CHAPTER FIVE

Cross-Examination of Expert Witnesses

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By

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> "You must think of [the expert to be cross-examined] as a man with a knife in his hand who is out to stab you."
>
> — Edward Bennett Williams

> "An expert is one who knows more and more about less and less."
>
> — Ambrose Bierce

I. INTRODUCTION

The use of expert testimony has long posed some of the most interesting and challenging questions for trial attorneys. In addition to the theoretical — even epistemological — problems posed by the *Frye*[1] versus *Daubert*[2] debate, there are numerous practical questions that confront trial attorneys every day. Questions like, "How can I gain enough knowledge to cross-examine an expert in her area?" and, "How can I make sure that I will not be surprised at trial by the opposing expert offering some new theory or opinion?" are but two poignant examples of these practical problems.

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1 *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).
2 *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

As a practicing lawyer, I have been fortunate to work with, oppose and observe many outstanding trial advocates. I have savored success and continue to learn from my mistakes. This experience has given me the opportunity to analyze effective techniques and compile useful guidelines for preparing and conducting an effective cross-examination of opposing experts. It is my hope that you will find some of these techniques and guidelines useful, that you will improve upon them, and that you will pass them on.

II. OVERVIEW

The goal of every cross-examination is to neutralize or destroy the expert's testimony. If you cannot or will not achieve this goal, do not cross-examine. You will only weaken your case.

Effective cross-examination of experts begins long before trial. It starts with discovery, continues through motions in limine, and culminates in a carefully crafted trial examination. Each stage of preparing to cross-examine an expert deserves separate discussion, keeping in mind that an attorney's ethical obligations may be much more rigorous than any expert's. Accordingly, this paper addresses four topics — discovery, motions, trial examination, and ethics — as they pertain to expert witnesses.

III. DISCOVERING THE OPPOSING EXPERT'S OPINIONS

As usual, most good legal work results from thorough preparation. When it comes to discovering and deposing an expert, this means at least three things: First, a thorough knowledge of the applicable rules; second, a thorough

investigation of the expert's background and his prior opinions; and third, a clear definition of case goals and themes, some of which are the same in every case.

A. Know The Rules Applicable To Expert Testimony.

The rules you should know particularly well when dealing with experts are CR 26(b)(5) and ER 703 - 705. There is more discussion of ER 703 - 705 later in this paper concerning motions to limit or exclude the opposing expert's opinion. Fair warning, however; you have no business taking (or defending for that matter) any expert's deposition until you are quite familiar with all of the Title VII Evidence Rules, not just ER 703 - 705.[3] Know them as they apply to your case.

1. CR 26(b)(5)

It is mainly the first part of CR 26(b)(5) that pertains to expert testimony. Subpart (A)(i) of this rule provides:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to 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, and to state such other information about the expert as may be discoverable under these rules. . . .

So often, expert interrogatories request only the four matters specified in CR 26(b)(5)(A)(i). But, the last part of the rule allows you to elicit "such other information about the expert as may be discoverable . . ." If you are practicing in a jurisdiction that does not limit your interrogatories, or does not require an exchange of written expert reports, you should ask a great number of additional questions, such as:

[3] Title VII of the Evidence Rules governs the standards for admissibility of expert testimony.

- Will any of the identified experts base his/her opinion, in whole or part, on facts acquired personally by him/her in the course of any investigation or examination of any of the issues in this case? If your answer is yes, regarding each such investigation or examination, state as to each expert:

    a. The date on which it took place;
    b. The name, address and telephone number of each person present;
    c. Describe in detail the nature of the investigation or examination; and
    d. Identify all facts derived and how the facts were derived.

- Will any of the previously identified experts base his/her opinion on information and facts provided to her by others? If your answer is yes, state as to each expert:

    a. Each and every fact made available to the expert and the source for each fact;
    b. Identify each and every document, item, photograph or other tangible object supplied or made available to the expert and the dates on which each document, item, photograph or tangible object was provided to the expert;
    c. The name, address and telephone number of each person who supplied any information to the expert; and
    d. Identify the specific information provided by each person to each expert.

- Produce each and every document, item, photograph or other tangible object supplied or made available to any expert identified in your answer to the preceding Discovery Request, marked and segregated so as to make it clear which document, item, photograph or other tangible object was provided to which expert.

- Do any of the experts previously identified intend to testify regarding any statement contained in a published treatise, book, periodical, brochure or pamphlet or other publication which the expert has considered or will provide as a ground for her testimony? If your answer is yes, regarding each such published treatise, book, periodical, brochure or pamphlet or other publication, state as to each expert:

    a. The author, title, date and publisher; and
    b. Identify the chapter, page number and section.

- As to each expert witness previously identified, describe the expert's prior experience in litigation, including for each such case, the case

name, cause number, the court in which the litigation took place, and the names of the attorneys who retained the expert.

- As to each expert witness previously identified, identify with particularity each and every case in which the expert has provided expert opinion and/or testimony at the request of or on behalf of plaintiff or its attorneys.

- As to each expert witness previously identified, identify all treatises, books, articles, monographs or other writings which he/she has authored, co-authored or edited.

- Please produce a current curriculum vitae or résumé for each expert identified in your answer to the preceding Discovery Request.

The goal under CR 26(b)(5) is to get complete answers to thorough interrogatories and requests for production of documents well in advance of the expert's deposition.

2. ER 703

While CR 26 deals with the procedure for discovering the expert's opinions before trial, Title VII of the Evidence Rules defines the substantive basis for expert testimony. In particular, Rule 703 defines the data upon which the expert may base her opinion:

> 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.

Thus, an expert is not restricted to the usual rule requiring a witness to testify from firsthand knowledge.[4] Instead, under ER 703, the expert may base her

[4] ER 602

opinion on hearsay, so long as the opinion is based on the type of evidence reasonably relied upon by other experts in the field.

Rule 703 represents a significant departure from the traditional approach to expert witness testimony. Traditionally, an expert without firsthand knowledge based her opinion only upon information that was in the record. Thus, the expert would either listen to the testimony at trial or would answer a hypothetical question based upon that testimony. *See, e. g., State v. McKeown*, 172 Wash. 563, 20 P.2d 114 (1933). By contrast, ER 703 allows the expert to consider a broad range of evidence not in the record so long as that evidence is reliable.

3. ER 703 and 705

The crafty trial attorney may bootstrap ER 705, which allows the expert to explain to the jury the reasons for her opinion, with ER 703, which allows an expert to base an opinion on hearsay, to get inadmissible hearsay before the jury. Indeed, in *Group Health Cooperative of Puget Sound, Inc. v. Dept. of Revenue*, 106 Wn.2d 391, 722 P.2d 781 (1986), the court allowed the admission of otherwise inadmissible hearsay evidence for the limited purpose of showing the basis of the expert's opinion, but not as evidence of the truth of the matter asserted. *Compare State v. Anderson*, 44 Wn. App. 644, 723 P.2d 464 (1986) ("Courts have been reluctant to allow the use of Rule 705 as a mechanism of admitting otherwise inadmissible evidence as an explanation of the expert's opinion.").

The danger of an expert introducing otherwise inadmissible hearsay testimony in front of the jury may be ameliorated by ER 403 (exclusion of

relevant evidence on grounds of prejudice, confusion, or waste of time) and by the practical consideration that the expert's credibility may suffer by reliance on questionable data as the basis of her opinion. At any rate, an alert advocate will guard against potentially damaging and otherwise inadmissible testimony entering the trial arena through the opposing party's expert under the guise of ER 703 and 705.

4. ER 704

Rule 704 allows an expert to render an opinion on an ultimate issue in the case:

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

The comments to Rule 704 attempt to make clear that an expert is still not allowed to state an opinion on matters of law or matters involving mixed questions of fact and law:

> Except for testimony concerning foreign law, experts are not to state opinions of law or mixed fact and law. On this basis, questions such as whether X was negligent can be excluded. *Meisenholder* Section 356.

As anyone who has ever attempted to draft findings of fact and conclusions of law knows, whether a topic involves a matter of law, or is a mixture of fact and law, is difficult to ascertain. This difficulty may provide fertile grounds for motions in limine of the opposing expert's opinions.

B. Investigate The Experts' Background And Prior Opinion.

Armed with thorough discovery answers and a complete set of documents, it is time to dig deep to make this information useful. Use your discovery

responses as a springboard to develop information about the expert's prior deposition and trial testimony. Call the attorneys previously opposed to the expert, get transcripts where you can, and measure carefully the expert's prior opinions against those she is now offering. The same lawyers who previously opposed the expert can evaluate the expert as a witness and provide invaluable insights into controlling the expert at trial. For example, is the expert passive aggressive; is she pompous; is she prone to fabricate responses; or is she measured in her responses?

Some of the best impeachment gold comes from mining prior reports by the expert. Often these reports provide devastating impeachment. I once had a real estate valuation case in which the opposing appraisal expert valued the same property three times for substantially different amounts within a very short time period. Having gotten some insight into the willingness of the expert to shade his opinion depending on which way the wind was blowing, we then found other recent appraisal reports in which the same expert was very pessimistic about the market for the real estate development upon which he optimistically based his valuation in our case. We could hardly wait to impeach him with this information at trial, and we did, with great success.

During this investigation phase, use computerized legal research to discover and review the books, treatises, and articles authored by the expert or upon which she relies. The expert may offer a more qualified, or even contradictory, opinion in her articles compared to the opinion she now asserts. At

the very least, the expert may acknowledge a competing school of expert thought on the issue involved in the litigation.

These articles and treatises are also invaluable in helping you to locate your own expert. If the treatise or article is a learned or peer-reviewed publication, the expert will support her assertions with citations to other experts in the field. Try to hire one of them. The opposing expert will be hard pressed to deny the credibility of your expert after acknowledging him in writing as an expert in the same field.

