American Inns of Court
Potter Stewart American Inn of Court

Selection and Use of Experts, Including the Difference Between State and Federal Rules

September 17, 2013

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Featuring special guest Dr. George Vredeveld, *Alpaugh Professor and Director of the University of Cincinnati Economics Center for Education and Research*

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Program

Announcements & introductions - *Michael D. Eagen and Jean Geoppinger McCoy*

Direct & cross of an expert – *Mia L. Conner, Michael Keefe, and Dr. George Vredeveld*

What your expert needs from you – *Dr. Vredeveld*

Finding an expert – *Derrick A. Wyatt*

Judicial panel – *Judges Michael R. Barrett, Beth A. Myers, and Scott T. Gusweiler*

PRESENTATION MATERIALS FOR INNS OF COURT

SEBPTEMBER 17, 2013

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HYPOTHETICAL SUMMARY

Joe Doe was terminated from his employment and brought suit for loss of income due to the termination. Mr. Doe was approximately 56 years of age with more than 60 hours of graduate study in counseling and education. Subsequent to his termination of employment with Defendant employer, XYZ, he obtained employment as a bagger/stock person for a grocery store. The expert report is included for your review.

January 31, 2007

Mr. Attorney

Dear Mr. Attorney:

I have reviewed the facts relating to the termination of Mr. Joe Doe in September 2005 and his subsequent employment in another job. According to my information, Mr. Doe is a 56 year old Caucasian male, born September 25, 1950. He earned a Bachelor of Arts in psychology with more than 60 hours of graduate study in counseling and education. He was employed as a support coordinator by the Defendant. Until very recently, he was employed as a bagger/stock person for a grocery chain. He has now obtained new employment that appears to be more promising financially.

In order to calculate Mr. Doe' loss of income due to his termination, I project what he would have earned in his position as a XYZ support coordinator and compare that to what he would earn in alternative positions. Of course, no one can accurately project exactly what will happen in the future, but reasonable assumptions will yield reasonable conclusions. In my analysis, I assume that the salary paid to a XYZ support coordinator will increase at the rate of 3.75 percent per year. This is somewhat higher than my projections for most occupations because of an expected increase in demand for these services. Mr. Doe actual salary in 2004 is increased each year by this percentage until, based on conclusion presented in the Journal of Forensic Economics[1], his expected retirement, which is nine years and two months from now.

According to the U.S. Bureau of Labor Statistics (BLS Occupational Outlook Handbook), the job outlook for health service psychologists is expected to grow faster than the average for all occupations through 2012 due to an increased demand for psychological services in schools, hospitals, social service agencies, mental health centers, substance abuse treatment clinics, consulting firms and private companies. The BLS explains that there is increasing awareness of the need for both mental and behavioral health services to treat mental disorders (i.e., depression, anxiety, and post-traumatic stress) and behavioral problems (i.e., smoking, substance abuse, violence, unhealthy life style such as obesity and sexually risky behaviors), many of which are related to such chronic illnesses as heart disease, cancer, and pulmonary disease. Health service psychologists are the health professionals most extensively and specifically trained in these areas.

To calculate his income in alternative jobs, I calculated his income since September 2005. Beginning in January 2007, he obtained new employment that pays considerably more. For this new work, his weekly income was $775 per week. I assume that his income from this job will

[1] T. Hunt, J. Pickersgill & H. Turemiller "Recent Trends in Median Years to Retirement and Worklife Expectancy for the Civilian US Population", Journal of Forensic Economics, Vol XIV No 3

increase at the rate of 3.25 percent per year. Once again, this pay increase is higher than what I would project for occupations in general.

Mr. Doe's income loss because of his termination is the difference between what he would have earned as a support coordinator and the pay we project he will earn in an alternative position. I calculate the Present Value of the difference, which adds to the amount during the period September 2005 to the present and discounts the difference after that, using a rate of 2 percent. The following table presents these calculations for each year.

It is my expert opinion that the financial loss to Mr. Doe is $203,458.00.

Sincerely,

George Vredeveld, Ph.D.

Professor of Economics

Analysis of Income Loss to Joe Doe

Year	Income Projection	Assumed Earned Income	Lost income	PV of lost income
2004	43,243			
2005	44,865	33,648	11,216	11,785
2006	46,547	0	46,547	47,950
2007	48,293	35,650	12,643	12,518
2008	50,104	36,809	13,295	12,906
2009	51,982	38,005	13,977	13,302
2010	53,932	39,240	14,692	13,708
2011	55,954	40,515	15,439	14,123
2012	58,052	41,832	16,220	14,547
2013	60,229	43,192	17,038	14,980
2014	62,488	44,595	17,893	15,423
2015	64,831	46,045	18,787	15,876
2016	67,263	47,541	19,721	16,339
Total				203,458

An In-Depth Look at Direct Examination of Expert Witnesses[†]

Deborah D. Kuchler

I.
Introduction

The Honorable Ralph Adam Fine[1] describes a trial as a "battle for your client while the jurors are those whom you must *persuade*" and he describes direct examination as a "great engine" to get at the truth.[2] Fine's theory is for an attorney to "[u]se what the jurors already know – before they hear any of the witnesses."[3] He encourages examiners to "build on this foundation of pre-trial knowledge to win your case through the expert witness; that is, use the witness to validate the points you need to make on direct-examination" starting far enough back in the logical train so that either (1) the jury knows the answer before the witness responds; or (2) the answer rings true to the jury.[4]

[†] Prepared by the author on behalf of the Trial Tactics, Practice and Procedures section. Deb Kuchler acknowledges with thanks the contributions of Nathan Swingley and Mary Nell Bennett to the preparation of this paper.

[1] The Honorable Ralph Adam Fine is an appellate court judge in the Wisconsin Court of Appeals, located in Milwaukee, Wisconsin. He is also the author of The How-to-Win Trial Manual (Juris 3d rev. ed. 2005).

[2] Ralph Adam Fine, Direct and Cross-Examination of Expert Witnesses to Win, SM060 A.L.I.-A.B.A. 265, 267 (2007), adapted from Ralph Adam Fine, The How-To-Win Trial Manual, *supra* note 1.

