Winning with Experts Part 2

How to Deal with the Designated Expert—Retaining and Working with Experts

By Ryan L. Harrison and Kelsey C. Osborne

Adhering to some simple principles will give you the best chance of winning with your expert.

If you read Part 1 of this series, then you understand the process of identifying, vetting, and selecting the best expert for your case. To continue with our prior theme, you are at the point where you have made the decision to get a pet and have already determined what type of pet is best for your family. Now it is time to bring your furry friend home and integrate it into your life. Of course your pet has certain intrinsic qualities and other experiences that influence its behavior. These virtues are likely the reason why you picked this pet. However, you must learn to work with your new companion to ensure that you get the most out of the relationship.

Similarly, once you have picked the perfect expert for your case, it is time to retain and work with your expert. Working closely and effectively with your expert will ensure that he or she stays on task, produces the best work product, and ultimately, helps you win your case. This article will discuss strategies for and offer guidance on retaining and working with expert witnesses.

Communications with the Expert

From the first interaction to the last, communicating with your expert is crucial,

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especially if you want to ensure that your expert will provide the most effective and persuasive testimony for your case. However, it is essential that you understand the rules governing your communications with expert witnesses. Significantly, some communications may be discoverable by the opposing side. On the other hand, some communications are protected and are not subject to disclosure. Thus, you should familiarize yourself with the rules regarding communications between attorneys and experts before engaging in any communications with an expert witness.

Oral Communications

Under the Federal Rules of Civil Procedure, a party may obtain discovery regarding any non-privileged matter that is relevant to the party's claim or defense. Fed. R. Civ. P. 26(b)(1). This includes oral communications between attorneys and their retained experts. However, the rules also provide a safe harbor for certain communications. This safe harbor protects communications as long as they do not relate to the expert's compensation for testimony or identify facts, data, or assumptions that the attorney provided to the expert that the expert considered or relied on in forming his or her opinion. Fed. R. Civ. P. 26(b)(4)(C).

The current rules were enacted to protect attorneys' work product and to allow attorneys to interact with their experts without fear that their communications would be discoverable. Fed. R. Civ. P. 26(b)(4) advisory committee's note to 2010 amendment. In addition, the notes to Federal Rule of Civil Procedure 26 make clear that the exceptions are narrowly drawn and any communications about subjects that do not fall within the scope of the three exceptions are protected, and the exceptions only operate in limited circumstances.

While this safe harbor applies only to testifying expert witnesses, the rules provide a broader protection to non-testifying witnesses. Under the rules, a party may not "discover facts known or opinions held" by a consulting expert, unless the party can show "exceptional circumstances," meaning that the party cannot obtain this information by other means. Fed. R. Civ. P. 26(b)(4)(D)(ii).

On the other hand, state rules may vary. You should review and understand the rules governing the discoverability of attorney–expert communications in your jurisdiction.

Written Communications

The same protections that apply to oral communications under the Federal Rules of Civil Procedure also apply to written communications. Fed. R. Civ. P. 26(b)(4)(C). As with oral communications, written communications are protected if they are

between the attorney and the expert witness. *Id.* The safe harbor provision applies to testifying witnesses, as do the three exceptions to the safe harbor. *Id.*

However, before you engage in written communications with your expert, you should keep in mind that along with the report, the expert must disclose "the facts or data considered by the witness in forming [his or her opinions]." Fed. R. Civ. P. 26(2)(B)(ii). Thus, if in his or her report your expert relies on any written communications with you, those communications may be subject to discovery.

Depending on the circumstances, you may want to use a detailed retention agreement or a simple engagement letter.

Lastly, as with oral communications with a non-testifying expert, written communications with a non-testifying expert are broadly protected and are only discoverable under exceptional circumstances.

Retaining the Expert

Once you have selected the expert, you will need to formally retain the witness. Retaining the expert requires extensive communication, including a discussion about the terms of the retention and ultimately coming to an understanding that is memorialized in a retention agreement.

Discuss the Terms of the Retention

While you previously interviewed the expert and should have discussed most of the issues mentioned below, now is the time to confirm that you and the expert are on the same page before you formally retain the expert.

Address the Compensation

Before executing the retention agreement, you should confirm how the expert will be compensated. Generally, experts are paid on an hourly basis. This is helpful because the expert can testify that he or she is being paid only for the work performed. As discussed in Part 1 of this series, it is unethical to compensate an expert on a contingency fee basis. Lastly, you should specify in the agreement if anyone else will be assisting the expert. If so, you should include their names and rates in the agreement and ensure that these individuals will also abide by the terms of the engagement.