Have someone check the résumé of the expert and articles written about her. Graduate students in the expert's field may be particularly cost-effective for this task. While I have never experienced it firsthand, I have heard of gross exaggeration in qualifications.

Inquiries about the reason an expert left prior employment or association with an institution can also be very revealing. Why was the expert the only secretary of the professional association never to become president? Even if the professional association conducts examinations of its members, has anyone ever failed?

Finally, see if the expert really is a member of those professional and honorary organizations. Membership in some "pay to join" organization may seem like a little thing, but credibility is everything when it comes to experts. If the expert is willing to lie about membership in a professional organization, what else will she "fudge" on? Be careful, the expert may claim you received an

outdated résumé to explain away these inconsistencies. You should still be able to make the expert seem sloppy if you handle this information carefully.

A review of the expert's website and advertising can also prove fruitful. Does the advertising indicate bias in any way, or a propensity to testify for one side or the other in most litigation? Does the advertisement imply that the expert can make a case in certain substantive areas if she is hired? Does the information you have been provided in discovery match the information disclosed in the expert's website?

As a final note, you should consider conducting an equally thorough background check on your expert before you hire him, but at any rate before you disclose him to your opponent. Otherwise, you risk being in the awkward position of trying to explain away some very embarrassing material generated by your own expert! Neither you nor your client will be amused.

C. Depose The Expert With Case Goals In Mind.

1. Preparing for the Deposition.

After receiving full and complete responses to expert interrogatories and requests for production of documents seeking all information forming the basis of the expert's opinion, issue the deposition notice with a subpoena duces tecum. The subpoena should force supplementation of the prior discovery requests, and if you notice the deposition at the close of discovery, it should also elicit trial reports. Your goal here is to ensure discovery of all information the expert relied upon for her opinions and all reports she will generate for trial. Of course, the subpoena duces tecum becomes Exhibit 1 to the expert's deposition.

Use your expert or consultant to dissect the opposing expert's opinions and to help you prepare an effective and complete examination outline. This is a good time to revisit your strategy. Do you want to confront the expert with her shortcomings to resolve the case, or do you just want to lock the expert into positions that will allow you to neutralize or destroy her at trial? In most cases, you should resist the urge to cross-examine and "destroy" the expert in her deposition, as doing so will only educate the expert and her counsel as to the flaws in her analysis and allow them to prepare for trial.

2. Videotape or Stenographic Deposition?

One of the threshold questions you will confront is how to record the expert's deposition. Many trial attorneys prefer to cross-examine the opposing expert on videotape, subscribing to the theory that videotape is much more effective impeachment at trial than simply reading back a transcript. In some courtrooms, the videotape can be edited for trial to juxtapose inconsistencies in testimony or highlight evasiveness. The videotape can even be frozen to highlight a facial expression, and with the help of a graphics agency, text from a bad (for your opponent) document can be depicted in the same frame.

Despite the many advantages videotape offers, I still prefer to take an expert deposition with only a court reporter present. I believe this conveys a more relaxed atmosphere and the expert is more likely to let down her guard. Because I view the deposition of the opposing expert as a chance to be educated by her, I find this relaxed atmosphere much more productive. For these reasons, I recommend that you affect the attitude of the expert's most interested, but

ignorant, student in your questioning; or, as my former partner, Bill Block, used to describe it, "Pretend you are the smart kid in the dumb kid's row." Remember your goal is to get as familiar with the expert's opinion as she is.

3. Patience, Humility, and Curiosity.

In general, you may take more risks in deposing an expert than you can with fact witnesses. The probability that the answers you elicit will be used against you at trial are much lower because, on almost all occasions, the expert will testify live. At any rate, your overarching goal is to come to know the expert and her field of expertise intimately. You cannot do this if you follow a strict script or rush questions and answers. This is not to say you should proceed without a script; just that you must be conversant enough with the expert's subject matter to depart from your prepared questions. I have attached as Appendix A a general script for every expert deposition.

Deposing the opposing expert and coming to understand her opinions takes time. You should seek to engage the expert fully by making good eye contact and establishing a conversational tone and rapport with her. While the deposition may be a humbling experience, especially if the expert is a bio-statistician or electrical engineer, remember that the jury will be no smarter than you (generally).

You may take some comfort in realizing that if you cannot understand the expert, neither will the jury. Unfortunately, the jury may not understand the impeachment testimony you elicit if it is cloaked in technical jargon. Force the expert to speak every-day English. The jury will appreciate it, and you should

expect your opponent to have his expert speak at the jury's level at trial despite the mumbo jumbo and condescension you may encounter at the expert's deposition.

4. Four Goals for Every Expert Deposition.

In every case, you have at least four goals to establish in your opposing expert's deposition. First, establish the opposing expert is biased. Second, put a wall around the expert's testimony. Third, weaken the credibility of the opposing expert. Fourth, strengthen the credibility of your own expert.

a. Establish that the opposing expert is biased.

Bias can be established through a series of seemingly innocuous questions, such as the following:

- **Who selected the materials you reviewed?**

  Many times, the expert has been fed selected materials by opposing counsel. This puts the expert in a very bad position because she has seen less than the entire picture. The expert is then exposed to questions such as, "Were you aware that there were other materials on the subject that you did not see? If you had been aware of these materials, would you have liked to have seen them before you formed your opinion and testified under oath here today?"

- **What did you review or consider and decide not to rely on?**

  While many lawyers might object to this question on the basis that it invades work product, most courts would allow the question. After all, if the expert has two piles of material divided between information that supports her client's position and information that does not, the objectivity of the expert is destroyed. It goes without saying that the cross-examiner is much more interested in the materials collected, but not relied upon, by the expert.

- **What do you perceive your role to be in this case?**

  If you have already established that the expert has received less than all of the available evidence before formulating her opinion, it

may be very difficult for the expert to claim objectivity and independence. If the expert persists in maintaining this façade, you should explore this "objectivity and independence" with her by asking questions like, "Isn't it true that in the last calendar year, you earned in excess of $200,000 performing defense exams alone?" Or, "Isn't it true that 85% of your practice is defense exams?"

- **Have you made any credibility judgments or ignored any evidence as part of your analysis in this case?**

In most cases, it will be very difficult for the expert to explain her conclusion without conceding that she has made some credibility judgments or ignored some data. On the other hand, the very act of making these decisions may show bias on behalf of the expert.

You may even get lucky enough to ask and receive an answer to the ultimate question of bias. My partner, Chris Brain, who is known for asking bodacious questions, recently asked the opposing expert at trial, "Isn't it true that your role in this case is to render an opinion in support of the plaintiff's position?", to which he received a simple, "Yes" response. When confronted with similar cross-examination, Chris' expert responded that he was there to render an independent and objective evaluation of the evidence. Chris won that trial.

b. Put a wall around the opposing expert's testimony.

In every expert deposition, your paramount goal should be to lock the opposing expert into her opinion and eliminate all means of supplementation or equivocation. This is especially true if you believe the opposing expert has committed an error in her analysis. If you effectively seal the expert's defective opinion in concrete, her credibility will be destroyed at trial or, perhaps, not even admitted into evidence.

You can begin to erect a wall around an expert with very simple questions, such as:

- **What opinions have you formed in this matter?**
- **What did you do to reach those opinions?**
- **How did you do that?**
- **Why did you do that?**
- **What result did you get?**
- **How did that result affect your opinion?**
- **Have you now told me all of your opinions or conclusions?**
- **Do you contemplate developing any other opinions or conclusions in this matter?**

Assuming the opposing expert has made a mistake in her analysis, you should explore that area exhaustively. It does not hurt to ask the expert to repeat her error several different times in response to several questions. This will minimize the chance that the expert will claim at trial that she did not understand your question or that her answer was incomplete.

On occasion, the expert will appear for her deposition before she has completed all of her work. Indeed, some attorneys believe presenting an expert as a work in progress may give them strategic advantage. This is a mistake. If you do not know your case and what you are trying to prove by the time your expert is deposed, you are in deep trouble.

In addition to risking exclusion of the expert, the work-in-progress expert is exposed to critical attack. Each time the expert identifies a task yet to be done, ask why that task needs to be completed. This series of questions and answers

will expose flaws in the expert's current analysis. If the expert never does the work, you can prove at trial that her analysis is flawed by her own admissions. Even if she completes the work, her willingness to jump to conclusions will contrast nicely with your expert, who no doubt is a lineal thinker who unerringly adheres to the scientific method.

Calcifying the expert's opinion gives you the critical tools you need to cross-examine the expert at trial and prevent her from adjusting her opinion to meet the weaknesses you will expose before the jury.

c. Weaken the credibility of the opposing expert.

Of course, establishing bias in the ways previously discussed goes a long way toward weakening the credibility of the opposing expert. The standard questions about who is paying the expert, how much the expert is being paid, how much the expert testifies — as opposed to practices her profession — etc., all help further weaken the credibility of the opposing expert. You should ask these questions in every deposition.

An additional question that can start hours of deposition testimony is, "Assume your opinion turns out to be wrong. Take me through the steps you would go through in order to analyze how you went wrong." This type of question works particularly well in product liability litigation and can be tied to the *Daubert* factors of testability and replicability.[5] In response to this question, the expert often will draw a roadmap for analyzing her weaknesses. Check and

[5] The *Daubert* factors make for great impeachment even in a *Frye* jurisdiction.

see if the expert answers the question by outlining the same steps she used to arrive at her conclusion in the first place.

d. Strengthen the Credibility of Your Own Expert.

