allow plaintiffs' claims to stay alive rather than "rush to judgment," despite the lack of scientific support, because plaintiffs' scientific evidence "may have the scintilla of plausibility that merits reservation of judgement while evaluation goes forward."

[FN92]. See Daubert, 509 U.S. at 593.

[FN93]. See id. at 596.

[FN94]. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1316 (9th Cir. 1995).

[FN95]. See Mary Ann Glendon, A Nation Under Lawyers 84 (1994).

[FN96]. See id.

[FN97]. Model Code of Professional Responsibility EC 7-8 (1980) (emphasis added); see also Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 144-45 (1993).

[FN98]. Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958).

[FN99]. Daubert, 509 U.S. at 596.

[FN100]. See Federal Discovery News, supra note 46, at 4.

[FN101]. Angell, supra note 7, at 57-61, 99-103, 195-96.

[FN102]. See Paul Reidinger, They Blinded Me with Science!, 82 A.B.A. J., Sept. 1996, at 54, 60; see also Paul Connors, Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case, 18 J. Legal Med. 251, 354 (1997) (reviewing Angell's Science on Trial).

[FN103]. See David Bernstein, Out of the Frying Pan and Into the Fire: The Expert Witness Problem in Toxic Tort Litigation, 10 Rev. Litig. 117, 122-23 n.34 (1990).

[FN104]. See Model Code of Professional Responsibility, DR 7-102(A)(6) (1981) (in his representation of a client, a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false"); Model Rules of Professional Conduct, Rule 3.3 (1983). See also, Wolfram, supra note 87, at 657-60.

[FN105]. Model Code of Professional Responsibility DR 7-102(B)(2)(1996).

[FN106]. Rule 11 of the Federal Rules of Civil Procedure:

(b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--...(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery ....

Fed. R. Civ. P. 11. Rule 11 only applies:

to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit.

Id. at Rule 11 (advisory committee notes). In the case of junk science, it is arguable that Rule 11 is violated by an attorney who files a complaint which is based entirely on junk science.

[FN107]. Peter W. Huber and Kenneth R. Foster, 33 Science in the Courts Civil Justice Memo (Center for Judicial Studies, The Manhattan Inst.) Sept. 1997, at 7.

[FN108]. See e.g., S. 400, 105th Cong. § 2 (1997); S. 79, 105th Cong. (1997).

[FN109]. See supra text accompanying notes 18-19.

[FN110]. See Hand, supra note 19, at 56-58.

[FN111]. See supra note 7.

[FN112]. See Thomas M. Burton, Top Judge in Breast-Implant Case Calls on Doctors to Hear Evidence, Wall St. J., July 22, 1997, at B6.

[FN113]. Id.

[FN114]. Philip C. Jessup, Elihu Root 1845-1909 133 (1938).

SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE

Proposed Recommendation No. 248

Proposed Amendment of Rule 4003.5 Governing Discovery of Expert Testimony

The Civil Procedural Rules Committee proposes that Rule of Civil Procedure 4003.5 governing discovery of expert testimony be amended as set forth herein. The proposed recommendation is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court of Pennsylvania.

All communications in reference to the proposed recommendation should be sent no later than **February 18, 2011** to:

Karla M. Shultz
Counsel
Civil Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
P.O. Box 62635
Harrisburg PA 17106-2635
FAX 717-231-9526
civilrules@pacourts.us

Rule 4003.5. Discovery of Expert Testimony.Trial Preparation Material

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

[(a)] **(A)** any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and

[(b)] **(B)** **subject to the provisions of subdivision (a)(4),** the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

(2) Upon cause shown, the court may order further discovery by other means, subject to **[such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate]** **(1) the provisions addressing scope, and fees and expenses as the court may deem appropriate and (2) the provisions of subdivision (a)(4) of this rule**.

(3) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the

same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

> Note: For additional provisions governing the production of expert reports in medical professional liability actions, see Rule 1042.26 et seq. Nothing in Rule 1042.26 et seq. precludes the entry of a court order under this rule.

(4) A party may not discover the communications between another party's attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) regardless of the form of the communications.