Prevent Discovery of Drafts and Notes

Everything that the expert prepares may be subject to discovery. Under the federal rules, drafts of reports and disclosures are protected; however, to be safe, you should explain to the expert that anything that he or she writes *may* be discoverable by the opposing side. Additionally, explain to the expert that he or she must consult you before preparing any draft or other writing regarding his or her opinion or any other relevant issue. This helps prevent any exploitation by the opposing counsel of any unintended, half-developed opinions or concepts. Lastly, be sure that the expert understands that his or her opinion will likely evolve as more information is discovered in the case.

You may also want to consider engaging in a written agreement with opposing counsel, under which (1) communications between attorney and expert are excluded from discovery, and (2) only the data that the expert actually relied on in creating the report is discoverable. However, before suggesting any such arrangement, you should check your jurisdiction's applicable rules to confirm that the agreement is permissible and enforceable.

Address Any Protective Orders

You should also address any protective orders issued in the case. The expert may encounter material that is protected by court order. If so, the expert and all his or her support staff are likely bound by the order and should be informed regarding the terms.

Require that the Expert Preserves All Materials

As discussed above, the expert is required to disclose anything that he or she considers in forming his or her opinion. Courts have held that this includes the notes that the expert takes, emails, drafts, and other documents. Although these rules do not apply to consulting experts, you may decide later in the litigation process to have your consulting expert testify. This would, of course, subject your expert to the disclosure rules. Thus, at the very beginning, you should advise the expert—whether consulting or testifying—to keep copies of every document and all resource materials in the event these materials must be produced to the other side.

Require that the Expert Return Provided Materials

Just as the expert should retain his or her documents, you should confirm that the expert will return all the materials that you provided on the conclusion of the case. Particularly, you should make clear that he or she should not retain any confidential client information or attorney work product. In most cases, you should also insist that the expert turn over his or her work papers as well.

Address Any Continuing Obligations After the Case Is Concluded

You should explain to the expert that even after the case is closed, he or she is to maintain the confidentiality of any information or conclusions that he or she develops or is privy to as a result of participation in the litigation. Additionally, if there was a protective order, the expert should continue to abide by the terms of the order and return any material or information covered by the order.

The Written Agreement

After concluding the extensive discussions outlined above and confirming the selected expert is the right fit for your case, the expert should be retained through a written agreement. This written agreement is crucial in establishing what you expect from the expert, as well as what the expert can expect from you. Essentially, the written agreement acts as the roadmap in navigating the attorney–expert relationship. Without this important guide, you and your expert will have little direction going forward.

Depending on the circumstances, you may want to use a detailed retention agreement or a simple engagement letter. For example, if you are working with a new expert, then a detailed retention agreement

is probably preferable. However, if you have worked with the expert previously, then a simple engagement letter may be best.

This type of simple engagement letter should be brief and concise, and only contain the basic points of the employment agreement. At a minimum, these would include the fee structure and billing guidelines. The engagement letter should also clarify whether the expert is being retained as a consulting or testifying expert, and include a general description of the scope of engagement, specifying that the scope of engagement may change as the issues in the case develop. Lastly, the letter should advise the expert that the specific rules of engagement are themselves confidential. Consider the following sample letter:

> Dear Mr. Jones:
>
> I am writing to confirm that you have been retained as a testifying expert in the above-referenced matter to provide expert witness services, including testimony, should such testimony become necessary. The full scope of services will be determined as the matter proceeds.
>
> The rate for your services will be $200 per hour, $1,000 per day for depositions, and $1,500 per day for court appearances. These rates are in accordance with your normal rates for such services. We have also agreed that you will send invoices on a monthly basis.
>
> You have agreed that all aspects of this engagement including, but not limited to, all materials reviewed, generated or received by you or sent by you to this firm or by our client, will remain confidential until you are asked to testify in this matter. You will refrain from speaking with anyone about this matter and you will treat all communications between you and our client and/or between you and my firm as privileged.
>
> Very truly yours,
>
> Jim Smith
>
> Approved and agreed:
>
> John Jones

Of course, this letter provides only basic information for retaining the expert. It does not include any ancillary information regarding the facts or nature of the case that may expose your witness to unnecessary probing during cross-examination. The engagement letter, unlike the more detailed retention agreement, intentionally excludes important information. If you choose to use an engagement letter, you should discuss those additional, unwritten terms and confirm your expectations with the expert, even though they will not be reduced to writing.