Most experts, as a matter of professional courtesy and human nature, will be reluctant to criticize your own expert if he is well-qualified. Indeed, the opposing expert may endorse large parts of your expert's opinion if you approach the issue incrementally with questions such as those suggested by Peter Winik in *Strategies in Expert Depositions:*

- **You believe that Dr. Jones is a nice person, don't you, Dr. Smith?**
- **You don't believe that he's lying here, do you?**
- **You don't believe that he's tailoring his opinion to fit what the other side wants to hear any more than you are, Dr. Smith?**
- **You and he have come up with different answers here, but you're not challenging his integrity, are you?**
- **Would you agree that Dr. Jones' degree is from a first rate university?**
- **Would you agree that his degree in economics is relevant to the opinions that both of you are expressing in this case?**
- **His work at Acme Corporation was in the very same field that both of you are opining on, correct?**
- **He has honors from XYZ organization. That's a reputable organization, is it not?**
- **You and Dr. Jones both agree that it is appropriate to apply the principles of economics in this case, correct?**
- **You both think it's appropriate to examine past property sales in arriving at your opinion, right?**
- **You both think it's appropriate to look at economic trends in arriving at your opinion, correct?**

- **Among the trends that you both look at are interest rates, employment and new home starts, correct?**

A series of questions along these lines not only allows you to establish the credibility of your own expert, but also allows you to narrow the differences between the experts for trial.

Now that you have isolated the points in contention, you can concentrate on helping the jury to understand more clearly why the opposing expert's assumptions or data points are less reliable or credible than those forming the basis of your expert's opinion. You are well on the road to winning your case at trial.

IV. EXCLUDING OR LIMITING THE OPPOSING PARTY'S EXPERT

A. Is The Expert's Opinion Admissible?

To be admissible, the expert's opinion must be relevant (ER 401) and reliable (ER 702 and 703). For seventy years, an expert's testimony was reliable in most courts if it was "generally accepted in the relevant field" under the *Frye* test. When the U.S. Supreme Court decided *Daubert* in 1993, the standard for admission of expert testimony in federal courts changed materially. However, because *Frye* remains the Washington standard for admission of expert testimony, trial lawyers must be conversant with both tests.

1. The *Frye* Test.

It is first important to understand the scope of the *Frye* "general acceptance" test in Washington courts. In Washington and some other states, it appears that the *Frye* test only applies to expert testimony that is based on new machines, techniques, and theories which are ostensibly infallible, like the lie

detector that was analyzed in *Frye*. It is the "aura of mathematical certainty or infallibility" of "novel scientific theories" that has the potential to over awe jurors that concerns the court when it applies the *Frye* test.

By contrast, when an expert provides a personal opinion that is based upon objective and verifiable evidence, the expert's testimony will generally not be excluded under *Frye* because the testimony can be effectively impeached and tested without resort to some supposedly "foolproof, mechanical black box." As one California court put it, "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to . . . *Frye*." *People v. Stoll*, 783 P.2d 698, 710 (Cal. 1989). Perhaps the limited scope of *Frye* explains why for over sixty years, from 1923 until 1984, *Frye* was never used to exclude an expert in a civil case. *See, e.g., Developments In The Law — Confronting the New Challenges of New Scientific Evidence*, 108 Harv. L. Rev. 1509, 1529 n.160 (1995).

In cases involving "novel scientific theory" where *Frye* applies, the court looks to a number of sources, including available literature, cases from other jurisdictions, and the trial record, to determine whether the theory or principle has achieved general acceptance in the relevant scientific community. *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). The question of whether a novel scientific theory satisfies the *Frye* test is reviewed de novo by the appellate courts. *State v. Baity*, 140 Wn.2d 1, 9, 991 P.2d 1151 (2000).

2. The *Daubert* Test.

While the *Frye* test remains the standard for judging expert testimony in Washington, *State v. Copeland*, 922 P.2d 1304, 1310 Wash. 1966 (en banc), *Kaech v. Public Util. Dist.*, 106 Wn. App. 260 (2001), the U.S. Supreme Court in *Daubert* established a four-prong test for admission of expert testimony in federal courts: (1) Has the methodology been subjected to a peer-reviewed publication?; (2) Is there a known or knowable error rate for the methodology?; (3) Is the methodology generally accepted in the relevant scientific field?; and (4) Has the methodology been tested or is it testable?[6] On remand, the Ninth Circuit added the additional criterion of whether the methodology was created for the purpose of litigation.

e of the case?he heels of *Daubert*, the U.S. Supreme Court decided *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In *Kuhmo Tire*, the Supreme Court made clear that the *Daubert* standard applies not only to scientific testimony, but also to non-scientific expert testimony in federal courts. In *Joinder*, the U.S. Supreme Court established an abuse of discretion standard of review for trial court exclusion of expert testimony, and instructed the trial court to investigate the basis of the expert witness's methodology, rather than trusting the expert's reassurances that her methodology is reliable.

In order to determine whether an opposing expert's methodology satisfies the *Daubert* criteria, questions such as the following are helpful:

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[6] Some commentators have suggested the acronym PEAT as an aid to recalling the four *Daubert* factors.

- **Where else has this methodology been used?**
- **Has this methodology ever been applied in this way by other experts in the field?**
- **Has this methodology appeared in a peer-reviewed or journaled publication?**
- **Do you know the error rate attributable to this methodology?**
- **Is the error rate determinable?**
- **Is this methodology generally accepted in the relevant scientific field for the purposes for which you are utilizing it?**
- **Have you attempted to replicate the results of your methodology?**
- **Is your methodology testable as applied here?**
- **Did you create this methodology for the purposes of this litigation?**

These questions illustrate that the expert's application of the methodology must be reliable, not just the underlying methodology. For example, an expert might use a reliable methodology to predict when the moon is full, but that methodology will not allow the expert to apply the methodology to conclude that criminal defendants are insane when the moon is full.

B. Is The Expert's Opinion Excludable?

1. When to Object.

Procedurally, objections to expert testimony are made by motions in limine before trial, by objection based on voir dire at the time of trial, or by objection when the expert or her opinion is tendered. There are strategic reasons

behind the choice of which of these objections to invoke in your attempt to exclude expert testimony.

a. Motions in limine.

Where the issues are complex and it is important to keep the jury from hearing the expert at all, motions in limine are appropriate. Moreover, where admissibility is not clear because of the way the *Daubert* factors apply to the expert in question, a motion in limine can give much needed guidance as to how the trial judge will analyze the expert methodology at issue. Because the *Daubert* factors were developed with the scientific method in mind, it is much more difficult to predict how the trial judge will apply the *Daubert* factors to less scientific experts who have obtained their expertise through experience rather than education. For example, in water intrusion cases, many structural engineers testify based on plunging a screwdriver into the wood as to how much impairment of structural integrity a building has suffered and, perhaps more speculatively, when that impairment occurred. While this methodology may be generally accepted and admissible in *Frye* jurisdictions (if *Frye* even applies), it is less clear what foundation needs to be laid in order to admit this evidence in a *Daubert* jurisdiction. Finally, challenges based on inadequate credentials, misapplication of methodology, unreliability or unrepeatability of the methodology employed, or failure to comply with the pretrial disclosure rules should all be brought by motions in limine.

b. Objections at trial.

On the other hand, challenges based on errors in calculation, inadequate data and the like are much less likely to be the basis of total exclusion of the expert and may provide a more fertile ground for voir dire or cross-examination. In general, there is no reason to educate your opponent about these mistakes in advance of trial.

In choosing between whether to voir dire or cross-examine the opposing expert, consider that voir dire allows you to communicate to the jury that there are serious concerns about this expert and the jury should be skeptical of her opinions. Of course, your opposing counsel will have more time to address the concerns you raise in voir dire than if you save your criticisms for cross-examination.

2. Additional Bases for Excluding Expert Testimony.

In addition to the *Frye/Daubert* challenges, expert testimony may be excluded under the evidence rules codified under Title VII, for failure to comply with court rules or because of ethical conflicts.

a. Title VII exclusions.

Other than the obvious challenge that the expert lacks the appropriate credentials to qualify as an "expert" under Rule 702, it is still worth considering whether the area of "expertise" is appropriate for expert testimony. Remember that ER 702 allows expert testimony with respect to a particular issue if the trier of fact needs assistance "to understand the evidence or to determine a fact in issue." If the expert testimony really leans toward common knowledge to the

average juror, or goes too far in telling the jury how to apply the facts to the law, it may be excluded. *Compare* ER 704.

If you believe that you are confronting an expert who is basing her opinion on unreliable data, you should also consider an ER 703 challenge. Remember, ER 703 requires an expert to base her opinion on evidence that is typically relied upon by experts in the same field in forming their opinions. Disputes over the reliability of hearsay or other evidence forming the basis of an expert's opinion are ruled upon by the trial judge outside the presence of the jury pursuant to ER 104(a).

Be alert to the expert that disguises the unreliability of her opinion by using a reliable methodology, but applying that methodology in an unreliable way. In a valuation case, I encountered a well-known economist who had embarked upon a complicated regression analysis to predict property values. The regression analysis theory was well accepted by the scientific community, but the expert claimed that he alone was brilliant enough to see how regression analysis could be used to evaluate property. Most of the expert's opinions were excluded at trial.

b. Conflicts of interest.

The expert may also be disqualified based on prior work she did for your client, a confidentiality agreement she signed in prior litigation prohibiting her from disclosing trade secrets she learned; or otherwise becoming tainted by access to confidential information. Presumably, you will have discovered this conflict in

your expert deposition and will be prepared to bring it before the court on a motion in limine.

C. Exclusion For Failure To Comply With Court Rules.

The admissibility of the expert's testimony depends not only upon its evidentiary reliability and relevance, but also on whether the proponent has adequately satisfied procedural obligations imposed by the rules.