[3] *Id.*

[4] *Id.* at 267-268.

Deborah D. Kuchler is a founding partner of Kuchler Polk Schell Weiner & Richeson, LLC in New Orleans, Louisiana. She graduated cum laude from the University of New Orleans with a B.A. degree in education in 1980. Ms. Kuchler attended Loyola Law School in New Orleans, Louisiana at night while working full time as a natural gas contract administrator and gas supply representative for an interstate natural gas pipeline company. She was a member of Loyola Law Review and graduated in 1985 in the top 10% of the combined day and night school class. Ms. Kuchler served from mid-1985 to 1987 as law clerk for the Honorable Patrick J. Carr in the United States District Court for the Eastern District of Louisiana. She is admitted to practice in Louisiana, Mississippi and Texas and is a member of the Louisiana, Mississippi and Texas State Bar Associations, the Federation of Defense and Corporate Counsel (FDCC), Lawyers for Civil Justice (LCJ), the International Association of Defense Counsel (IADC) and the Defense Research Institute (DRI). Ms. Kuchler has managed dockets of complex civil litigation in Louisiana, Mississippi, Texas, Georgia, Alabama and Florida involving toxic tort and environmental litigation, class actions, product liability, personal injury and commercial litigation. Her trial experience includes serving as lead or co-lead trial counsel in numerous state and federal actions, including multi-week trials in Louisiana, Mississippi and Texas involving alleged chemical releases and exposures; purported community asbestos and dioxin exposures; oil and gas operations involving alleged down-hole reserve losses; products liability actions; and admiralty.

In accordance with Fine's theories on the direct-examination of expert witnesses, this article attempts to untangle how an expert can effectively "assist" the jury to either "understand the evidence or determine a fact in issue."[5] First, the article highlights the expert witness generally by looking at the need for expert testimony and ways to engage a competent expert. Next, the article focuses on managing expert witnesses. Third, the article explores preparing the expert witness by reviewing of testimony, demonstrative exhibits, and ways to frame questions prior to trial. Fourth and finally, this article emphasizes a four-step process to use in the direct examination of witnesses: (1) qualifying the expert; (2) establishing a basis for his or her opinion; (3) eliciting the opinion; and (4) explaining the opinion. Specifically, under the subsection entitled "Explaining the Opinion," the article provides a two-step process that counsel can utilize to maximize the effect of experts' testimonies on jurors.

[5] Fed. R. Evid. 702; Fine, *supra* note 2, at 267.

II.
Expert Witnesses Generally

A. *Need for Expert Testimony*

When preparing a case for trial, counsel must assess whether an expert's testimony will be necessary.[6] Generally, the purpose of expert witnesses is to clear up fuzzy facts or to strengthen inferences that might otherwise be confusing for the jury.[7] The decision usually involves weighing the cost of an expert with the potential advantage gained through her testimony, coupled with the difficulty in securing the correct expert for the job.[8] However, in certain instances, the law imposes a duty to present expert testimony, and the attorney is required to select an expert.[9]

A central principle in the selection of an expert witness is helpfulness, and the attorney should make a practice of asking herself whether a "witness with specialized skills, education, or training would add in some appreciable way to the jury's understanding of the facts."[10] If the answer to this question is "yes," the time and expense of engaging an expert will surely pay off at trial.[11]

Moreover, expert testimony offered to counter an opponent's expert's testimony can be valuable to point out a case's weaknesses and flaws that might not be as evident to the jury as they are to counsel. Retaining the skills of a knowledgeable, informed, personable, and straightforward expert could prove more effective in highlighting those flaws than exposing them only through a closing argument.[12]

Despite the help that expert testimony can provide, a potential for abuse also exists if an expert exaggerates, makes misstatements, or bolsters facts. To avoid these scenarios, it is crucial that attorneys remain conscious of the potential for abuse and carefully prepare for both direct and cross-examinations.

B. *Engaging the Expert*

Unlike when the attorney selects lay witnesses, "a good deal of selectivity may be exercised when it comes to experts."[13] One of the most important questions to consider when selecting one expert from many qualified candidates, is asking for what purpose you are seeking the expert's assistance. While the ultimate goal is to obtain qualified expert at the lowest possible cost, there are other factors to consider.

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[6] Kenneth M. Mogill, Examination of Witnesses § 6:3 (2d ed. 2008).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See id.* at § 6:4.

[11] *Id.*

[12] *Id.*

[13] *See id.* at § 6:6.

If an expert will be called as a witness at a trial, not only should the expert be qualified, but the expert's qualifications should mirror the issues about which testimony is sought.[14] For example, if a medical expert is required to testify about heart surgery, the expert should be qualified in this area of specialization. Not only are these qualifications important to give accurate and knowledgeable testimony, but because the witness will appear on the stand, he or she should have an appearance and demeanor with which the jury can identify.

When choosing an expert to testify, it is critical that the attorney meet the expert in person and examine her demeanor. The attorney should carefully consider the expert's behavior and ask several questions. Does this expert have any irritating personal habits? If those habits irritate the attorney, are they going to irritate the jury too? Can she communicate with real people? How does the expert express complicated scientific principles? If the attorney can barely understand her, the jury will surely struggle.

However, if the expert is not expected to testify at trial, different considerations might affect the choice of expert. In that situation, the expert's appearance and demeanor may be insignificant.[15] When an expert is used in a consulting role to advise counsel during pre-trial stages, counsel should attempt to balance the expert's qualifications against the cost of his services.[16] It might be the case that a particular expert can conduct examinations and tests at a lower cost than others, but that same expert might not be sufficiently qualified to testify at trial.

When choosing an expert, it is also important to consider that experts decipher facts that are incomprehensible to the average layman, and there is a presumption that authorities in the field will have very divergent views.[17] Because experts can often reach different conclusions based on the same evidence, it is important for attorneys to take considerable time and effort to locate an expert witness whose views are as consistent to the theory of your case as possible.