* * *

Explanatory Comment

The Civil Procedural Rules Committee is proposing the amendment of Rule 4003.5 governing the discovery of expert testimony. Recent amendments to the Federal Rules of Civil Procedure have prohibited the discovery of communications between an attorney and his or her expert witness unless those communications (1) relate to compensation for the expert's study or testimony, (2) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or (3) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. *See* FRCP 26(b)(4)(C), effective December 31, 2010.

Current practice in Pennsylvania has not been to seek discovery of communications between the attorney and his or her expert. The proposed amendment to Rule 4003.5 follows the federal rule in explicitly prohibiting the discovery of such communications. However, it does not include the exceptions in the federal rule to those communications because of the differences between the federal rules and the Pennsylvania rules governing the scope of discovery of expert testimony.

The federal rules of civil procedure permit an expert to be deposed after the expert report has been filed. The exceptions enumerated above simply describe some of the matters that may be covered in a deposition. However, in the absence of cause shown, the Pennsylvania rules of civil procedure do not permit an expert to be deposed. Thus, the exceptions within the federal rule are inconsistent with the restrictions of the Pennsylvania rules of civil procedure governing discovery of expert witnesses.

In Pennsylvania, questions regarding the compensation of the expert have traditionally been addressed at trial; there is no indication that this procedure is not working well.

In addition, the facts or data provided by the attorney that the expert considered, as well as the assumptions provided by the attorney that the expert relied on in forming his or her opinion, are covered by Rule 4003.5(a)(1)(b), which requires the expert to "state the substance of the facts and opinions to which the expert is expected to testify and summary of the ground for each opinion." If facts or data which the expert considered were provided by counsel or if the expert relied on assumptions provided by counsel, they must be included in the expert report. *See* Rule 4003.5(c) which provides that the expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of his or her testimony set forth in the report. If the expert report is unclear as to the facts upon which the expert relied, upon cause shown, the court may order further discovery including the filing of a supplemental expert report. *See* Rule 4003.5(a)(2).

By the Civil Procedural
Rules Committee

Robert C. Daniels
Chair

--- F.R.D. ----, 2011 WL 1311900 (N.D.Ill.)
(Cite as: 2011 WL 1311900 (N.D.Ill.))

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
SARA LEE CORPORATION, Plaintiff,
v.
KRAFT FOODS INC., and Kraft Foods Global, Inc., Defendants.

No. 09 C 3039.
April 1, 2011.

Richard J. Leighton, Douglas J Behr, Hesham M. Sharawy, Scott M. Abeles, Keller and Heckman LLP, Washington, D.C., Charles H. Cole, Schuyler, Roche, & Crisham, P.C., Chicago, IL, for Plaintiff.

Stephen J. O'Neil, Michael E. Martinez, J. Michael Keyes, Jeffery T. Peterson, Sangmee Lee, K & L Gates LLP, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

MORTON DENLOW, United States Magistrate Judge.

***1** Before the Court on opening day of baseball season in Chicago is Plaintiff's motion to compel deposition testimony and disclosure of documents from Defendants' consumer survey report. Plaintiff Sara Lee Corporation ("Plaintiff") alleges that Defendants Kraft Foods Inc. and Kraft Foods Global, Inc. (collectively "Defendants") failed to comply with the rules governing expert discovery. According to Plaintiff, Defendants improperly instructed their expert not to answer certain deposition questions and to withhold certain documents relating to this litigation. Defendants respond that Plaintiff seeks materials beyond the scope of expert discovery. For the reasons explained below, Plaintiff strikes out and the Court denies Plaintiff's motion to compel.

I. BACKGROUND FACTS

In this lawsuit, two of the nation's largest hot dog manufacturers accuse each other of false and deceptive advertising. Plaintiff, maker of Ball Park Franks, sued Defendants, who own the Oscar Meyer brand, and Defendants filed counterclaims. Both sides have retained experts to testify about the allegedly misleading nature of each other's ads.