In jurisdictions such as federal court where expert reports are due at least 90 days before the trial date, the expert's report must be complete, primarily the work of the expert, and expert discovery must be timely supplemented. Unless otherwise directed by the federal court, rebuttal expert reports are due 30 days after receipt of the report which they rebut in federal court. Fed. R. Civ. P. 26(a)(2)(C). The court should not be sympathetic to attempts by opposing counsel to introduce new theories, approaches, and conclusions in rebuttal reports when those matters could have been included in the initial report. Similarly, new evidence offered by the expert at trial under the guise of illustrative evidence may be logically barred by supplementation rules.

Many Washington courts, including King County, have adopted local rules concerning disclosure of lay and expert witnesses. King County courts will enforce pretrial witness disclosure deadlines, especially where a party may be prejudiced by late disclosure. *See, e.g., Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wn.2d 202, 898 P.2d 275 (1995) (exclusion of expert opinion for failure to comply with disclosure rules).

V. CROSS-EXAMINATION OF THE OPPOSING EXPERT AT TRIAL

The proper approach to cross-examination of expert witnesses is an area upon which the commentators disagree. Some commentators counsel that cross-examination of the opposing expert is no different than lay witness cross-examination, just tougher. Other commentators claim that you should throw out everything you have learned about cross-examination before addressing the expert at trial. I find a middle ground most appropriate.

A. Cross-Examination Principles That Remain The Same.

In my view, many of the principles of cross-examination remain the same. These include:

- **Always cross-examine with case goals and your case theme in mind;**
- **Be wary of scoring points for purposes of keeping score only;**
- **Know whether you intend to neutralize or destroy the witness before beginning your examination;**
- **Ask only leading questions to which you know the answer;**
- **Make sure you have a written outline of your cross-examination, but be ready and willing to depart from it; and**
- **As David Allen used to plead with me, K-I-S-S the witness — by that he meant, Keep It Simple and Stupid (or perhaps, "Keep it simple," Stupid).**

B. Cross-Examination Principles That Are Different.

In other ways, cross-examining the expert witness is quite different from cross-examining the lay witness. First, while there is some disagreement on the issue, I never pass the opportunity to cross-examine the opposing expert. I

believe there are simply too many ways to get the opposing expert to build your expert's credibility or, at the very least, to establish that some of the assumptions underlying your expert's opinions are valid.

1. Constructive Cross-Examination.

While I generally subscribe to the "snap-of-glove-leather" theory of cross-examination -- meaning that under the theory of primacy, the first question you ask on cross-examination should be a knockout -- this is not always the best strategy to employ in cross-examining an expert. If you go for the knockout punch immediately, you will lose the chance to get "constructive" cross-examination from the opposing expert. Again, almost every expert will agree with a number of your own expert's assumptions and data points. You may also be able to get the opposing expert to agree that your expert's evidence and data are of the type normally relied upon by experts in the field, even if the opposing expert has not utilized the same data.

Highlighting areas of agreement for the jury can be important, and you are much more likely to get a hostile witness to concede points if you elicit this testimony before you pick a fight with her. Once you antagonize the expert, you will never get agreement from her. Moreover, it does not make logical sense to destroy the expert's credibility first and then use her to help establish the veracity of key points in your case.

2. Destructive Cross-Examination.

When it comes to the destructive part of your cross-examination of the opposing expert, it is generally much more productive to attack the assumptions

and data that form the basis of the expert's opinions, rather than the conclusions the expert reached. If you attack bit by bit and piece by piece, soon you have enough pieces to make a substantial difference in the expert's conclusion.

As you begin to antagonize the opposing expert, be wary of the temptation to use your newly acquired expertise to debate the expert. Remember, she truly is the expert and can drown you in jargon or bamboozle you with her B.S. Get your answers and move on.

a. Controlling the witness.

Stay in control in your cross-examination, avoiding how and why questions. Use single fact, declaratory sentences to construct leading questions that call for a simple yes or no answer. If the witness insists on explaining her answer, cut her off, explain that her counsel can allow her to elaborate, and demand a yes or no answer to your question.

If you get a windy and evasive answer from the expert, consider not cutting the witness off. Instead, simply re-ask the precise question that calls for a yes or no answer again, perhaps prefacing it with the expert's name and title. The jury will get the point. Do not rephrase your question. Rephrasing only gives the witness wiggle room, inviting more argument or artful dodging: "Since you rephrased your question, let me rephrase my answer," and off the witness launches to your chagrin.

b. Self control.

Control your body language and voice carefully. Never show anger, frustration, or flinch. Even if you are offended by what you perceive to be the

opposing expert's wholesale disregard for key data that (objectively) supports your client's position, you are much better off letting the jury reach that conclusion with the help of your questions, rather than asking them to understand your anger with the expert.

Never let the expert tell her story twice, with one exception. If the opposing expert has exhibits or visual aids, try to impeach the expert on at least one visual aid, including by marking on the exhibit or by marking on a piece of Mylar placed over the top of the exhibit. The object of this exercise is to reinforce graphically your impeachment with the jury. In all events, do not allow the opposing expert to "go to the board" or freely rummage through her exhibits to illustrate answers to your questions.

Save the killer question for last in your cross-examination, and make sure the jury gets it. It might not hurt to ask the court for a brief moment, review your notes, consult your second chair or client, and then return with the final crisp question to score high with the jury.

Finally, know when to sit down. I have been in the middle of expert cross-examination when the opposing expert made an unexpected golden concession. I almost missed the answer as I plunged ahead in my notes, but one glance at the jury told me they had heard the admission clearly. I quickly reviewed my cross-examination outline and, realizing that my unasked questions would be anti-climatic by comparison, I thanked the witness and sat down. The expert's admission became a key theme in my closing argument.

VI. ETHICAL ISSUES IN PRESENTING EXPERT TESTIMONY

Please see Appendix B.

VII. CONCLUSION

The painter, Edgar Degas, once said, "What a delightful thing is the conversation of specialists! One understands absolutely nothing and it is charming." While trial attorneys cannot afford to understand absolutely nothing about experts, doing battle with them can be (if not "charming") some of the most exciting, stimulating and delightful parts of being a trial attorney. If you know the evidence and civil procedure rules, define your trial goals, and take up the intellectual challenge of learning the strengths and weaknesses of the opposing expert's opinions, you will be prepared to fight the good fight! Some of the techniques and guidelines outlined here may help you win.

SAMPLE

EXPERT WITNESS DEPOSITION OUTLINE

I. Personal Background

- A. Full name.
- B. Business/residential addresses.
- C. Age.

II. Educational Background

- A. Undergraduate education.
  1. Each university/college attended and dates of attendance.
  2. Each degree obtained and date when obtained.
  3. Special areas of study or emphasis.
- B. Graduate education.
  1. Each university/college attended and dates of attendance.
  2. Each degree obtained and date when obtained.
  3. Special areas of study or emphasis.
  4. Significant papers (dissertation, thesis, etc.), projects, and research.
- C. Teaching experience.
  1. Where (e.g., university, college, seminar, etc.).
  2. When.
  3. Full time/part time.
  4. Subject matter(s) taught.
  5. Scope/responsibilities, including research and significant projects.
  6. Awards/other recognition.

III. Work History

A. For each period of employment:

1. Name and address or location of employer.

2. Title(s) or position(s).

3. Duties and responsibilities for each position held.

4. Length of service for each position held.

5. Immediate supervisor for each position held.

6. Significant projects and accomplishments.

IV. Professional Licenses, Registrations, Certifications, etc.

A. Professional licenses (e.g., architect, engineer, certified public accountant, etc.)

B. Registrations.

C. Certifications.

V. Professional Associations, Organizations, and Societies

A. For each association, organization, and society in which the expert is a member:

1. Name of association, organization, or society.

2. Charter or purpose of the entity.

3. Identify all offices the expert has held and describe duties and responsibilities of each.

4. Identify all committees on which the expert has served and describe services performed on each.

5. Names of all periodicals and other publications provided.

VI. Publications and Speeches

A. Identify by title, subject matter, date of publication, and publisher, all books, articles, and other materials that the expert has published.

1. Identify all co-authors for each publication.

B. Identify by title or subject matter, sponsor or audience, and date or presentation, all speeches of any significance by expert.

VII. Areas of Expertise

A. Identify all areas in which expert considers himself/herself to be an expert.

B. Identify all other persons whom the expert considers to be experts in each such area.

VIII. Materials on Which Experts in the Area Generally Rely

A. Identify the materials to which experts in the field or area generally refer and upon which they generally rely.

IX. Previous Experience as an Expert

A. Identify all instances in which person has been retained as either a consulting or testifying expert. (This can be a generalized inquiry if you are deposing a "professional" expert whose experience has been substantial.)