Finally, when choosing an expert, attorneys should investigate them as carefully as they would the opponent's experts. A prudent attorney must always request a resume and also references from other lawyers with whom the expert has worked.[18] Several questions are essential. How did the expert perform in deposition? In trial? Was the expert difficult to work with? An attorney's pre-retention investigation should also include the location and analysis of previous transcripts. Transcripts can be found using IDEX, Google and other searches. A prudent attorney should also look for *Daubert* challenges and whether judicial opinions cite the expert favorably or unfavorably.

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See id.* at § 6:8; *see also* Douglas Danner and Larry L. Varn, Expert Witness Checklists §§ 1:30-1:37 (3d ed. 2008).

Ultimately, an attorney should exercise great diligence and care when locating and selecting an expert, and the expert's qualifications should always be determined at the outset. Counsel should remain mindful of how the expert will come across in court and what value he or she will bring to the presentation.

III.
Managing the Expert

During preparation for a trial, it is important to properly manage an expert's work. Even an expert who is persuasive and articulate on the stand can be a poor choice if the cost is so exorbitant it breaks the proverbial bank. To ensure that the expert does not over-work the case, counsel should stay in regular communication with the expert and develop a personal relationship with him. This contact will make it easier for the attorney to touch base with the expert frequently on budget expectations and carefully monitor the work that is being done. Additionally, counsel should be specific in giving assignments so that both the attorney and the expert know what is to be done, how long it is likely to take, and what it is likely to cost.

IV.
Preparing the Expert to Testify

A. *General Considerations*

Due to the expense and importance of expert testimony at trial, the attorney must take proper care to prepare the expert. This preparation includes such considerations as ensuring that the expert understands the legal elements of the case, reviewing substantive testimony with the expert, practicing a clear explanation of exhibits, if necessary, and framing questions in a way to make the expert's job as easy as possible.

Rehearsal of question and answers in preparation for trial is as important with the expert as it is with the lay witness, and special care should be taken to ensure that the expert will adequately testify.[19]

To ensure favorable expert testimony, the attorney must be certain that the expert understands the legal elements that must be proven in order to win the case and how his or her expert testimony will support this effort.[20] It is imperative that this discussion take place at the beginning of preparation to determine whether the expert will be able to testify truthfully to opinions that will establish the elements necessary to prevail.[21]

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[19] Danner & Varn, *supra* note 18, at § 1:147; Thomas A. Mauet, Fundamentals of Trial Techniques, § 4.8 (2d ed. 1988).

[20] Deborah J. Gander, *Prescription for Powerful Expert Testimony,* 43 Trial 40, 40 (May 2007).

[21] *Id.*

Another important consideration is the expert witness's credentials and experience. Just as with a lay witness, much time should go into the preparation of an expert's testimony. However, additional time will be devoted to "developing the expert's professional background in order to qualify him to render an opinion."[22] Not only is the preliminary testimony regarding his background necessary to establish the expert's competency, but this preliminary testimony also creates credibility with the jury.[23]

B. *Reviewing Testimony*

During a preparation session with an expert witness it is often tempting to simply review the substance of the testimony and indicate that the expert will be asked about his or her education, background and training.[24] This technique is especially tempting when the expert is paid on an hourly basis. If the witness has had experience in the courtroom, this technique might prove adequate provided the witness is also very informed about the facts of the case prior to trial. However, the testimony and effectiveness of the witness will still be enhanced if the preparation session is an *actual* dress rehearsal of the in-court testimony.[25] A principal benefit of an actual dress rehearsal is that the examiner and witness can align the theory of the case. Additionally, the attorney can ensure that the expert understands the questions, and likewise that the attorney understands the answers. If counsel prepares by simulating the trial testimony, the actual examination will be superior and more persuasive than one where the expert is entirely unfamiliar with the surroundings or the procedure of the court.

In addition to practicing direct examination, preparing the witness for cross-examination in a "mock trial" setting may also prove helpful. Deborah J. Gander suggests having someone whose trial abilities you respect cross-examine your expert before the trial.[26] She further suggests that "[a] mock cross-examination with someone who can act as the expert's worst nightmare will help minimize surprises at trial. When you actually face each other in the courtroom, the preparation will help you start off strong."[27] This preparation will also ensure that the witness is not surprised and does not get flustered at trial.

A mock trial exercise is also an opportunity to identify issues with the expert's clothing. For example, is she wearing slacks and a manly blazer in a Southern courtroom where women are best perceived in a skirt? Office staff can also sit in on the exercise and offer their input on the expert's demeanor, language, mannerisms or other unhelpful quirks.

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[22] Mogill, *supra* note 6, at § 6:14.

[23] *See id.* at §§ 6:21-6:26.

[24] *See id.* at § 6:15.

[25] *See id.* at §§ 3:6-3:10.

[26] Gander, *supra* note 20, at 40.

[27] *Id.*

C. *Demonstrative Exhibits*

"Charts, models, bodily demonstrations, and in-court experiments often make up some of the most dramatic and informative parts of an expert's testimony."[28] Not only do these exhibits catch the eyes of the jury, but they also offer a break from the monotony of questions and answers between the examiner and expert.[29] Demonstration of exhibits will often require the witness to leave the stand in order to explain an exhibit, conduct an experiment, or even handle a treatise.[30] In all circumstances where exhibits are known in advance, choreographing these portions of the exam allows the testimony to have a uniform and cohesive outcome.[31]

D. *Framing Questions*

Some courts previously required that the "expert state that he holds the opinion with a reasonable degree of (e.g., scientific or medical) 'certainty'[32] or 'probability.'"[33] Although the Federal Rules of Evidence no longer require such rhetoric, many lawyers continue to follow this tradition in framing their questions.[34] In order to avoid confusing the witness, it is essential that the examiner forewarn him about the possibility of such questions. Attorneys should "[m]ake sure that the expert understands the standard of proof that their testimony must meet."[35] "For example, in the state of Florida, the 'reasonable probability' or 'more likely than not' standard is defined as more than 50 percent."[36] However, in another state, this standard could be different, and the same testimony could fail to meet the necessary standard of proof. Further, is it good practice to "arm [an] expert with any legal language that the evidence rules require, and make sure he or she is comfortable using it."[37] After the necessary time and diligent care is utilized in preparing an expert to testify, the next consideration for an attorney is the actual direct-examination.