The motion to compel involves a defense expert retained to testify about one of Plaintiff's advertisements and to consult, but not testify, about another. Defendants retained Dr. Yoram ("Jerry") Wind, the Lauder Professor of Marketing at the University of Pennsylvania Wharton School of Business, to conduct a consumer perception survey and to offer expert testimony about Sara Lee's "Taste America's Best Beef Franks" advertisement. Ex. 8 to Pl. Mem.[FN1] (copy of ads). With the help of a market research firm, Dr. Wind conducted a survey about Plaintiff's "Taste America's Best Beef Franks" ads. Using the survey, Dr. Wind issued an expert report opining that Plaintiff's advertisement misled "a significant portion of the relevant consuming population" into believing that it was Ball Park *Angus* Beef Franks, rather than Ball Park Beef Franks, that were advertised as "America's Best Beef Franks." Ball Park Beef Franks won the ChefsBest award referenced in the ad. Rule 26 Expert Report 1–2, Ex. A to Def. Resp.[FN2]

The dispute arises over Dr. Wind's role as a non-testifying consultant regarding another of Plaintiff's ads. Dr. Wind consulted Defendants but will not testify concerning Plaintiff's "We'd Compare Our Dogs to Others But They Aren't Even in the Same League" advertisement. Ex. 6 to Pl. Mem. (copy of ad). Defendants did not produce to Plaintiff any materials or communications relating to this ad in their expert disclosures. Plaintiff first learned of the dual relationship at Dr. Wind's deposition, when Defendants instructed Dr. Wind not to answer questions about his work as a consultant, where he has prepared no expert report and will not testify.

Defendants submitted *in camera* to this Court their written and electronic communications with Dr. Wind regarding the "Not Even in the Same League" ad. They are few in number, and a review shows that Dr. Wind did nothing more than advise defense counsel how they might conduct pilot surveys of the "Not Even in the Same League" ad. He suggested possible methodology and also provided price quotes. These communications are consistent with Defendants' representation to the Court that Dr. Wind advised Defendants about a pilot study of the ad but that defense counsel independently conducted the survey and did not share the results with Dr. Wind.

***2** Plaintiff now requests that the Court order Defendants to produce all previously undisclosed documents related to Dr. Wind's consultations, and order Dr. Wind to answer deposition questions about his services regarding the "Not Even in the Same League" ad. Defendants oppose the motion to compel.

A choice-of-law agreement between the parties also bears on the motion. In preparation for expert discovery, the parties agreed to adopt the newly amended Federal Rule of Civil Procedure 26 relating to expert disclosures and discovery. The attorneys also exchanged a number of e-mails attempting to clarify what documents and communications fell within their agreement. Contrary to Plaintiff's assertion, however, the exchanges do not evince an agreement to provide attorney-expert communications beyond what is required by the amended Rule 26. In Plaintiff's counsel's own words, the parties agreed to limit the production of attorney-expert communications to "any substantive e-mails or other documents that we sent to our experts regarding facts, opinions, or the bases for opinions *that are discoverable under Rule 26(b)(4)(C)* [a provision added by the 2010 amendements]." E-mail dated Dec. 15, 2010, Ex. B to Def. Resp. (emphasis added). Accordingly, the Court will apply amended Rule 26.

II. LEGAL STANDARDS

This motion implicates the two different standards that govern discovery related to testifying experts and non-testifying consultants. Federal Rule of Civil Procedure 26(a)(2) sets forth required expert disclosures. This rule was amended in 2010 to narrow the scope of expert discovery, and Rule 26(b)(4)(C) was added to provide work-product protections concerning many communications between a party's attorney and expert witness. Rule 26(b)(4)(D), meanwhile, establishes a high barrier to discovering opinions of a non-testifying consultant.

First, a review of the standards for discovery relating to testifying experts. In 1993, Rule 26(a)(2)(B) was amended to require a testifying expert to produce a written report setting forth a complete statement of the expert's opinions, as well as "the data and other information considered by the witness in forming the opinions." Many courts interpreted the rule as establishing a "bright-line" approach that required disclosure of all attorney-expert communications, including "otherwise protected work product and attorney-client communications" if the expert "read or reviewed the privileged materials before or in connection with formulating his or her opinion." *In re Commercial Money Ctr., Inc., Equip. Leasing Litig.*, 248 F.R.D. 532, 537 (N.D.Ohio 2008) (citing *W. Resources, Inc. v. Union Pac. R.R. Co.*, No. 00–2043–CM, 2002 WL 181494, at *9 (D.Kan. Jan.31, 2002)); *see also In re Pioneer Hi–Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed.Cir.2001) ("[F]undamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony," regardless of whether it is work product or not.) Such broad expert discovery carried with it several unfortunate consequences. It increased discovery costs and impeded effective communication between attorneys and their experts, sometimes even inducing parties to retain two separate sets of experts—one for consultation and another to testify. Fed.R.Civ.P. 26 advisory committee's note (2010 Amendments).