1. Who retained the expert?

2. What was the purpose for which the expert was retained?

3. What work did the expert perform, and was it performed in conjunction with other experts?

4. Where was the work performed?

5. Was the expert's deposition taken, and if so by whom? (Identify specific attorney(s)).

6. Did the expert testify at trial?

7. What opinions did the expert render?

X. Expert's Assignment for Case

A. How and when did expert first become aware of the case?

1. Identify all persons who contacted expert and what they told and provided to expert and when.

B. Who retained expert and when?

C. What specific assignment(s), instruction(s), or direction(s) was expert given, by whom, and when?

1. Identify all restrictions or limitations placed upon the expert.

D. What are the terms of the expert's fee agreement?

1. How much compensation/how fixed?

2. Is the fee agreement with the opposing party, opposing counsel, or someone else?

XI. Identify all Information and Materials Provided to the Expert

A. Factual information — verbal and otherwise.

B. Pleadings and other court papers.

C. Documents, including summaries, charts, graphs, etc.

D. Deposition transcripts.

E. Photographs/video tape.

F. Other materials.

XII. Identify Any Information Requested by the Expert But Not Provided

XIII. Identify All Information Obtained by the Expert From Other Sources

A. What information?

B. Where obtained?

C. Purpose for obtaining the information.

D. How used?

XIV. Identify all Analyses, Evaluations, and Research Done by the Expert

A. Research performed by expert.

B. Research performed by others.

C. Industry standards etc. consulted.

D. Tests performed, models, etc.

XV. Identify Everything Further That Needs to be Done

A. What has/will expert recommend?

B. What response?

XVI. Identify all Conclusions Reached and Opinions Formed

A. List each opinion/conclusion.

B. What is opinion/conclusion based upon?

1. Facts (how learned or discovered).

2. Standards, codes, customs, usages, etc.

3. Opinion based upon any assumptions?

C. What other explanations may exist?

CHAPTER THREE

Finding, Preparing, and Using Expert Witnesses
Ethical Issues in Presenting Expert Testimony

January 1999

by

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> "[T]he question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession that should stand free from all suspicion . . . It is not by way of punishment; but the Court on such cases, exercise their discretion, whether a man whom they have formally admitted, is a proper person to be continued on the roll or not."[7]

I. Introduction

Expert witnesses are, in many cases, subject to ethical rules and principles of their professions which apply to all of their engagements, including engagements to provide consulting or testifying expert testimony. Lawyers, in the retention, development, and presentation of the testimony of experts are, in turn, subject to the Rules of Professional Conduct. Although neither the ABA=s Model Rules of Professional Conduct nor the Washington Rules of Professional Conduct mention expert witnesses explicitly, the courts have applied these rules, the discovery rules, and the inherent power of the court to the relationship between lawyers and experts and the testimony that experts present. Remedies for direct or indirect violation of these principles include sanctions, disciplinary actions, waiver of attorney client or work product privileges, exclusion of expert testimony, the grant of a new trial, and disqualification of experts and counsel. In some cases, ethical rule violations may even become an independent basis for tort remedies and other civil liabilities.

II. Duty to Preserve Client Confidences (RPC 1.6)

A. <u>Testifying Experts</u>

The duty to preserve client confidences is perhaps one of the most fundamental ethical principles of our profession. It is therefore critically important for

[7] *Ex parte* Brounsall, 98 Eng. Rep. 1385 (K.B. 1778) (Lord Mansfield).

attorneys and their experts to understand that these duties of confidentiality do not operate to protect information supplied to experts retained for the purpose of testifying.[8]

The reason that communication with experts is not privileged is fairly straightforward. Evaluation for testimonial purposes does not fall within the ordinary practice of a profession. Communications to and from a testifying expert, do not fall within the "zone of privacy" necessary for invocation of the privilege. Consequently, attorneys should assume that all communications flowing to and from their experts from whatever source, including direct client communication, will be disclosed in the discovery process. The attorney and the expert must both assume that the expert's file will be an open book. The testifying expert's research files, work papers, notes, drafts, correspondence and similar materials will be produced in discovery.

As a practical matter, apart from a general engagement letter and actual documentary evidence, an attorney should allow very little, if any, written communication with the testifying expert. In many cases, there may be very little reason for the client to have any direct contact with the testifying expert. The attorney who provides chronologies, summaries of the case, summaries of client interviews B or worse yet, allows the client to explain facts directly B to his testifying expert has implicitly waived the protections of the attorney-client privilege and work product immunity and, as a result, violated the duty to preserve client confidences codified in RPC 1.6. Again, if the testifying expert has acquired any information from whatever source, that information will most likely be discoverable.

Based on these principles, it should be obvious that to even suggest to a testifying expert that it might be better if she destroyed parts of her file or earlier drafts of her opinion the attorney found disagreeable is unethical and perhaps even criminal.

Instead, experts should be encouraged to keep their files limited to what they actually need, and be aware of the potential for cross-examination on what they do keep. Experts should develop their initial impressions orally, rather than in writing. Expert opinions commonly evolve during the course of work on the case. Opinions that are committed to writing at an early stage before all the evidence is assembled will inevitably lead to problems, either because the expert changed her mind and can be cross-examined on the change, or because the expert reached an opinion too soon before reviewing all relevant information.

[8] 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.

In the case of testifying experts, careful attention to all communications is essential to avoid violation of ethical duties and prejudicing the client's case.

B. Work Product Consultants

By contrast to testifying experts, information provided to and gleaned from a work product consultant is generally protected from disclosure.[9] The rationale for this rule is again simple. Work product consultants are essential to the attorney providing effective counsel and communication to the client on complex matters. Work product consultants generally offer insight on issues attorneys cannot fairly understand without the aid of outside expertise. For these reasons, it is common for counsel in complex cases to retain both work product consultants and testifying experts to comply with the duty to provide competent counsel while at the same time preserving client confidences.

III. Conflicts of Interest and the "Tainted" Expert

Lawyers, we all know, may not "switch sides." The conflicts rules of the Rules of Professional Conduct, Rules 1.7, 1.8, 1.9, and 1.10, protect clients from the lawyer who would attempt to serve two masters. The risks are divided loyalties, lack of zealousness, and breach of client confidences. Experts, as well, may not serve two masters. An expert, and the lawyers that hired her, may be disqualified if the expert has relevant confidential or privileged information about one party to a case and "switches sides" to serve that party's adversary. This confidential or privileged information may have been acquired through work done on other matters, acquired through pre-retention interviews, or acquired by virtue of past employment with a party. Whatever the source, if an expert has acquired relevant, confidential information about one party, she may be "conflicted out" of work for an adversary. Moreover, if she is retained by the adversary, the court may conclude that confidential information was shared with the adversary's lawyers, imputing the expert's "taint" to them, and exposing the lawyers to disqualification along with the expert.

State and federal courts invoke their inherent power to disqualify experts for "conflicts." The purpose is to protect the various privileges which may be breached if an expert changes sides, and to preserve the fairness and integrity of

[9] Special rules apply where the physical or mental condition of a party is at issue in the litigation. CR 35. For example, the Washington Supreme Court has recently affirmed that the work product doctrine does not protect from disclosure a psychiatrist who examines a criminal defendant, even though the psychiatrist is not designated to testify at trial. *State v. Hamlat*, 133 Wn 2d 314 (1997). *See also* CR 26(b)(4)(B) allowing discovery of consulting witness upon showing of substantial need and undue hardship.

judicial proceedings. *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 277-78 (S.D. Ohio 1988); *Roundpoint v. V.N.A. Inc.*, 621 N.Y.S.2d 161, 163, 207 A.D.2d 123 (1995); *Wang Laboratories, Inc. v. Toshiba Corporation*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991). The standard applied by most courts in evaluating an expert's conflicts is more lenient than that applied to lawyers.[10] Experts perform a different function in litigation. They are not advocates, but are sources of information retained to assist the parties and the trier of fact to understand complex evidence. *See English Feedlot v. Norden Laboratories, Inc.*, 833 F. Supp. 1498, 1501 (D. Colo. 1993).

The most often-applied standard for evaluating expert conflicts was first set forth in *Paul v. Rawlings Sporting Goods, Co.*, *supra*. In *Paul*, the plaintiff sued Rawlings claiming that a baseball helmet was badly designed and led to his severe brain injuries. Rawlings' national coordinating counsel for product liability claims contacted an expert, Goldsmith. Their discussions over the next several months principally involved the possibility that Goldsmith might supervise product testing for Rawlings, but also at least touched on the evaluation of the *Paul* case. Goldsmith was paid a small amount by Rawlings, but was not formally engaged as an expert in the *Paul* case. Eventually, Goldsmith was retained by the plaintiff and Rawlings moved to disqualify him based upon its counsel's discussions with him.

The *Paul* court defined the relevant inquiry as:

> (1) Did Rawlings and Dr. Goldsmith enter into a relationship (whether it rose to the level of a contract for services, or not) which gave rise to an objectively reasonable expectation on Rawlings' part that it could, without risk, impart confidential information to Dr. Goldsmith; (2) Did Rawlings take advantage of its opportunity to disclose confidential information to Dr. Goldsmith; and (3) Is there a showing that Dr. Goldsmith has used or may use such information to Rawlings' disadvantage?

Paul, 123 F.R.D. at 277.

In the formulation offered by most courts since *Paul*, the first two inquiries are the key ones. *See, e.g., Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Systems, Inc.*, 994 F. Supp. 244 (D. New Jersey 1997); *English Feedlot, supra* at 1302. The burden of proof is uniformly placed on the party seeking disqualification of an expert. *See, e.g., English Feedlot, Inc., 833 F. Supp. At 1501-02.* The court will also consider policy objectives which militate against

[10] A few courts have applied the more stringent standard applicable to attorney disqualifications for conflict of interest. *See Marvin Lumber & Cedar Co. v. Norton Company*, 113 F.R.D. 588, 591 (D. Minn. 1986); *Conforti v. Eisele, Inc.*, 405 A.2d 487, 491 (N.J. Supp. 1979).

disqualification. The primary objectives are ensuring that parties have access to expert witnesses who posses specialized knowledge and allowing experts to pursue their professional calling. *English Feedlot*, 833 F. Supp. At 1505.

A. An "Objectively Reasonable" Confidential Relationship

When is it "objectively reasonable" to assume that a confidential relationship exists with an expert? As a general statement, it is objectively reasonable to assume that a confidential relationship exists when an expert knows or should know that he is expected to keep what he learns confidential. Prior management-level employment by a party or a formal engagement as a consultant or expert on other matters is frequently deemed to satisfy the first prong of the *Paul* test. Management-level employees and formally retained consultants know or should know that the information they learn should be kept confidential. *See Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp., 651 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995) (former CFO hired as trial consultant). Technical and nonmanagerial level former employees may be bound by a confidentiality agreement signed during employment. *See Wang Laboratories, Inc. v. CFR Assoc., Inc.*, 125 F.R.D. 10 (D. Mass. 1989) (former employee who developed software program could be called as a fact witness but not as an expert, particularly as he had signed a confidentiality agreement); *Space Systems/Loral v. Martin Marietta Corporation*, 1995 WL 686369 (N.D. Cal 1995) (former employee privy to confidential information directly related to case disqualified; another former employee expert limited to testifying only based on information acquired after he left employment). Other experts are obligated by law to hold client communications confidential. *See Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab Systems, Inc.*, 994 F. Supp. 224 (D.N.J. 1997) (certified public accountant required to maintain client confidences by statute). In other cases, confidentiality is implied, or not, from the particular circumstances.