If you determine that a comprehensive retention agreement is necessary to form the basis of the relationship between you and the expert, this agreement will generally be more detailed than a simple written engagement letter and will confirm procedures and other important matters.

Parties to the Retention Agreement

As previously noted, there are certain protections for communications between attorneys and experts. Thus, it is important that you, as the attorney, hire the expert, rather than having your client hire the expert directly. In addition to protecting certain communications and work product, this will also give you more control over the terms of the relationship. Accordingly, you, not your client, should be the one to sign the retention agreement along with the expert. However, as noted in Part 1 of this series, be sure to clarify with your client who is responsible for paying the expert and how he or she will be paid, and make certain that the agreement clarifies those points.

Scope of Engagement

The retention agreement should include a description of the scope of the engagement. In the scope of engagement, you should include exactly what you are hiring the expert to do. For example, is the expert being retained to testify or merely consult? In this section, you should be clear about your expectations for the expert, including things such as the services that you expect him or her to perform, the primary method of communication between you and the expert, and the preparation that is expected or will be required going forward.

Amount of Fees and Method for Billing

The retention agreement should specify the billing rate, as well as the frequency of billing. It cannot be said too many times: *the expert's compensation must not depend on the outcome of the case*. It may also be helpful to include the expert's precise billing practices, including when and how the expert will be paid. Whether it is your law firm, the client, or an insurance carrier, the agreement should make clear who is ultimately responsible for paying the bills. Keep in mind that the expert's invoices may be discoverable, and he or she will almost certainly be asked about fees during cross-examination.

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Potential Conflicts

At this stage, you should be confident that the expert has informed you of any and all potential conflicts. This includes legal conflicts, as well as practical conflicts. Thus, the retention agreement should include confirmation that any potential conflicts, legal or otherwise, have been disclosed and dealt with, if necessary.

Document Preservation

Once again, the expert should preserve any and all written documents, including electronic communications, notes, and drafts. This should be spelled out in the retention agreement. If your expert destroys any discoverable evidence, you may be subject to a spoliation claim. Clearly, it is preferable to litigate the discoverability of a document rather than the circumstances behind its destruction.

Keep the Retainer Agreement and Materials Produced to the Expert Confidential

The retainer agreement is a written document and may be discoverable in some jurisdictions. Under the federal rules, the entire retention agreement will likely not be subject to discovery, unless it contains facts or data that your expert considered in forming his or her opinion. Fed. R. Civ. P. 26(a)(2)(B)(ii). However, parts of the retention agreement may be discoverable. For

example, any discussion of compensation in a retainer agreement with a testifying expert is subject to discovery. Fed. R. Civ. P. 26(b)(4)(C)(i). It is advisable to make clear to the expert and on the face of the agreement that it is privileged, confidential, and attorney work product. However, you should be aware that this label may not prevent the agreement from being subject to discovery in every situation. Finally, include in the retention agreement an acknowledgment by the expert that he or she will keep the terms of retention confidential.

Working with the Expert

The formal retention of the expert is, by no means, the end of the road. In fact, your work has just begun. You must continue to communicate with your expert to keep him or her on task, help your expert prepare his or her report, and potentially prepare your expert to testify at trial. The first step is deciding which information to give to your expert.

Information Given to the Expert

When providing information about the case to your expert, generally speaking, more is better. On cross-examination, the opposing counsel will almost certainly try to draw attention to the absence of material provided to your expert. By providing all the relevant information, the opposing side will not be able to suggest your expert was incapable of making a fully-informed opinion.

Pleadings and Discovery

Specifically, you should provide your expert with the complaint, or petition, and any other pleadings that may have significance with regard to the issues of the case. Additionally, if there are any affidavits or deposition transcripts, you should provide those to your expert as well. Significantly, you should provide all the information, even if the information hurts your position. Again, your expert must be able to support his or her opinion in light of all the available evidence.

Expert Reports

You will need to provide your expert with the reports prepared by other parties, including the opposing side's expert reports. You may also want to share with your expert the opinions of any other experts that you have retained. This issue will be discussed in greater detail in a later section, but you must make sure that your experts do not contradict each other's opinions. Rather, your experts, and their opinions, should work together to tell one, cohesive story.