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[28] Mogill, *supra* note 6, at § 6:18.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See, e.g.*, Measday v. Kwik-Kopy Corp., 713 F.2d 118 (5th Cir. 1983); Eberle v. Brenner, 475 N.E.2d 639 (Ill. App. Ct. 1985), *appeal after remand*, 505 N.E.2d 691 (Ill. App. Ct. 1987).

[33] *See, e.g.*, Jones v. Ortho Pharmaceutical Corp., 209 Cal. Rptr. 456 (Ct. App. 1985); Thirsk v. Ethicon, Inc., 687 P.2d 1315 (Colo. Ct. App. 1983).

[34] *Id.*

[35] Gander, *supra* note 20, at 40.

[36] *Id.*

[37] *Id.*

V.
Direct Examination of Experts

Experts are retained for the purpose of stating opinions and expressing conclusions, and because of their special knowledge, training, education, and expertise, experts have much more freedom on the witness stand than a typical lay witness.[38] Most often, the expert's purpose is to decipher something that is beyond the judge or jury's common knowledge or competency.[39]

The direct examination of experts can be divided into four stages: (1) qualifying the witness as an expert; (2) establishing the basis for the opinion; (3) eliciting the opinion; and (4) explaining the opinion.[40] A good examination of a witness will follow this sequence.

A. *Qualifying the Expert*

1. Generally

To qualify an expert witness and demonstrate her expertise to the judge and jury, introductory questions should focus on her professional background[41] and seek to accomplish two goals: (1) demonstrate to the judge that the expert possesses at least the minimum qualifications to give opinion testimony on a particular subject; and (2) persuade the jury (or fact finder) that the expert's judgment is sound and that her opinion is correct.[42] As a "rule of thumb: the introductory material must either foreshadow an argument that is consistent with a theory of the case or make the witness someone with whom the jury can identify."[43]

A primary goal of qualifying the expert is eliciting testimony that he has the requisite "education, skill, or training to qualify as an expert."[44] It is also good practice to obtain an expert whose knowledge can be derived from formal as well as practical experience.[45] These factors should be considered along with the fact that jurors must be able to identify with the expert. By making the expert a three-dimensional person (e.g., asking a series of personal questions – married, children, hobbies, etc.) and advising the expert how to avoid braggadocios language, counsel can make the expert come alive for the jury.[46] Moreover,

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[38] *See* Mogill, *supra* note 6, at § 6:20.

[39] *Id.*

[40] *Id.*

[41] Fed. R. Evid. 702; Charles Tilford McCormick, Handbook of the Law of Evidence § 13 (3d ed. 1972); Graham C. Lilly, An Introduction to the Law of Evidence § 12.1 (2d ed. 1987); Louis E. Schwartz, Proof, Persuasion, and Cross-Examination § 5:06 (1973).

[42] Mogill, *supra* note 6, at § 6:21; Robert E. Keeton, Trial Tactics and Methods § 2.22 (2d ed. 1973).

[43] Fine, *supra* note 2, at 274.

[44] Howard Hilton Spellman, Direct Examination of Witnesses § 9:7 (1972).

[45] Fred Lane & Scott Lane, Lane's Goldstein Trial Technique §§ 14.06-14.08 (3d ed. 2009).

[46] *Id.*

the jury's ability to understand that an expert engages in far more than just a daily business routine increases the chance that an expert will be viewed as a three-dimensional person the jury will relate to and trust.

A large component of developing a three-dimensional expert is humanizing him for the jury. For example, if an expert is from Africa, he might explain that he has a Southern accent because he is from four degrees south of the Equator. If the expert is an oceanographer, he should tell several Jacques Cousteau-like stories about descending to the sea floor in a submarine. Being a "local boy" could also carry weight with a jury. A Mississippi jury will likely give the testimony of a local doctor from Ole Miss greater weight than the testimony of a doctor from Harvard.

2. Education and Formal Training

If an expert witness is highly accredited in his field, the attorney should put greater emphasis on the expert's formal education, training, academic qualifications, and credentials. For example, it is more effective to elicit a medical expert's formal training while in residency than simply having him state where he attended medical school and completed his residency.

The amount of information necessary to convey to the court regarding the witness's educational background depends entirely on the circumstances of the case. This decision is a "tactical determination," dependent on whether his qualifications derive from experience he has gained since his education and training or solely prior academic achievements.[47] A combination of an impressive technical background in addition to an expert's humanity is a recipe for success. As an example, one expert was especially persuasive when he had a unique combination of four certifications that no one else in the world had. This impressive accreditation in addition to his English-explorer mustache and tales of his work in tropical jungles created a highly successful and persuasive portrayal in front of the jury.

3. Experience

While experience alone may be enough to qualify an expert witness, experience coupled with education or actual training in the expert's field will demonstrate that he is not only well-versed in an area, but that he has direct experience, as well. For example, if a law professor is called to testify as an expert to the appropriate standard of practice in a legal malpractice case, and he has experience in a clinical practice as well, his credibility will likely be enhanced. With practical experience beyond the academic credentials elicited, the expert will no longer be subjected to the question "Professor, have you never actually handled a case?"[48]

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[47] Keeton, supra note 42, at § 2.22.

[48] Mogill, *supra* note 6, at § 6.23.