For example, in *Shadow Traffic Network v. Metro Traffic Control, Inc.*, 29 Cal. Rptr. 2d 693 (1994), Metro's lawyers had several preliminary discussions with Deloitte & Touche about undertaking a damages analysis but Deloitte was not retained. Deloitte was later retained by Shadow to perform its damages analysis. In Metro's motion to disqualify Shadow's lawyers, Latham & Watkins, Metro's lawyers testified that they expressly cautioned the Deloitte representatives that all information provided to Deloitte in the preliminary discussions should be kept confidential. In granting the motion to disqualify, the court noted that formal retention of an expert is not required, nor is a formal, written confidentiality agreement. What is required is that the lawyer's or client's expectation that information would be kept confidential be objectively reasonable. *Shadow Traffic Network*, 29 Cal. Rptr. at 700.

In *Wang Laboratories, Inc. v. Toshiba Corporation*, 762 F. Supp. 1246 (E.D. Va. 1991), Wang moved to disqualify Toshiba's expert in patent infringement

litigation. Counsel for Wang had telephoned the expert with a view towards retaining him to consult on the case. Following the call, the lawyer sent the expert a letter enclosing various materials, including materials which were prominently labeled "work product." There were several additional phone calls to discuss technical aspects of the case. About a month later, the expert notified the lawyer that he could not agree with Wang's position and therefore could not pursue work as a consultant. The expert was later retained by a defendant as a testifying expert in the case. In ruling on Wang's motion to disqualify the expert, the court concluded that the facts clearly gave rise to an objectively reasonable expectation that information flowing from the lawyer to the expert would be kept confidential. *See also Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D. N.Y. 1994) (prospective expert reviewed binder of discoverable and nondiscoverable material; reasonable expectation of confidentiality).

On the other hand, if a prospective expert receives only information which is discoverable in the case in any event, an expectation of confidentiality is not reasonable. *Palmer v. Ozbeck*, 144 F.R.D. 66 (D. Md. 1992); *English Feedlot*, 833 F. Supp. at 15031 (expert had been testifying expert in former case and all information or which he relied was discoverable). Likewise, a prospective expert may caution the interviewing lawyers not to provide him with any confidential information thereby undercutting any colorable claim of privacy. *See Advanced Cardiovascular Systems, Inc. v. Medtronic, Inc.*, 1998 WL 230981 (N.D. Cal. 1998) (not reported in F. Supp.).

If the first of the *Paul* court's questions is answered affirmatively, the courts move to the second question. Was confidential information of substance actually provided to the expert?

B. An Exchange of Confidential Information

The information which the courts will protect from disclosure to an adversary comes in three forms. The first is confidential or proprietary business information and is often an issue in patent, trade secret and competitive tort cases. The second and third are attorney-client privileged information and work product. Attorney client and work product information may include discussion of case strategy, or strengths and weaknesses, anticipated defenses, and the strategic and tactical role of the expert. The challenged expert may have acquired this information during the course of prior work for a party or during the course of pre-retention discussions. The information must be important, not trivial, and relevant or helpful to an opponent in the current litigation.

In *Carnival Corporation v. Romero*, 710 S.2d 690 (Ct. App. Fla. 1998) the Romeros asserted claims arising out of Ms. Romero's alleged rape while on a Carnival cruise. The Romeros hired two former security officers for Carnival as experts and Carnival moved to disqualify them, and the plaintiffs' attorney.

Carnival argued that, while employed by Carnival, the security officers had investigated similar claims and allegedly knew the procedures used by Carnival in evaluating, analyzing and defending claims. The security officers acknowledged investigating claims, but denied ever speaking to attorneys for Carnival or performing management level responsibilities. The court concluded that the former security officers offered the plaintiffs no informational advantage warranting disqualification. Neither were employed by Carnival when the Romero incident occurred. Neither were high-ranking employees. Neither had access to work product, attorney-client or other confidential information. The security officers general familiarity with the company's security procedures were facts which were not protected by any privilege.[11] *Cf., Rentclub, Inc. v. Transamerica Rental Finance Corporation*, *supra* (defendant's counsel hired plaintiff's former CFO creating appearance of impropriety and inducing employee to disclose confidential matters relating to managerial practices, strategies, theories and mental impressions).

In *English Feedlot*, the issue was an allegedly faulty vaccine. The challenged expert retained by English Feedlot had previously been retained by defendant Smith-Kline to evaluate other vaccine-related claims. Although the court found that the defendant had a reasonable expectation of confidentiality, it concluded that no substantial confidential information from the defendant had been passed on to the expert by virtue of the expert's earlier work. Rather the expert had evaluated claims, rather as a claims adjuster, and presented claims analyses to the defendant. The information flow was from expert to defendant, not from defendant to expert.

In *Paul v. Rawlings Sporting Goods Co.*, *supra*, the court ultimately concluded that the second prong of the test was not met because no matters of particular substance relating to the *Paul* case were ever communicated by Rawlings counsel to the expert. Most of the communications concerned a possible business deal between Rawlings and the expert by which the expert would evaluate its baseball helmets. At best, the discussions centered on anticipating the plaintiff's theories of the case, not relating the defense's theories. *See also Shadow Traffic Network, supra* (in pre-retention interviews, Metro's counsel discussed theories and analysis of damages which constituted confidential information); *Western Digital Corp. v. Amstrad*, 71 Cal. Rptr. 2d 179 (Cal. Ct. App. 1998) (plaintiff's lead attorney stated that he had provided proposed experts with his views of the progress of litigation, his evaluation of strengths and weaknesses of the liability case, his prognosis for the remainder of the case, and his analysis of strengths and weaknesses of the damages issues).

[11] The court noted that no attorney for Carnival testified that she had protected communications with either of the former security officers.

C. Improper Use of Confidential Information

If an expert acquired confidential information about a party important to the current case which must be kept confidential, she will be disqualified from acting as an expert for an adversary. The courts generally conclude that the possession of confidential information by an expert will give that expert and, derivatively, the adversary, an unfair "informational advantage," warranting disqualification of the expert. The question then becomes, must the lawyers be disqualified as well?

A "tainted" expert may be presumed to have passed on confidential or protected information to the lawyers who retained him thereby necessitating their disqualification along with the disqualification of the expert. Disqualification of the lawyers was the key issue in *Shadow Traffic Network v. Metro Traffic Control, supra*. The court had found that confidential information was disclosed by Metro's lawyers to Deloitte & Touche which it was reasonable to believe would be kept confidential. The court then went on to apply a rebuttable presumption of disclosure of that confidential information from Deloitte & Touche to Latham & Watkins. The purpose of the presumption was to implement the public policy of protecting confidential communications. The presumption affected the burden of proof and imposed upon Latham & Watkins the burden to prove that no confidential information had been received by it.

On the record in the case and its own analysis of the testimony, the court on appeal concluded that the trial court had not abused its discretion in disqualifying Latham & Watkins because the presumption of disclosure from Deloitte & Touche to the law firm remained unrebutted.[12] *See Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994) (forensic engineer who switched sides during litigation led to disqualification of defendant's counsel to maintain the fairness and integrity of the judicial process).

Although there are no Washington cases, case law involving attorney disqualification suggests that the Washington courts may not employ the *Shadow Traffic* presumption of disclosure of confidential information from the tainted expert to the lawyers. In *First Small Business Investment Company of California v. Intercapital Corporation of Oregon*, 108 Wn.2d 324, 738 P. 2d 263 (1987), the Washington Supreme Court, interpreting the former Code of Professional Responsibility, reversed a Court of Appeals decision which disqualified a law firm because its co-counsel for a short period had been interviewed by the opposing party. The Court of Appeals presumed that

[12] The court did go on to note that if Latham & Watkins had suggested it, the court would have considered disqualification only of those lawyers who had been in communication with Deloitte & Touche representatives. Because Latham & Watkins had declined to request a partial disqualification and taken an "all or nothing" position, the court had no choice but to disqualify the entire firm.

confidential information had passed from the co-counsel to the firm. In reaching its decision, the Supreme Court distinguished cases in which the conflict of one lawyer in a firm disqualifies all members of the firm. The relationship of members of a firm may be close with an everyday exchange of ideas and problems which can lead to the inadvertent release of confidential information. 108 Wn 2d at 330. This type of relationship is simply not present where the disqualified attorney is not a member of the same firm. The Court concluded that proof of actual knowledge of confidential information by the firm was appropriate where the disqualified attorney is not a member of the challenged law firm, but only associated as co-counsel.

The relationship of experts to the lawyers who retain them is more analogous in most cases to the relationship between co-counsel then to the relationship between members of a law firm. The presumption that an expert has shared confidential information with the lawyers operates in practical effect in the same way as vicarious disqualification of all of the members of a law firm because of the conflict of one of them. *First Small Business Investment Company of California* suggests that the party seeking to disqualify the lawyers as well as the expert carry the burden to show the actual dissemination of confidential information to the lawyers without aid of a presumption. *See also Western Digital Corporation v. Superior Court*, 71 Cal. Rptr. 2d 179 (Cal. Ct. App. 1998)(consulting firm screened "tainted" expert; court refused to disqualify firm or counsel deeming screen adequate to prevent the disclosure of confidential information by the tainted expert).