Exceptions

Though it is generally advisable to provide your expert with all information available, there is some material that you should not provide to your expert. Specifically, you should not give your expert any material that is privileged or otherwise contains your own thoughts, notes, or mental impressions because this material may be discoverable. You should also refrain from providing your expert with scientific or any other specialty-specific literature, unless absolutely necessary. Your expert should do his or her own research and draw his or her conclusions, rather than relying solely on information you have provided.

Establish Expectations with the Expert

At this point in the expert-selection process, you should have expressed your general expectations for the case to your expert. However, after your expert has been retained, you should communicate your precise expectations for the case to your expert. Specifically, you should explain the issues relating to the case in detail and discuss how he or she can help you address those issues.

Timeline

As part of your efforts to clarify expectations, you should set a timeframe for when certain tasks are to be accomplished. Throughout the litigation, you should continue to monitor your expert's progress in completing those tasks and address any concerns that you or your expert may have with respect to the work that he or she is performing. You should include specific deadlines in the expert's timeline. In fact, any scheduling or docket control order should be provided to your expert and all relevant dates from the order should be included in the timeline. If there is no formal scheduling order, then at a minimum your expert must still be advised regarding when his or her report is due, when he or she will be deposed, and the trial date.

Budget

You and your client have likely established a budget for expert expenses in the case. If so, you should clearly communicate the applicable portions to your expert and make sure that he or she understands not to exceed the limits agreed to by you and your client. You should check in frequently with your expert to make sure that the time spent on the case has not gone over budget and is expected to stay within those established budgetary bounds.

Scope of Opinions

Along with your general expectations regarding the case, you should communicate to your expert your expectations regarding the scope of his or her opinions. In outlining that scope, you should be clear regarding the issues about which your expert will be expected to offer an opinion. Lastly, to prevent overlap and potential conflict, advise your expert of any other testifying expert's scope of opinions. For example, you may retain a liability expert, as well as a damages expert. The liability expert's scope will likely include theories regarding your client's liability, as well as alternative causation. On the other hand, you may want the damages expert to limit his or her opinion to certain areas or issues identified by the liability expert.

You should not forget to solicit and consider input from your expert when defining his or her scope of opinions. Your expert is in the best position to identify which issues he or she is qualified to opine on and which opinions will benefit your client. Furthermore, your expert should be able to identify which subject areas he or she is not qualified to testify about and may be able to recommend another expert who can help with those issues.

Preliminary Opinions

It goes without saying that an expert is hired to offer his or her opinion in the case. However, the expert's opinion should benefit your client, and hopefully, align with your theory of the case. Accordingly, after giving your expert an opportunity to review the relevant materials, it would be wise to ask about his or her initial opinions regarding the case. If the initial opinion is unfavorable, the best course of action may be to withdraw the designation of the expert, to aver positively that the previously desig-

nated expert will not be called as a witness, and to re-designate the witness as a consulting expert. However, if your expert's opinion is *potentially* unfavorable, but not fully formed, you will need to ask more questions or provide more information to your expert to gauge whether his or her opinion will ultimately be helpful to your case. This is also a good time to evaluate whether your expert is willing to give his or her honest opinion, or is simply taking a position that will maintain the engagement. It will be much more helpful to your case if your expert is sincere in his or her opinions and beliefs.

Rules Governing Expert Reports

Expert reports are required under the Federal Rules of Civil Procedure, as well as under some state rules. The following sections discuss expert report requirements under federal and selected state rules.

Federal Rules

Under the Federal Rules of Civil Procedure, a party must disclose the name of any witness who will testify at trial. Fed. R. Civ. P. 26(a)(2)(A). In addition to and along with this disclosure, the testifying witness must submit an expert report. The report must be written, prepared, and signed by the witness. The report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). As noted previously, the report must also include the "facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B)(ii). Lastly, the report must include the following: any exhibits that will be used to support the expert's opinions, the expert's qualifications, a list of cases that the expert has been involved in, and a statement of the compensation to be paid to the expert. Fed. R. Civ. P. 26(a)(2)(B)(iii)–(vi).

While it is not required, you should advise your expert to provide enough evidence in the report to support his or her position. Your expert should consider both the helpful and unhelpful facts and include those in the expert report. Bottom line, your expert should defend his or her position in the report in light of *all* the facts.