4. Additional Considerations

In addition to an expert's education, training and experience, there are many other qualifications that can speak to the expert's credibility. For instance, licenses and certificates, professional associations, awards, research and publications, teaching positions, and of course prior testimony, are all relevant.[49] Many experts devote a large portion of their careers to the forensic side of their respective professions.[50] It is also effective to establish, if possible, that the witness has testified on both sides; this will demonstrate that he is not devoted to a certain side of a particular type of case.[51]

5. Offers to Stipulate to Qualifications

Some lawyers will offer to stipulate to the qualifications of an expert, in an attempt to keep the jury from hearing the expert's credentials. To avoid this tactic by the opposing attorney, advise the court that the jury will be able to adequately judge the credibility of the witness only if they know her qualifications. Having the expert testify to her qualifications is especially important when counsel anticipates arguing to the jury that its expert is better qualified than the opponent's. To invoke this argument for the expert's specific background and accomplishments there must be evidence on the record that these qualifications actually exist. At this point, counsel usually tenders a witness as an expert by stating, "Your Honor, I offer Dr. Navarro as an expert in the field of neurosurgery."[52]

B. *Establishing the Basis for Opinion*

1. Generally

In the second stage of preparing for expert witness testimony, the witness should describe the facts and data that support his opinion. Prior to the testimony, the expert must have relevant information about the subject to present at trial. If the expert gives only an opinion without disclosing facts on direct examination, he may be required to do so during cross-examination.[53] Thus, it may be more credible for the expert to present these facts at the outset of direct examination. Traditionally, it was permissible for an expert to express an opinion only if it were based on personal knowledge or a hypothetical, or a combination of the two. Under that system, the expert could not draw an opinion based on information that he acquired outside the courtroom from other sources.[54] In contrast, the modern approach liberalized the sources of information the expert may refer to, including testimony from

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[49] *See id.* at § 6:24.

[50] *Id.*

[51] *Id.*

[52] *See id.* at § 6:26.

[53] Fed. R. Evid. 705.

[54] Advisory Committee Note, 56 F.R.D. 183, 283 (U.S. 1972).

other experts, other sources normally relied upon by experts in that field, and data given to the expert outside the courtroom.[55] The following discussion addresses the various techniques an attorney can use for examining an expert under both the traditional and modern approaches.[56]

2. Using the Expert's Personal Knowledge

In instances where the expert observed the facts or conditions upon which she bases the opinion, counsel should elicit the expert's personal knowledge of these circumstances after establishing her qualifications.[57] Doing so is especially important where the expert was involved in the events that led to the trial. For example, a patient's treating physician can also be used as an expert to attest to that patient's predicted recovery.[58] The treating physician has personal knowledge of the injuries and can form an informed opinion as to the patient's prognosis. By describing a personal familiarity with the case in addition to facts that support this opinion, the expert's credibility will be magnified.

3. Asking Hypothetical Questions

If used properly, hypothetical questions can be a great tool for establishing facts that are relevant to an expert's testimony.[59] Particularly, the hypothetical question is useful to focus the jury's attention on the relevant facts that control the expert's conclusions, even where the expert might not have personal knowledge. In cases where the expert does not have personal knowledge, the hypothetical can be used to make inferences. For example, "If I *assume* A, B, and C to be true, then I can infer X."[60] Furthermore, even though the hypothetical must establish the facts of the case fairly and accurately,[61] the examiner need not mention all of the facts. This selectivity in determining exactly which facts to provide to the expert is an effective technique to control the information to which the jury is exposed.[62]

While hypothetical questions allow an attorney to choose the facts to present to the expert, the way counsel poses the question also impacts the effectiveness of the expert's testimony. When posing a hypothetical question, an attorney should remember that other witnesses must prove the facts assumed in the question. Therefore, the attorney is afforded

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[55] Fed. R. Evid. 703; Advisory Committee Note, 56 F.R.D. 183, 283 (U.S. 1972).

[56] Mogill, *supra* note 6, at § 6:28-6:33.

[57] *See id.* at § 6:28.

[58] *Id.*

[59] *See id.* at § 6:29.

[60] *Id.*

[61] *See, e.g.*, Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986).

[62] *See* Mogill, *supra* note 6, at § 6:29.

an opportunity to remind the jury of testimony that has already been given or preview testimony about to come. Furthermore, some attorneys have a great ability to relay a sense of drama and action into the hypothetical question, which builds on the idea explored below, that creating a story is an effective tool to win over the jury.

4. Expert's Opinion on Testimony of Other Witnesses

Under the modern approach, it is advisable to have the expert remain in the courtroom and listen to the testimony of other witnesses who describe the facts upon which the expert will base his or her opinion. Experts who plan to rely on the testimony of other witnesses in order to form their opinion are not typically sequestered from the courtroom during this time.[63] The attorney should always make sure that he knows beforehand what the witness will testify to, in addition to the opinion that the expert can draw from this testimony to ensure that examination goes smoothly.[64]

C. *Eliciting the Expert's Opinion*

1. Generally

The third stage of consideration for an expert witness is the actual opinion generated by the expert. In this phase of the questioning, the "witness applies [his or] her knowledge, skill, experience, training, or education to the facts known or assumed … and draws conclusions or makes inferences that are helpful to the jury."[65] This opinion is often the focal point of an expert's testimony; therefore, counsel must ensure that the testimony falls within the expert's field of expertise to render opinions on the subject matter. Moreover, it is of great importance that counsel thoroughly discusses the matter with the expert prior to trial so that the expert actually conveys the desired opinion consistent with the theory of the case.[66]

2. Never Ask "What Happened Next?"

The following excerpt from John Grisham's *The Runaway Jury*, demonstrates the flawed follow-up question, "What happened next?" which some attorneys choose to ask. At this point in the book, the plaintiff's lawyer is asking an expert witness (a former high-level tobacco company employee) to describe a long-missing document that allegedly showed that the tobacco company knew that nicotine was addictive:[67]

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[63] *See id.* at § 5:13.

[64] *See id.* at § 6:30.

[65] *See id.* at § 6:41.

[66] *Id.*

[67] Fine, *supra* note 2, at 268.

Q: And the next paragraph?

A: The writer suggested [to the president] that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine meant more smokers, which meant more sales, and more profits.[68]

While these statements do seem powerful, many jurors will miss them, and unfortunately this *is* the way that many lawyers question.[69] The statements from the expert could be much more powerful if the lawyer did not ask, "What happened next," which undoubtedly produces a lengthy exegesis by the witness.[70] Rather, the jury needs to know the answer or likely answer to the question before the expert actually responds.[71] According to Judge Fine, a direct-examination question should not be asked unless it satisfies at least one of the following rules: (1) the jury already knows the answer before the witness responds; (2) the attorney has immediate corroboration for the witness's answer or (3) the attorney starts at a point so early in the logical train of thought that the answer rings true.[72]

There are several benefits to allowing the jury to know the answer to a question before it is even answered. First, it "cements into their minds these building blocks of the lawyer's argument, without relying on their assessment of the witness's credibility."[73] Second, the attorney must make the logical connections in incremental steps, so that the jurors are not forced to take in the whole developed testimony as one question and one answer.[74] This is especially crucial because jurors have a tendency to fade in and out, and it is possible that their "fade-out" could be during the most important part of the expert's testimony.[75] Third, by using this method rather than the "what happened next" methodology, the lawyer is allowed to repeat all of the helpful information by rephrasing questions to give a different perspective.[76] By repeating key phrases and facts, no juror should miss the highlights of the argument.