***3** In December 2010, Rule 26 was amended to

address the undesirable effects of routine discovery into attorney-expert communications. *Id.* First, Rule 26(a)(2)(B)(ii) was amended to require disclosure of "facts or data," rather than "data or other information," considered by an expert witness in forming the opinions to be offered. The advisory committee intended this change to "limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel." *Id.* That said, the committee urged that the amendment be interpreted broadly to cover "any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert." *Id.*

In addition, Rule 26(b)(4)(C) was added to provide work-product protection against discovery into communications between expert witnesses and counsel. The new provision applies work-product protections to "communications between the party's attorney and [testifying expert], regardless of the form of the communications." Fed.R.Civ.P. 26(b)(4)(C). That said, the new provision withholds work-product protections from communications that

> (i) relate to compensation for the expert's study or testimony;
>
> (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
>
> (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Id. Communications that receive work-product protection are not discoverable unless the party seeking discovery "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(A)(ii)..

As for non-testifying consultants, the Rules provide an even higher barrier to discovering attorney-expert communications. Ordinarily, a party may not "discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial." Fed.R.Civ.P. 26(b)(4)(D). The only exceptions are medical examinations under Rule 35(b) or a showing of "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." *Id.*

Occasionally, courts must determine which standard applies to an expert who wears "two hats" by serving as both a non-testifying consultant and a testifying expert. *In re Commercial Money Ctr.*, 248 F.R.D. at 538. Most courts have held that a single expert may serve in both roles but that the broader discovery for testifying experts applies to everything except "materials generated or considered *uniquely* in the expert's role as consultant." *Id.* (emphasis in original) (citing *SEC v. Reyes*, No. C 06–04435 CRB, 2007 WL 963422, at *2 (N.D.Cal. March 30, 2007)). In light of **Rule 26** (a)(2)(B)'s broad **disclosure** requirements, courts have concluded "any ambiguity as to the role played by the **expert** when reviewing or generating documents should be resolved in favor of the party seeking **discovery**." *B.C.F. Oil Refining, Inc. v. Consol. Edison Co. of N.Y., Inc.*, 171 F.R.D. 57, 62 (S.D.N.Y.1997); *see also In re Commercial Money Ctr.*, 248 F.R.D. at 538 ("If the line between consultant and witness is blurred, the dispute should be resolved in favor of the party seeking discovery.").

III. DISCUSSION

***4** As explained below, Dr. Wind serves as a testifying expert for the "Taste America's Best Beef Franks" ad and a non-testifying consultant for the "Not Even in the Same League" ad. For that reason, the communications that Plaintiff requests are subject to the protections for non-testifying consultants, which Plaintiff cannot overcome. Moreover, even assuming that the communications between Dr. Wind and defense counsel did relate to Dr. Wind's role as a testifying expert, they receive

work-product protection.

A. The Requested Materials Are Protected As Communications With a NonTestifying Consultant.

The Court concludes that the requested materials relate solely to Dr. Wind's role as a consultant, even taking into account the preference for disclosure when dealing with an expert who wears two hats. Dr. Wind is a testifying expert for the "Taste America's Best Beef Franks" ad and a non-testifying consultant for the "Not Even in the Same League" ad. He has not expressed any opinion regarding the "Not Even in the Same League" ad and he will not offer any testimony with respect to it at trial.

The requested materials merely suggest a methodology for potential pilot surveys of the "Not Even in the Same League" ad. They do not reference the ad discussed in Dr. Wind's expert report. Plaintiff's counsel objects that the materials may shed light on the methodology employed in Dr. Wind's expert report, because both the consulting work and the expert report involved surveys about Plaintiff's hot dog advertisements. But the requested materials on their face relate only to the "Not Even in the Same League" ad, so the Court finds that they were generated "uniquely in the expert's role as consultant." *In re Commercial Money Ctr.*, 248 F.R.D. at 538 (emphasis omitted).