State Rules

While many states follow the federal rules when it comes to disclosures relating to expert witnesses, some states do not. For example, in Texas, an expert is not required to prepare an expert report, absent a court order. Nonetheless, a party may request disclosure of a testifying expert witness, and on request, the responding party must disclose the substance of a testifying expert's mental impressions and opinions, and the material used by the expert to reach those opinions. Similarly, in Alabama and Indiana, through interrogatories, a party may require another party to identify a testifying expert and include the subject matter of the testimony, the substance of the facts and expert's opinions, and a summary of the ground for those opinions. Ala. R. Civ. P. 26(b)(5)(A)(i); Ind. R. Trial P. 26(B)(4)(a)(i). None of these states' rules require a detailed and complete expert report. Rather, the expert is merely required to provide the substance of his or her opinions. Therefore, you should check the rules in your jurisdiction to determine the specific expert disclosure requirements for testifying experts.

Drafting the Expert Report

As previously stated, your expert should consult with you before preparing any written opinion, memorandum, or report. Any work product prepared before the final report may be discoverable, even though the federal rules protect drafts of reports or disclosures. Fed. R. Civ. P. 26(b)(4)(B). Thus, you should review the applicable rules and controlling law before your expert prepares drafts or any other materials that contain initial thoughts or opinions or mental impressions.

When drafting the report, you, as the attorney, may assist the expert. The federal rules do "not preclude counsel from providing assistance to experts in preparing reports, and indeed, with experts… this assistance may be needed." Fed. R. Civ. P. 26(b) advisory committee's notes to 1993 amendment. Although you are permitted to assist the expert in preparing the export report, you *must not* write the report for your expert. This practice has been considered "a remarkable breach of ethics and protocol." *Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934, 941 (E.D. Mich. 2014). Thus, you may assist the expert in preparing his or her report by explaining the rules and ensuring that the report complies with Federal Rule of Civil Procedure 26 or a state equivalent. However, the report should reflect the expert's testimony and must be signed by the expert.

Further, you should consider how much of your expert's time and report should be devoted to addressing opposing experts' opinions. While there are no rules governing this, you will want to consider the strategic advantages and disadvantages of anticipating your opponent's position. Similarly, you should consider how much of your rebuttal position to disclose to the other side, while keeping in mind the obligation to disclose your expert's opinions, including what he or she will likely testify at trial.

Expert Disclosure or Designation

Neither the federal rule nor any state rule that we are aware of dictates who is required to prepare the expert disclosure. Consequently, you should prepare the expert disclosure or designation, depending on what is required in your jurisdiction, while your expert prepares his or her report.

Expert Challenges

As the attorney, it is your responsibility to ensure that your expert's testimony meets the applicable *Daubert/Frye* requirements. If your expert's testimony does not meet the requirements, his or her testimony may be inadmissible. To survive a challenge, the expert's testimony must be reliable. Below are some helpful things to keep in mind.

Educate Your Expert

Before your expert begins preparing the report, educate him or her regarding the rules and requirements for expert testimony under the applicable laws. Make sure that your expert understands that you will assist him or her in preparing the report to ensure that his or her testimony does not come under attack. To the extent that it is beneficial, provide your expert with specific information such as the *Daubert* or *Frye* decision, applicable state court decisions, applicable federal and state rules, and examples of acceptable expert reports.

Ensure that the Methodology Is Valid

An expert's methodology must be valid. To ensure that the methodology is valid, your expert should use practices and procedures that are accepted by other experts in his or

her field. To determine whether the methodology is accepted within that field, question your expert extensively, paying close attention to who uses the method and how often it is used. It is not enough that your expert is the only person in his or her field who follows the practices and procedures used to develop the opinions in your case.

Although you are permitted to assist the expert in preparing the export report, you *must not* write the report for your expert.

Rule Out Other Causes

An expert should be prepared to explain or adequately disprove other possible causes of injury. Failing to rule out other, alternative causes could render an expert's theory or opinion speculative or conclusory, which could be grounds for excluding his or her opinion.

Include Calculations and Supporting Data

While not explicitly required, including mathematical calculations and data that directly support a theory is helpful and should be encouraged. There must not be too great a gap between your expert's testimony and the supporting data. Therefore, your expert's testimony is less likely to be attacked if your expert includes the calculations that he or she used and the data supporting his or her opinion in the report.

Divide the Report into Subsections

Your expert's theory is more susceptive to attack if it is innovative or controversial. In some circumstances, there is no avoiding this situation. If this is the case for your expert's theory, consider dividing the report into subsections. Your expert should explain his or her theory in subparts that support the overall theory. Dividing the report into subsections may protect the entire testimony from being excluded. For example, your expert may be allowed to testify on individual subparts, even if he or she cannot testify about the ultimate conclusion.