Fine demonstrates a better way to reformulate the direct examination of the tobacco witness to accomplish these three abovementioned points:

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[68] *Id*; John Grisham, The Runaway Jury (2003).

[69] Fine, *supra* note 2, at 268-267.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 271.

[73] *Id.* at 270.

[74] *Id.*

[75] *Id.*

[76] *Id.*

Q: Did you read the next paragraph as well?

Q: What was the subject of that paragraph?

Q: Did the writer of that memorandum suggest that the company do something about the nicotine levels in the cigarettes it was making?

Q: Did the writer suggest that the nicotine levels in the cigarettes be increased or decreased?

Q: Did the writer tell the company's president how increased nicotine levels would affect the number of people who smoked?

Q: Would increasing the nicotine levels in cigarettes mean more or fewer smokers?

Q: More smokers than if the nicotine levels were not increased?

Q: Would this mean more or fewer sales?

Q: Would this mean more or less profit for the company?

Q: Would the profits be substantial? [77]

In his example, Fine frames the questions so that the jury should expect to know the answer before it is repeated by the expert and breaks down each of the logical connections necessary to implant the whole opinion in the jury's mind.

3. Consistent Framing of the Questions

"Because the wording of the question might influence the expert's response, it is important not to vary the form of the question in any material way that will trouble the witness."[78] If the examiner changes the phrasing of questions from how they were rehearsed, the expert might be taken aback and ask for a clarification and might give an unexpected answer.[79] The actual trial testimony is not the time for miscommunication between the examiner and the expert.

D. *Explaining the Opinion*

1. Generally

The fourth step to consider for an expert witness is that he must be prepared to explain his opinion. Even though the expert is not required to offer an explanation, the opinion will lose persuasive effect if the jury is unable to understand the technical or scientific reason-

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[77] *Id.* at 268-269.

[78] *See* Mogill, *supra* note 6, at § 6:42.

[79] *Id.*

ing underlying the opinion.[80] One way to ensure that the explanation makes sense is for the expert and attorney to focus on turning the courtroom into a classroom.[81] Some strategies an attorney can use to create this setting include having the expert leave the stand and write on an easel, using body language to draw in the jury or having the expert converse directly with the jurors. Further, the attorney should start the questioning facing the expert, then turn to the jury for eye contact during the question and return to face the witness for the conclusion of the questions. Additionally, the expert should be prepared to speak directly to the jury for substantive answers and make eye contact with the jurors.

While experts are essential to help the jury absorb and comprehend technical matters that might be outside of the realm of common knowledge, they must be careful not to "undo the carefully prepared presentation by eliciting an impermissible vouching statement during the course of the expert's explanation."[82] For instance, in a child abuse prosecution, the state was incorrect to allow the expert to vouch for the credibility of other witnesses[83] when the witness testified, "99.5% of children tell the truth and that . . . in his experience with children, [he] had not personally encountered an instance where a child had invented a lie about abuse."[84] The testimony "improperly invade[d] the province of the jury and [wa]s particularly likely to be prejudicial where [it] [wa]s relied on in closing argument,"[85] and attorneys should be mindful of the repercussions.

2. Help the Expert Teach Through Story Telling

In a short column for the American Bar Association, Professor Jim McElhaney[86] highlights two key points an attorney should recognize for the direct examination of an expert witness in a criminal trial. Although the article pertains to a criminal trial, it can easily apply to experts in civil litigation.

a. The High Ground of Credibility

Professor McElhaney first emphasizes that the purpose of an expert is not to "put a hired gun on the stand who will argue the case for you," [87] as many attorneys mistakenly think. The problem with this mindset is that the attorney is just adding another advocate as

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[80] *See id.* at § 6:44.

[81] *Id.*

[82] *Id.*

[83] Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998).

[84] *Id.*

[85] *Id.; see also* Mogill, *supra* note 6, at § 6:44.

[86] Jim McElhaney, *Put Simply, Make Your Experts Teach: Expert Witnesses Are Most Effective When They Tell the Story of Your Case*, 94-MAY A.B.A. J. 28 (2008).

[87] *Id.*

opposed to an expert, and credibility issues may arise. Similarly, the purpose for calling an expert witness is not to "fill the courtroom with incomprehensible erudition," according to McElhaney.[88] If the expert is portrayed as just another advocate for one side, jurors may be reluctant to accept what they do not understand.

Rather, McElhaney surmises, the "point of calling an expert is to put a teacher in the stand – an explainer who brings another set of eyes in the room through which the judge and jury can see the facts and understand your case."[89] He suggests that the expert should act as a guide that can lead the fact finder through the confusing elements of a case.

McElhaney proposes that when selecting an expert, attorneys should look for an individual who can act as a teacher, because that profession is seen as a fundamental symbol of credibility in our society.[90] By using someone who enjoys explaining complex issues to others and who feels "natural with a piece of chalk in their hands," the jury will likely view the expert as more credible, and the fact finder will have a greater chance of grasping difficult elements of a case. While there are many intelligent and highly qualified experts, it can be difficult to find an expert who is able to convey information in a way that a lay person can understand. While it might take time to find a qualified expert who is also an effective explainer, teaching an expert to be a good educator would likely consume an even greater amount of time.[91]

While some characteristics create an effective credible witness, there are characteristics an attorney should avoid in an expert as well. First, when picking experts, attorneys should also be wary of witnesses who caution that the case is too complex or deals with concepts that are too difficult for ordinary people to comprehend. If the expert has this attitude going into the trial, she is sure to convey this impression to the judge and jury.