D. Other Issues

Related issues can arise. For example, in *Teleconnect Co. v. Ensrud*, 55 F.3d 357 (8th Cir. 1995), a telecommunications company brought an action against a former employee for breach of a confidential relationship, breach of his employment contract, and misappropriation of trade secrets after the former employee agreed to serve as an expert witness for a competitor. The district court had granted summary judgment in favor of the employee which was reversed by the Eighth Circuit on the grounds that fact issues precluded summary judgment on the misappropriation of trade secrets claim. Hence, an expert who "switches sides" may be exposed to claims by her former employer.

In *The Beam System, Inc. v. Checkpoint Systems, Inc.*, 42 U.S.P.Q.2d 1461 (1997), the court disqualified an expert and took under consideration dismissal of the plaintiff's complaint with prejudice for violation of the terms of a protective order protecting trade secrets and other highly confidential information. The grounds for the court's ruling arose from the terms of a protective order which permitted highly sensitive information to be divulged only to attorneys and to "independent" experts. Plaintiff's expert, Luther, in fact, was not "independent"

in the view of the court because Luther had a long history of engagements with the plaintiff. As stated by the court,

> [W]hat matters is that plaintiffs disclosed defendant's software and related materials to a person who, instead of being independent, was in fact subject to being influenced by the plaintiffs because of his long profitable, and ongoing business relationship with them.

The court considered Luther's lack of independence to be a flagrant violation of the protective order by both the client and its counsel and in addition to disqualifying Luther awarded the defendants their attorneys' fees and costs.

IV. Ex Parte Expert Contacts (RPC 3.4(c) and CR 26(b)(5))

CR 26(b)(5) prohibits *ex parte* contact with an opposing party's expert regardless of whether the expert is a consultant or trial witness. *In re the Matter of Firestorm*, 129 Wn.2d 130, 916 P.2d 411 (1996). While the court in *Firestorm* did not reach the ethical issue, it noted that ABA Formal Opinion 378 (1993) finds that Model Rule 3.4(c) (knowingly violating an obligation of a tribunal) may be violated by *ex parte* contact with an expert witness. *Firestorm*, 129 Wn.2d at 137, n.2.

The facts of *Firestorm* are instructive. Plaintiffs brought a tort action against Washington Water Power related to over 90 wildfires that created a firestorm in eastern Washington in 1991. Counsel for Washington Water Power, Paine Hamblen, represented a number of utilities, and had hired an expert for one of them, Inland Power, even though Inland Power was not a party to the lawsuit.

An expert, Norman Buske, contacted plaintiffs' counsel and told them he had been hired by Paine Hamblen to investigate the firestorm for Inland Power. Buske told plaintiff's counsel he had important information relevant to the fire at issue in the lawsuit, but Buske feared Paine Hamblen and its clients would conceal or hide this information.

Apparently not realizing that they might be looking at a Trojan horse instead of a smoking gun, plaintiff's counsel met with Buske and gathered a great deal of valuable information from him. When the news of this meeting got back to Paine Hamblen, they immediately brought a successful motion to disqualify plaintiffs' counsel.

In *Firestorm*, the Washington Supreme Court held that, "*ex parte* contact with an opposing party's expert witness is prohibited by CR 26." The court further found that "when faced with an expert employed by opposing counsel, who may or may not be technically employed by an opposing party, counsel should always comply with CR 26(b)(5) in proceeding with any discovery or contacting that expert."

However, the Washington State Supreme Court reversed the order disqualifying plaintiffs' counsel as too severe of a sanction under *Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 336-56, 858 P.2d 1054 (1993). The court distinguished the circumstances of *Firestorm* from the more severe situation where counsel actively seek to induce an expert to switch sides in litigation.

The rule of *Firestorm* is simple. If counsel has any reason to suspect an expert has been retained in any fashion by another party to the lawsuit, *ex parte* contacts with that expert are strictly prohibited, will result in sanctions under CR 26(g) and may constitute a violation of RPC 3.4(c).

Another interesting case presenting similar facts but a different result is *In re American Protection Insurance Co. v. MGM Grand Hotel B Las Vegas*, 1986 WL 57464 (D. Nev. 1986). This case pitted the MGM Grand Hotel against one of its insurers arising out of a disastrous hotel fire. MGM successfully moved to disqualify its opposing counsel based upon *ex parte* meetings between defense counsel and plaintiff MGM's sole trial expert.

It appears that MGM's expert, George Morris, was motivated more by greed than pursuit of a noble profession. Mr. Morris offered to testify in favor of the insurance defendants for the paltry sum of $1,000,000. Counsel for the insurance company countered -- as they typically do -- with a much lower offer of $495,000, which was rejected.

The Disciplinary Board of Pennsylvania determined that the insurance company's attorney, who was a member of the Pennsylvania Bar, had not engaged in unethical conduct.[13] However, the Pennsylvania Bar's opinion did not prevent the Nevada court from disqualifying the insurance company's counsel for violation of Cannon 9: "A lawyer should avoid even the appearance of professional impropriety." The Nevada court attached little importance to the fact that MGM's expert first approached the insurance attorney, finding instead the insurance attorney's participation in the expert's scheme to collect a bonanza for his disloyalty to be reprehensible.

Another case which is instructive of the courts' attitude toward *ex parte* contacts with experts is *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996). The *Erickson* case involved a *pro se* plaintiff suing a mobile home manufacturer for alleged defects to the frame and body of the motor home. Before commencing the deposition of plaintiffs' metal expert, defense counsel asked the expert if he

[13] It appears that the Pennsylvania Board felt that MGM's expert might actually be a fact witness concerning the fraudulent insurance claim by MGM. However, the opinion does not consider the separate ethical issue raised by the attorney offering a fee to a fact (as opposed to expert) witness.

would evaluate a lock which was evidence in an unrelated case defense counsel was handling. After concluding the deposition, defense counsel met with the metal expert outside the presence of plaintiff to view a videotape and photographs of the lock.

Although the metal expert resigned from his job with defense counsel, plaintiff fired the metal expert because plaintiff did not know if he could trust him. The next day, the *pro se* plaintiff filed a motion for judgment against the mobile home manufacturer for tampering with a material witness.

The district court denied plaintiff's motion and five days later plaintiff went to trial without his expert witness. Plaintiff lost. The Ninth Circuit Court of Appeals granted the plaintiff a new trial and held the district court abused its discretion in failing to impose appropriate sanctions and disciplinary action upon defense counsel. The court found a clear violation of Nevada's equivalent to RPC 3.4(c), RPC 8.4(d) (the prohibition against engaging in conduct that is prejudicial to the administration of justice) and FRCP 26(b)(4).

The message of these cases is that if an attorney has any reason to believe an expert, whether testifying or consulting, may be employed by the opposition, the attorney is subject to sanctions and possible disciplinary action if he or she engages in any *ex parte* communications with that expert.[14]

V. Expert Witness Fees (RPC 3.4(b))

A. Contingency Fees

RPC 3.4(b) states, "A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

Based on this rule, attorneys generally understand that an offer to pay a fact witness a few thousand dollars to encourage him to testify would subject the lawyer to disciplinary action and a possible criminal prosecution for bribery. Nevertheless, legal ethics generally allow an attorney to pay an expert large sums of money in order to induce him to testify. Apparently, ethics pundits have concluded that experts, including those that are not independently wealthy, are less susceptible to financial inducement than ordinary factual witnesses.

[14] Special rules apply in personal injury cases. *Ex parte* communications with the plaintiff's treating physician are prohibited even after the physician-patient privilege is waived. *Louden v. Mhyre*, 110 Wn.2d 675, 756 P.2d 138 (1988). However, defense counsel may communicate *ex parte* with the claimant's treating physician in workman's compensation proceedings. *See Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 822 P.2d 271 (1992).

Although there is no explicit prohibition in the Rules of Professional Conduct, it is generally considered unethical to pay an expert contingent fees.[15] *See, e.g.*, American Bar Association Model Rules of Professional Conduct, Rule 3.4(b), comment. *See also* American Bar Association Model Code of Professional Conduct, DR(7)-109(C). The rationale appears to be that an expert who will be paid only upon a favorable verdict may lose her objectivity and be induced to give stronger or more positive testimony than would otherwise be appropriate.

There is some degree of controversy surrounding the prohibition of paying a contingency fee to an expert. At least one commentator has argued that this contingency fee prohibition prevents poor claimants from obtaining fundamental access to justice, or at least to the more qualified experts. Jim Douglas, *The Ethical Problems in Paying Witnesses for their Testimony* (Journal of the Legal Profession, No. 20, 1995-96).

B. Payment of Contingency Fees to Expert Witness Finders

The rise of expert witness finder organizations further confounds the contingency fee quandary. Some of these finder organizations offer to find an expert witness for the client based on a contingency fee. However, the finder "organization" agrees to pay the expert on an hourly basis regardless of the outcome of the litigation.

The courts and bar associations are split on whether such an arrangement is a violation of the attorney's legal ethics. Arizona, California, Maryland and Idaho have all found this arrangement to be ethical.[16] Other states have held these arrangements unethical.[17]

So long as the expert provided by the finder organization is truly independent, there are good reasons to allow payment of a contingency fee to the finder.

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[15] Presumably, the same rationale would prohibit an expert from "value billing" because it provides a similar incentive for the expert to generate more favorable testimony.

[16] Arizona Op. 84-9, California Op. 84-79, Idaho Op. 128; *Schackow v. Medical-Legal Consulting Service, Inc.*, 46 Md. App. 179, 416 A.2d 1303, 15 ALR 4th 139; *Ojeda v. Sharp Cabrillo Hosp.*, 10 Cal. Rptr. 2d 230 (Ct. Apps. 1992). Legal Ethics Comm. of the D.C. Bar Ass'n. op. 233 (1993). (As D.C.'s version of Rule 3.4 permits payments of contingent fees to expert witnesses so as long as they are not based on percentage of recovery, a law firm may, with client's consent, contract with non-lawyer consultants to share "success fee" the client pays law firm in the event of favorable outcome of client's case).