Deposition Testimony

Under Rule 26 of the Federal Rules of Civil Procedure, a testifying expert may be deposed by any party. Fed. R. Civ. P. 26(b)(4)(A). However, if an expert report is required, the deposition may not take place until the expert has produced his or her report. Following are a few ideas to consider when preparing for your expert's deposition.

Preparing the Expert

If your expert is being deposed by opposing counsel, you should expect the attorney taking the deposition to have a firm grasp on the issues. Thus, you should ensure that your expert is well prepared for the deposition. Accordingly, you should seek to keep your expert informed of any new developments or new information in the case leading up to the deposition. Importantly, as you receive new discovery, you should share this with your expert so that he or she will have an opportunity to incorporate this information into his or her opinions.

Lastly, discuss the deposition itself. Try to anticipate your opposing counsel's questioning style and address this with your expert. Help your expert decide how he or she will respond to various questions and questioning methods. In addition, prepare your expert for any new documents that may be presented during the deposition, whether the documents are helpful or unhelpful.

Videotaped Depositions

If the deposition will be videotaped, you should inform your expert beforehand and prepare accordingly. While unrecorded depositions only have a written transcript, videotaped depositions capture body language, pauses, tone, and physical appearance. Thus, if the deposition will be videotaped, you should insist that your expert dress professionally, review the report carefully before the deposition, and express his or her opinions with confidence at the deposition.

Mock Deposition

When you begin to prepare your expert for the deposition, it may prove helpful to conduct a practice deposition. You should consider enlisting another attorney to act as opposing counsel to question your witness. This will give you an opportunity to observe your witness in action. During preparation, you should refrain from providing notes or a script to your expert, because these could be discoverable. In addition, unless you are absolutely certain that it will never be discoverable under any circumstances, you should not videotape or record a mock deposition, even if it would benefit your expert to observe him- or herself as a witness. This recording could be discoverable, and the last thing you want opposing counsel to have is a bloopers reel of your own expert witness in a deposition setting.

Opposing Expert's Deposition

You may want your expert to attend the opposing expert's deposition. This may be particularly helpful if your expert is retained as a rebuttal expert. In addition, your expert may glean information about the opposing side's position that can be helpful to you during the opposing expert's deposition. Specifically, your expert may be able to identify technical nuances during the opposing expert's testimony that you would not catch. In short, you may be able to question the opposing expert more effectively by using your expert's knowledge and expertise.

Materials to Bring to the Deposition

As noted previously, you will want to discuss with your expert which materials he or she should bring to the deposition. While some materials may help your expert organizationally, the most important document for your expert to bring is his or her report. However, there are other documents that your expert will need to bring to the deposition, including any documents exchanged during discovery, documents relied on when forming the opinion, and documents related to your expert's opinion.

Documents Exchanged During Discovery

During the discovery phase, documents that relate to your expert and his or her opinion must be produced. These documents include your expert's curriculum vitae, materials that support the expert report, and the report itself. Because most of these documents are stored and produced electronically, it may be helpful to

bring physical copies of these documents to your expert's deposition.

Even if physical copies of these documents are not available at the deposition, make sure that your expert reviews them before the deposition. Your expert must be able to recall the contents and details of his or her CV and expert report without your assistance.

Documents Relied On When Forming an Opinion

Your expert most likely relied on outside documents or other materials to support the opinions in his or her report. These outside documents or materials will likely be attached to the expert's report. If the supporting material is too voluminous to attach, you may ask your expert to bring his or her report and make notes on the report indicating where he or she relied on outside resources and what those resources are. Again, be sure to review these notes and ensure that they are not harmful to your case or to your expert's credibility, if discovered.

Documents Related to the Expert's Opinion

Finally, you may want to bring any material that the expert prepared, including notes, timelines, outlines, and even draft reports, to his or her deposition. It is up to you, as the attorney, to decide which documents your expert should bring to the deposition, based on the circumstances of your case. At any rate, you should definitely review the materials that your expert has with him or her before you walk into the deposition to determine what, if any, effect the materials might have on your expert's testimony, and ultimately, on your case.

Trial Testimony

It should be clear by now that communication and preparation are the keys to maximizing the effectiveness of your expert's testimony. Communication, as stated previously, is vital to working with the expert, particularly when it comes to preparing for trial testimony.