Because the requested materials relate solely to Dr. Wind's role as a non-testifying consultant, Plaintiff may not discover them unless it can show "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Fed.R.Civ.P. 26(b)(4)(D). Although Plaintiff emphasizes its need to undermine Dr. Wind's methodology, it has already retained an expert to do just that. The Court thus finds that Plaintiff has obtained "facts or opinions on the same subject by other means," so the requested materials retain their protection under Rule 26(b)(4)(D).

B. Even Assuming that the Requested Materials Related to Dr. Wind's Role as a Testifying Expert, They Do Not Fall Within the Scope of Expert Discovery.

The requested materials contain neither "facts or data" nor "assumptions that the party's attorney provided," so they are not discoverable even under the "testifying expert" rubric. After *in camera* review, the Court concludes that Dr. Wind merely advised Defendants on how they might conduct a pilot survey of the "Not Even in the Same League" advertisement. Such expert-attorney communications arguably may have been discoverable under the pre-amendment Rule 26, but no more. None of the communications contain facts, data, or assumptions that Dr. Wind could have considered in assembling his expert report, and thus Defendants had no duty to disclose the communications and Plaintiff no right to discover them. *See* Fed. Rule Civ. P. 26(a)(2)(B), 26(b)(4) (C).

***5** Rather, the requested materials receive work-product protection under Rule 26(b)(4)(C), because they are communications between Dr. Wind and defense counsel. As such, the materials are protected from disclosure unless Plaintiff shows it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(A)(ii). Concerning attorney-expert communications, parties will rarely be able to make this showing "given the broad disclosure and discovery otherwise allowed regarding the expert's testimony." Fed.R.Civ.P. 26 advisory committee's note (2010 Amendments); *see also Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 664 (S.D.Iowa 2000) (holding that counsel can effectively probe the reliability of an expert through normal cross-examination and testimony from other experts). Just so here.

Plaintiff has examined the data and methods underlying Dr. Wind's report, deposed Dr. Wind about the report, and retained its own expert to rebut the report. Given these considerable opportunit-

ies to test Dr. Wind's methodology, Plaintiff has not shown a "substantial need" for the materials here. Besides, even if the requested materials would show that Dr. Wind proposed a somewhat different methodology to test the other advertisement, they are of questionable relevance for impeachment. Because Dr. Wind never learned the results of any "Not Even in the Same League" pilot survey, he could not have adjusted his methodology based on those results.

Plaintiff also claims that Defendants waived work-product protection, but this argument lacks merit. Plaintiff argues that Defendants waived work-product protection by admitting that Dr. Wind consulted them on the "Not Even in the Same League" ad. Federal Rule of Evidence 502 governs waiver of work product protection, but because no disclosure occurred here, the Court need not perform a Rule 502 analysis. Merely admitting that communications occurred does not qualify as "disclosing" the underlying communications. By Plaintiff's logic, parties would commit a waiver every time they made an entry in a privilege log. The requested materials, therefore, retain their work-product protection.

IV. CONCLUSION

For the reasons set forth in this opinion, the Court denies Plaintiff's motion to compel deposition testimony and disclosure of documents. The Court nevertheless finds that Plaintiff was substantially justified in requesting *in camera* review of the disputed communications and therefore denies Defendants' request for fees and costs.

The season is long and a win or loss on opening day does not decide the pennant, or this case. We will have to wait to see whose hot dog tastes best. Batter up!!

SO ORDERED.

FN1. "Pl. Mem." refers to the Memorandum of Points and Authorities in Support of Sara Lee's Motion to Compel Deposition Testimony of Kraft's Expert Witness and Disclosure of Documents Considered by Him, Dkt. 87.

FN2. "Def. Resp." refers to Kraft's Response in Opposition to Sara Lee's Motion to Compel Deposition Testimony of Kraft's Expert Witness and Disclosure of Documents Considered by Him, Dkt. 88.

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