[17] *Sherman v. Burton*, 165 Mich. 293, 130 N.W. 667, *Griffith v. Harris*, 17 Wis. 2d 255, 116 N.W. 2d 133, *cert. den.*, 373 U.S. 972, 10 L. Ed. 2d 425, 83 S. Ct. 1530 (19__); Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Ass'n, op. 95-79 (1995).

Where the expert witness receives only a flat fee, he is arguably as free from influence on his testimony as he would be if the contingency fee attorney had hired him directly without utilizing the finder organization. Provided that the overall contingency fee remains reasonable, the finder organization may provide a broader avenue for every litigant, regardless of financial resources, to obtain independent and effective expert witnesses.

VI. Duty to Prevent False Testimony (RPC 3.4)(b)

As previously discussed, experts generally rely on their client's lawyer to supply relevant information to them about the case. Failure to provide the expert with complete information by, for example, withholding test results or notes from investigators that are unfavorable, is not only dangerous to trial presentation but may be unethical as well. Deliberate manipulation of the information an expert relies upon would appear to be creation of false evidence in violation of RPC 3.4(b).

Despite this somewhat obvious ethical issue, it is a somewhat common practice to provide the expert material generated only by the party he or she serves. Indeed, some trial practice commentators condone the practice of withholding "materials that would open the door . . . to cross-examination . . . in order to assure that only helpful opinions are reached." *See*, *e.g.*, James E. Daniels, *Managing Litigation Experts*, ABA Journal, Dec. 1984 at 64-66. Nevertheless, providing selective information to your client's expert may be nothing more than deliberately manufacturing false evidence.

VII. Duty of Candor toward the Tribunal (RPC 3.3(a))

A. Accurate Expert Witness Designations

RPC 3.3(a)(1) provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal. This ethical rule may put the attorney in danger of violating her ethical obligations if the attorney parts ways with the expert after informing opposing counsel that the expert has been retained.

At least one bar association has found that the designation of an expert witness is a representation of material fact to a tribunal and opposing counsel. *See, e.g.,* Los Angeles County Bar Association Ethical Responsibility and Ethics Committee Formal Op. No. 482 (March 23, 1995). If the expert resigns or is terminated, the Los Angeles County Bar Association found it to be unethical for an attorney to continue to negotiate a settlement of the case without correcting this misimpression with opposing counsel.

Designating experts before they are hired or failing to amend expert witness disclosure statements timely may constitute a basis for disciplinary action. In

order to avoid misunderstandings, the attorney should have a written engagement and termination agreement with every expert, whether testifying or consulting.

B. Cross-Examination of Expert Witnesses

While the law permits cross-examination of expert witnesses based on hypotheticals, the hypothetical must not assume facts the attorney knows cannot be supported with admissible evidence. An older case that reads like a Perry Mason episode, *In re Metzger*, 31 Haw. 929 (1931), illustrates this point.

In *Metzger*, an attorney was charged with misconduct for cross-examining a handwriting expert based on false evidence. The expert had previously testified that the criminal defendant had written a document based upon an exemplar of the defendant's handwriting. During a trial recess, the defense attorney copied the document and substituted the copy for the genuine exhibit. He then cross-examined the handwriting expert at some length on the forged exhibit.

The attorney's trick worked. The expert never noticed that the substitute exemplar was a forgery. The expert was completely impeached. The court, with one judge dissenting, was less impressed with the attorney's antics than the jury:

> There can be no doubt that it was the right and the duty of the respondent, who was entrusted with the defense of two men who were on trial for their lives, to expose if he could what he believed to be a lack of ability and a lack of credibility or accuracy on the part of the witness who had testified as an expert on handwriting; but there was a limitation upon that right and that duty and the limitation was that the test and the exposure must be accomplished by fair and lawful means, free from falsehood and misrepresentation. The so-called "necessities of the case," the keenness of the desire of the attorney to defend the accused to the best of his ability, cannot in our judgment justify falsehood or misrepresentation by the attorney to a witness or to the clerk of the court, whether that falsehood or misrepresentation be expressed in direct language or be conveyed by artful subterfuge. We are unwilling to certify to the younger attorneys who are beginning their experience at the bar of this court, or to any of the attorneys of this Territory, that it is lawful and proper for them to defend men, even though on trial for their lives, by the use of falsehood and misrepresentation, direct or indirect. The conduct of the respondent was unethical and unprofessional.

Despite the fact that the attorney's motives were good and that he clarified with the court and the jury that the evidence was false after the fact, there appears to be

nothing in the Rules of Professional Conduct that allows for even the temporary use of false evidence. RPC 3.3(a).

C. "False" Expert Testimony

Rule 3.3, Rules of Professional Conduct, mandates candor towards the tribunal. Lawyers may not knowingly mislead the court by presenting evidence known to be false, allow a client to do so or procure an advantageous result by perpetuating a court's ignorance of directly applicable law. The rule requires lawyers to police themselves and also explicitly limits a lawyer's duties to his client. The "zealousness" which lawyers must exhibit on behalf of their clients is confined to "the bounds of the law."

Rule 3.3 states:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclose by opposing counsel;
>
> (4) offer evidence that the lawyer knows to be false.

These duties are expressly limited in time. Subsection (b) states:

> The duties stated in Section (a) continue to the conclusion of the proceeding.

"Conclusion," though, is not defined. Rule 3.3 also imposes a duty to correct a false record. Subsection (c) states:

> (c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

Rule 1.6 governs confidentiality and prohibits a lawyer from revealing confidences or secrets relating to representation of a client unless the client consents after consultation.

Rule 3.3(a) applies only when a lawyer knows (as opposed to suspects) that evidence beneficial to his client is false. *See generally*, Hazard and Hudes *The Law of Lawyering*, § 3.3:201. Most litigation is premised on a debate over which competing facts are true. It is the responsibility of the trier of fact to determine the "truth." Nevertheless, a lawyer may not evade the duties of Rule 3.3 by crediting a witness' statements at face value. "Knowledge" of false testimony may be inferred from circumstances as well as actual knowledge.

Evidence presented not just by client, but by other witnesses, including experts, is at stake. In *United States v. Schaefer Equipment Co*., 11 F.3d 450 (4th Cir. 1993), an EPA suit to recover hazardous waste clean-up costs, the EPA's coordinator for the cleanup misrepresented his academic credentials. The district court found that the EPA attorneys failed to reveal the misrepresentations and obstructed the defendants' efforts to discover them. Finding the attorneys' conduct "most egregious and disturbing" the trial court dismissed the EPA's case with prejudice and awarded fees to the defendants as a sanction. On appeal, the Fourth Circuit affirmed the ethical violation but remanded for reconsideration of the sanctions.

The court on appeal also affirmed the district court's application of a general duty of candor, independent of Rule 3.3. This duty was described more broadly as the duty attendant to the attorney's role as an officer of the court with an ongoing obligation to inform the court of developments which may affect the outcome of the case. *Schaefer Equipment*, 11 F.3d at 457. As the *Schaefer* court said:

> Our adversary system for the resolution of disputes rests on the unshakeable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions - all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

11 F.3d at 457. Lawyers, the court stated, have the first-line task of assuring the integrity of the process. The system cannot harbor clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary

for justice in the end. In short, the duty of candor trumps a lawyer's duty of zealousness. *Id.*

The *Schaefer* court's analysis is instructive because the EPA representative was, for purposes of the case, an expert. His academic credentials were material to the case because the representative selected and supervised the clean-up technologies based upon his education and expertise. The costs of those technologies were the basis for the EPA's claims. The appropriateness of the chosen technologies were a principal ground for the defense.

Under Rule 3.3, a lawyer simply may not offer evidence she knows to be false. This duty is extended under Rule 3.1 to the obligation to refrain from asserting or controverting an issue unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. Rule 3.4 further prohibits falsifying evidence or assisting a witness to testify falsely or the reference at trial to any matter that the lawyer does not reasonably believe will be supported by admissible evidence.

Collectively, these rules define an ethical responsibility to refrain from offering expert testimony that a lawyer believes to be false, unfounded or unreliable under Evidence Rules 702 and 703 and applicable law, or otherwise inadmissible.

Appendix to CLE Presentation

1. Advice:

   1.1 WSBA Hotline regarding ethics: Chris Sutton B (206) 727-8284

   1.2 Written submission of inquiry for informal or formal opinion from RPC committee (call (206) 727-8284 for information)

2. Consultants:

   2.1 Professor Robert Aronson, University of Washington Law School, (206) 543-7423

   2.2 Kurt G. Bulmer, Esq., (206) 343-5700

   2.3 Professor John Straight, Seattle University School of Law, (253) 591-2252

3. Resource Tools:

   3.1 ABA Compendium of Professional Responsibility, Rules and Standards (1997).

   3.2 Annotated Model Rules of Professional Conduct (ABA 3rd Edition, 1996).

   3.3 Freedman, Monroe H., *Understanding Lawyers' Ethics* (Mathew Bender, 1990).

   3.4 Hazard and Hodes, *The Law of Lawyering* (Prentice Hall, 2nd Edition, 1994).

   3.5 Lubet, Steven, *Expert Testimony: A Guide for Expert Witnesses and Lawyers and Who Examine Them* (National Institute of Trial Advocacy, 1998).

   3.6 Mallen and Smith, *Legal Malpractice* (West Publishing Co., 4th Edition).

   3.7 Tanford, J. Alexander, *The Trial Process: Law, Tactics and Ethics* (The Michie Co., 2nd Edition, 1993).