Furthermore, depending on what type of expert you have chosen, your expert may be especially adept at testifying in court. This experience does not negate the fact that you and your expert will need to prepare for his or her trial testimony. You should practice cross-examination with your expert, paying particular attention to any weaknesses in his or her opinions. Additionally, and just as importantly, you should practice the direct examination, because this is where your expert will be able to convey his or her opinion directly and succinctly to the jury.

Remember, the trial is your expert's time to shine. Below are some suggestions for making the most of your expert's time on the witness stand.

Make the Presentation Interesting

As explained in Part 1 of this series, from the beginning stages of selecting your expert, you should consider how he or she will present him- or herself in front of a jury. Your expert will be expected to communicate his or her opinion to the jury in the most effective way possible, oftentimes by making the material interesting to the jury.

One way that you can encourage your expert to present his or her opinions persuasively is through demonstrative aids. Such demonstratives can be as simple as poster boards or handouts, or more advanced types, such as PowerPoint presentations or videos. Trials can be tedious affairs, full of complex issues, especially whenever expert witnesses are involved. Using visual aids will break up the monotony of questioning and help hold the jury's attention by engaging them in the presentation.

Further, depending on the type of expert that you have retained, your expert may have valuable input for presenting his or her material to the jury. For instance, the professorial or professional expert likely has extensive experience explaining complex material in a comprehensible way. Thus, if you are confident in your expert's ability to communicate the information, it may be best to let him or her take the lead on how to present it to the jury.

Do Not Neglect the Substance of the Testimony

While you should consider how best to *present* the expert's opinion, you should not neglect the *substance* of the expert's opinion. The substance of your expert's testimony is just as important as the presentation of that testimony. Remind your expert that his or her primary role is to convey technical information to the jury.

Accordingly, you may consider inviting your expert to sit in on parts of the trial, particularly opening statements, as well as the opposing expert's testimony. By observing each side's presentation of the issues and the opposing expert's opinions, your expert may gain a better understanding of the role his or her testimony plays in the trial.

Try to anticipate your opposing counsel's questioning style and address this with your expert. Help your expert decide how he or she will respond to various questions and questioning methods.

Other Testimony Considerations

Finally, you should keep in mind other elements of your expert's demeanor and testimony. You should remind your expert not to be combative or hostile in answering questions on cross-examination. No matter how good he or she is at communicating the material, your expert must be appealing to the jury. Coming across as argumentative or defensive does not help the cause.

You should consider having your expert move around during his or her testimony, if the judge allows. This may make your expert more comfortable teaching the material and will help in keeping the jury's attention. Similarly, during direct examination, try to avoid eliciting an uninterrupted, lengthy monologue from your expert. Try to keep his or her answers short and concise so that the jury will be able to easily digest the information.

Lastly, as the attorney, try to keep your objections during cross-examination to a minimum. Your expert should be able to present the evidence and defend his or her opinions. Your expert will come across as more credible and knowledgeable if he or

she can handle the opposing side's questions on his or her own.

Taking Your Expert to Mediation

You may want to consider taking your expert to mediation. Your expert will be able to help you refute unexpected liability and damages issues that often arise in mediation. Though not necessary in every case, having an expert on hand can positively affect the outcome of the mediation.

Considerations Before Deciding to Take Your Expert to Mediation

It goes without saying that your expert should be involved in the case well before mediation. As discussed in Part 1, engaging and involving your expert early ensures that you will have a better grasp on the complex issues of the case and will be able to advocate for your client zealously. Likewise, to advocate for your client during the mediation, you may find it helpful to have your expert witness attend the mediation with you. Your expert can credibly explain the technical issues of your case to the mediator and to the opposing side, as well as temper the plaintiff's expectations. Taking your expert witness to mediation also signals that you have confidence in your case and are prepared to try the case, if necessary.

If you are still not sure whether to involve your expert in mediation, consider the following questions: Will bringing your expert be financially prudent? Are there technical issues in the case that are difficult to explain? Do you have confidence in your expert's ability to explain the technical issues adequately?

Considerations After Deciding to Take Your Expert to Mediation

Once you have decided that you want to take your expert to the mediation, confirm that neither the mediator nor opposing counsel have any objections. This will avoid any unanticipated disagreements and ensure that the attorneys on the opposing side cannot claim that they are unprepared or their client is prejudiced by your expert's presence.