Second, the expert's vocabulary is important. By using professional jargon, the fact finder will feel "uninitiated out of the inner circle."[92] Conversely, attorneys should seek out experts who like to "share secrets" with others. "Sharing secrets" means that the judge and jury will understand a concept that they did not understand prior to trial, and then they can share that idea with others. A juror who gets an idea from an expert and uses that information indicates that the juror trusted the expert enough to share the idea with others. McElhaney surmises that when jurors partake in this relay of information from experts, they are essentially buying what the expert is selling.[93]

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 28-29.

The following examples of clear and unclear ways to communicate the same concepts demonstrate the importance of ensuring the expert avoids scientific jargon.

> NO: The analytical laboratory results indicated that the levels and distribution of congeners of dioxin and dioxin-like compounds within the plaintiff's blood sample were within normal limits.
>
> YES: The blood is normal.
>
> NO: The dioxin and dioxin-like congeners in the plant's emissions were not consistent with those found in the plaintiff's samples.
>
> YES: The plant's DNA was not in the plaintiff's blood, or soil, or dust, or water. OR The fingerprints don't match.
>
> COMPLICATED: The plaintiff's expert pointed to one study where furans could theoretically convert to dioxins in a lab.
>
> SIMPLE: The defense expert explained that for furans to convert to dioxins, the temperature would have to be 980 degrees – it gets hot in South Mississippi, but not that hot!

b. Let the Witness Repeat the Story

A second strategy an attorney should follow for effective expert testimony is having the expert repeat the attorney's theory of the case. Ideally, by the time the expert testifies, the attorney has already told the story of the case in her opening statement. Stories are what both judges and jurors use to process facts. By reiterating this story through a different voice, the expert's testimony, the story may reach a fact finder that the attorney was unable to reach in her opening statement.[94] Further, the expert's reiteration gives the jury a new point of view and a different way of approaching the case, through the expert witness.

The choice of words can be effective when an attorney and expert are explaining their theory of the case. Some words help a story come alive to the judge and jury. These words include "teach," "tell," "explain," "help us understand," "help us learn," "educate us about," "demonstrate," "interpret," "untangle," or "decipher."[95] A second group of words can be used in a demonstrative way to help the jury see what the expert or attorney is saying. Demonstrative words include: "show," "see," "watch," "look at," "view," "picture," "demonstrate," "scene," or "take us there."[96] Other words, however, insult the audience's common sense and

[94] *Id.* at 29.

[95] *Id.* at 29.

[96] *Id.*

should be avoided. Such words include "indicate," "elucidate," "illuminate," "explicate," "expound," "discern," "enlarge upon," or "assist us in comprehending."[97] It is good practice for an attorney to write down and review these words prior to examining the witness so that the attorney can use the helpful words and avoid those that are unhelpful as much as possible.

Demonstrative evidence can also be in the form of visual aids. Exhibits such as anatomical charts, models depicting various parts of the body, slides, overhead projections, films, and videotapes can afford a dramatic and effective opportunity to portray the data used by experts in reaching their opinions.[98] Particularly, when overhead projections, films, or videotapes are used in a darkened courtroom, the effect can be captivating and introduce a realistic element to the testimony.

It is also great practice when an attorney is "using words of both teaching and visualization to create questions that will inspire vivid testimony from experts."[99] The purpose is for the jurors to see the facts as if there were actually an eyewitness to the case. McElhaney offers several sample questions that demonstrate this point:

> Q: Dr. Sweeney, we need you to teach us a little about the spleen so we can understand what went wrong in the hospital. Take us to the operating room and let us see what's happening.
>
> Q: Ms. Wildt, help us look at this bridge through the eyes of a design engineer. What should we be looking for in this diagram?
>
> Q: Mr. Winter, we want to understand what these delusions were doing to Joan Quigley. Give us a picture of what was going on in her mind.[100]

3. Explaining Technical Terms

Often in an effort to sound scholarly and perhaps disregard the lawyer's request to speak English, experts will use complex rhetoric and technical language when testifying.[101] When this occurs, the lawyer must ensure that the jury understands exactly what the expert is trying to explain.[102]

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[97] *Id.*

[98] Mogill, *supra* note 6, at §§ 5:141-5:147, § 6:46; Lane & Lane, *supra* note 45, at § 14.50.

[99] McElhaney, *supra* note 86, at 29.

[100] *Id.*

[101] *See* Mogill, *supra* note 6, at § 6:47

[102] Lane & Lane, *supra* note 45, at § 14.51.

Some experienced expert witnesses will offer an explanation by their own initiative; however, when the expert does not do so, the attorney should prompt the expert to do so.[103] The following sequence of questions, answers, and explanations from a medical expert offers an example:

> Q: What sort of fracture was it?
>
> A: It was a compound, comminuted fracture.
>
> Q: What do you mean by a "compound, comminuted fracture?"
>
> A: Well, compound means that the bone is actually sticking out of the leg, piercing the skin. Comminuted means that bits and pieces of the bone were broken off, like the bone itself was shattered into smaller pieces.

When asking the expert to explain a technical term, the attorney must do so in a way that does not insult the jury's intelligence.

> Q: Now, Dr. Berg, no one on the jury here is a doctor, and you're probably talking over their heads when you use the term "spinous process," so would you please explain that word for their benefit?

Even more simply,

> Q: Would you explain the term "spinous process" for the jury?

This question might have a condescending ring to it. To be most effective, counsel should ask the question in a way that indicates the attorney actually wants to know the answer:

> Q: What's the "spinous process," Dr. Berg?

Much to the contrary, the lawyer should not convey a false ignorance to the jury by stating something like the following:

> Q: I'm sorry, doctor, but I'm just a poor lawyer who never went to medical school, and you lost me when you were talking about that spiny something-or-other; could you tell me what you meant by that?

Presenting the question in this fashion makes the lawyer seem patronizing to the jury and disingenuous.