If both the opposing side and the mediator agree to allow experts at the mediation, you must decide how to use your expert effectively. One way to involve your expert at the mediation is to have him or her give a presentation in front of the opposing side and the mediator. Again, this signals that you are confident in your case and well prepared for the mediation. It also gives you an opportunity to set the stage for the mediation. It ensures that any technical issues in your case will be explained at the outset, giving the mediator a better understanding of your position, which will likely save time and encourage a resolution.

Additionally, you should prepare your expert for the mediation as you would prepare your client. Even if your expert is familiar with the mediation process, you should still explain what to expect from your particular mediator. Though your expert can potentially be a great asset in a mediation, your expert can also be a great liability if he or she is not aware of your expectations for the mediation. Thus, do not overlook preparing your expert for mediation.

Working with Multiple Experts

Some cases may require the use of multiple experts, both consulting and testifying. You should consider the following issues when working with multiple experts.

Determine the Experts' Roles

When dealing with a complex case full of specialized and technical issues, determine early whether you will need multiple experts and what those experts' roles will be. As mentioned previously, there are many benefits to hiring an expert early in the case. This is especially true when hiring multiple experts. However, before hiring the experts, you must determine what each expert's role will be.

When determining your experts' roles in the case, keep in mind every step of the litigation process. As we have discussed at length, you may want a consulting expert to advise you on initial issues and provide guidance at the beginning stages of the case. In addition, you may need a testifying expert to help explain your position to the jury. Understanding these different stages will allow you to identify when and how, in the course of litigation, an expert witness will most help your case.

Appoint an Expert Coordinator

If you have multiple experts and the issues in the case are complex, consider appointing an expert witness coordinator or team leader. This person can be a lawyer, or preferably, one of the testifying experts who will manage the other experts and their work product. The coordinator will manage communications with the experts and help keep them on task in preparing their reports. The coordinator will also be the one to make sure that each expert receives all relevant materials, such as pleadings, affidavits, and other discovery, and he or she will keep the experts informed of any new developments.

The expert coordinator should have a strong working knowledge of all the issues on which the experts are being asked to opine. At the beginning stages of litigation, the coordinator will be helpful in identifying any additional evidence or arguments needed to respond to the opposing side's opinion, in addition to identifying any other experts that might be needed to fill in gaps as the case progresses. In the later stages of litigation, the coordinator will be the one to oversee the experts' reports. The expert coordinator should be able to spot any overlap in the experts' opinions and remedy any inconsistencies. Throughout the case, the coordinator should be cognizant of any discrepancies in the experts' methodologies or opinions and address those or bring them to your attention, as needed.

Develop a System for Sharing Information

If you retain multiple experts for one case, chances are that they will want and need to communicate with each other. In fact, some of your experts may rely on fellow experts' opinions when forming their own opinion, which has been referred to as cross-reliance. Rebecca Kirk Fair *et al.*, *Managing Multiple Expert Witnesses: Best Practices and Pitfalls,* The Woman Advocate, Am. Bar Ass'n (Aug. 17, 2017). With respect to how and whether your experts communicate and share information, you should keep in mind discovery concerns. If you choose to give your experts carte blanch communication with one another, will the experts take notes on any discussions they have? Could those notes be discoverable? In addition, if you allow your experts to review each other's work and reference each other's opinions, at what point in the process will each expert's work be

available for review? How will you determine whether one expert has developed his or her own opinions or simply borrowed from fellow experts? These are all issues that you should consider when developing a system for how your experts should communicate and share their work product with each other.

Conclusion

As you discovered in Part 1 of this series, picking the perfect expert requires diligent research, time, and money and is a task that must be taken seriously. However, after you have selected the expert, the work does not stop there. Early and ongoing communication with your expert throughout the litigation process will encourage productivity and help prevent unmet expectations. Entering into the appropriate retention agreement or engagement letter will establish those expectations and provide guidance for the terms of the relationship. Likewise, continuing to work closely with your expert will keep him or her on task and guarantee his or her opinions will benefit your case.

Again, the perfect pet may provide countless benefits to your health and social life, so long as you put forth the time and effort to deal with your new companion. Only after you have done your part will you reap the benefits associated with owning a pet. While you should not have to train your expert, you must understand how to deal with him or her effectively by establishing expectations, effectively communicating, and offering assistance when needed. By doing these things, you will likely find that, while the perfect pet may be "man's best friend," the perfect expert is definitely an "attorney's best friend." Finally, and perhaps more importantly, following these simple principles will give you the best chance of winning with your expert. FD