Lastly, is it important not to use acronyms when asking the witness questions. For example, if an attorney refers to the expert as the "CEO" of a company, she is assuming that

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[103] *Id.*

jurors will be well aware that "CEO" stands for "Chief Executive Officer." To avoid this problem, avoid the acronym. Further, if a witness chooses to use an acronym in testimony, the attorney should respond by explaining what the witness actually was referring to. For example:

Q: Where did you get your degree?

A: MIT.

Q: The Massachusetts Institute of Technology?

Q: When did you get that degree from MIT?

After the acronym is established and explained, it is typically okay to use it again, unless the acronym is lengthy and complex.

VI.
Conclusion

The care, preparation and direct examination of expert witnesses can be a tedious task. The practice of most attorneys is to brief the expert on what he will opine in court and discuss a brief synopsis of his or her background information and education. However, a diligent attorney can maximize his or her possibility of prevailing on the basis of the expert's testimony alone, if the attorney cautiously adheres to the four-step process for the direct examination of witnesses: (1) qualifying the expert; (2) establishing a basis for his or her opinion; (3) eliciting the opinion; and (4) explaining the opinion.

FED. R. EVID. 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

OHIO EVID. R. 702. Testimony by Experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

FED. EVID. R. 703. BASES OF AN EXPERT'S OPINION TESTIMONY

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

OHIO EVID. R. 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.

FED. EVID. R. 704. OPINION ON AN ULTIMATE ISSUE

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

OHIO EVID R. RULE 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

FED. R. CIV. P. 26(a)(2). DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY

(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 to be 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.

OHIO R. CIV. P. 26. General Provisions Governing Discovery

(A) Policy; discovery methods. It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of anadversary's industry or efforts.

Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency of use of these methods is not limited.

(B) Scope of discovery. Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure subject to comment or admissible in evidence at trial.

(3) Trial preparation: materials. Subject to the provisions of subdivision (B)(5) of this rule, a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor. A statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without showing good cause. A statement of a party is (a) a written statement signed or otherwise adopted or approved by the party, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded.

(4) Electronically stored information. A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or

expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the following factors when determining if good cause exists:

(a) whether the discovery sought is unreasonably cumulative or duplicative;

(b) whether the information sought can be obtained from some other source that is less burdensome, or less expensive;

(c) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and

(d) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues. In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

(5) Trial preparation: experts.

(a) Subject to the provisions of division (B)(5)(b) of this rule and Civ.R. 35(B), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.

(b) As an alternative or in addition to obtaining discovery under division (B)(5)(a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given to the other party or those to be given on direct examination at trial.

(c) Drafts of any report provided by any expert, regardless of the form in which the draft is recorded, are protected by division (B)(3) of this rule.(d) Communications between a party's attorney and any witness identified as an expert witness under division (B)(5)(b) of this rule regardless of the form of the communications, are protected by division (B)(3) of this rule 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.

(e) The court may require that the party seeking discovery under division (B)(5)(b) of this rule pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under division (B)(5)(a) of this rule, may require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

(6) Claims of Privilege or Protection of Trial-Preparation Materials.

(a) Information Withheld. When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(b) Information Produced. If information is produced in discovery that 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 receiving party must promptly return, sequester, or destroy the specified information and any copies within the party's possession, custody or control. A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege or of protection as trial preparation material. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(C) Protective orders. Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with on one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery. The provisions of Civ. R. 37(A)(4) apply to the award of expenses incurred in relation to the motion. Before any person moves for a protective order under this rule, that person shall make a reasonable effort to resolve the matter through discussion with the attorney or unrepresented

party seeking discovery. A motion for a protective order shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

(D) Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(E) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of person having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness as trial and the subject matter on which he is expected to testify.

(2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

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(B) In addition to the case management conference mentioned in Paragraph A hereof, there may be a pretrial conference before trial. The pretrial conference will be conducted by the judge to whom the cause is assigned. All matters set forth in subdivisions (1) to (10) of Civil Rule 16 will be discussed in depth at such pretrial conference.

(f) Attaching copies of available opinions of all persons who may be called as expert witnesses, including physicians, which shall not constitute a waiver of privilege granted under Revised Code Section 2317.02, as set forth in Civil Rule 16;

Finding an Expert

1. **Finding Names**
    a. List Servers (Paid memberships)
        i. American Association of Justice
        ii. Ohio Association for Justice
    b. Verdict Search (Paid membership)
        i. Lists verdicts as well as the experts used by both Plaintiff and Defendant.
        ii. Can sort by type of case
            1. Nursing home
            2. Medical Malpractice
            3. Misdiagnosis
    c. US News & World Report
        i. Best Doctors
        ii. Best Universities
        iii. Best Hospitals
    d. Universities close in proximity
        i. As distance away increases cost increases
    e. Google and other search engines
    f. Expert Witness Directory
        i. SEAK

2. **Determining Interest and Availability**
    a. How soon do you need an opinion?
        i. Statute of Limitations about to expire
            1. Need Affidavit of Merit
        ii. Case screening
            1. Case or no case?
    b. Difficulty of getting in touch with the expert
        i. Usually no direct line to doctors
    c. Best way to contact a potential expert is email
        i. Find email address through:
            1. University Websites
            2. Ask their nurse
            3. Find an old CV online
            4. From another attorney
        ii. Summary of case to speed the process along
            1. Explain parties in the case for conflict check
            2. Explain facts of case
            3. Inquire if this is something within their qualifications
        iii. Request CV and Fee Schedule
    d. Get preliminary opinion if possible
        i. Saves time
        ii. Saves money

3. **Finding the Best Expert**
    a. Key Questions
        i. Breakdown of professional time
            1. If teaching- What subjects?
        ii. How many times deposed?
            1. Percentage of time for Plaintiff and Defendant
        iii. How many times testified at trial?
            1. Percentage of time for Plaintiff and Defendant
        iv. Have you ever been disqualified as a witness in Ohio? Anywhere?
        v. Attorneys you have worked with in the past
            1. Check their references
    b. Qualified but Not
        i. Expert must have experience in specific procedure or surgery involved in case.
            1. Ex: Not all gastroenterologists do ERCPs
        ii. Specialist vs. general practitioner
            1. Match as closely as possible to Defendant.
                a. Too much specialization can actually be used against you in cross examination.