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*Expert Witnesses: An Update On Daubert,
Discovery, Bias And Related Issues*

Communications With Experts
Discoverability
Ghostwriting
Spoliation

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A. INTRODUCTION

Working with experts is one of the most important, and most interesting, aspects of being a trial lawyer, because it gives you a chance to be educated, or better yet, immersed, for a brief period of time, in something as to which you may have little or no knowledge going into the case. It's exciting to have to take on a new subject and have to learn enough about it to converse with a true expert, to depose and cross-examine one at trial, and to put yourself in a position to communicate in a knowledgeable way on the subject with the court and sometimes with a jury.

But there are dangers out there in addition to Daubert problems. This outline offers some explanations of the dangers with particular focus on the United States District Court for the Eastern District of Virginia after Trigon Insurance Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001). The outline offers some tips on how to communicate with your experts and potential

experts in the right way and how to maintain, in the eyes of the court and the jury, if applicable, the independence of your expert, without which he or she will not be effective.

B. TYPES OF EXPERTS

Generically, an expert is someone (usually quite expensive) who knows stuff you don't know and need to know.

There are essentially five types of experts:

1. Court-appointed. Outside the scope of this outline.
2. Non-testifying. You hire to help you out from the sidelines in identifying the issues, understanding complex issues or information, preparing your discovery, evaluating your opponent's discovery responses, and maybe in getting your testifying expert ready (but be careful on this last one). Your non-testifying expert doesn't have to meet any court-imposed tests, you usually don't have to disclose his or her identity to your opponent, and if you're both careful and lucky, your communications to and from this expert, and his or her work, are non-discoverable work product (except for communications with a testifying expert).
3. Testifying. Has to meet certain legal criteria, particularly if challenged by your opponent, usually has to prepare a report, will undoubtedly get deposed, and may have to suffer through a Daubert-type hearing. You have to identify the expert, usually have to turn over a report, and all your communications with, and all influences on, the expert are discoverable.
4. Not sure yet. Danger zone.
5. Cross-breed. Danger zone squared.

This outline is generally about the dangers inherent in communications with and among the last four kinds. You'd better not have any communications with the court-appointed expert except as the Court tells you to.

C. INDEPENDENCE

Oversimplified, the reason we have testifying experts is to help the court and/or the jury understand complicated concepts, subjects, calculations, etc. Neither we, nor our courts, nor our juries, know everything, and so we have to rely on others to explain things like electricity, chemistry, physics, statistics, economics, accounting, linguistics, industry standards, etc. To supplement the knowledge of the court and/or the jury. To be helpful.

In the purest sense, the reason we have testifying experts is to provide an independent source of knowledge, one on which the court and jury can rely.

There are already enough advocates in the courtroom that the court doesn't need experts to be advocates. Some of them really are advocates, and if they are, maybe they'll get caught. But the more independent the testifying expert, the more helpful he or she will be to the trier of fact. “[I]t is specifically not an expert’s position to advocate for a party, lest the witness ceases to be an expert whose testimony is valuable because he or she is not an advocate and becomes, instead, just another legal practitioner for the client.” Trigon v. United States, 204 F.R.D. at 290.

It’s important that a testifying expert's opinion be reliable not only in methodology, but also in that it is not driven by a desire to reach a particular outcome.

Because independence is so important, it is fully appropriate that your opponent be entitled to discover any aspects of your testifying expert’s background, work and communications that evidence impairments to his or her independence.

The fewer impurities in the testifying expert’s opinions and testimony the more reliable and believable the expert will be.

Impurities can come from:

1. Employment background.

2. Industry affiliations and loyalties.
3. Co-workers.
4. Lawyers.
5. Clients.
6. Other testifying experts.
7. Non-testifying experts.
8. Cross-breeds.

It should be your goal to find an expert with few or no impurities and to find and bring to the attention of the court and/or jury every impurity you can find in your opponent's expert. This should be a key focus of your discovery.

There are lots of fun avenues to explore here. But the main subject of this outline is the influence of communications.

D. DISCOVERABILITY

As a general principle, everything a testifying expert considers, whether or not he or she relies on it, is discoverable by the other side.

In many courts, and certainly in the Eastern District of Virginia, you are entitled to learn every influence on the testifying expert, from whatever source.

F. R. Civ. P. 26(a)(2)(B) requires that documents be "considered" by a testifying expert before they must be disclosed. After Trigon v. United States, it is now clear that the term "considered" extends not just to the documents relied on by the testifying expert, but also to any documents "that were provided to and were reviewed by the expert." 204 F.R.D. at 283.

"[I]nformation considered, but not relied upon, can be of great importance in understanding and testing the validity of an expert's opinion." Id. at 282.

“[A]s a consequence of the 1993 amendments, disclosure simply includes all documents that were provided to and reviewed by the expert. The party requesting discovery no longer bears the burden of demonstrating that the expert actually relied on the document.”

So “considered” equals “had”.

In the Western District of Virginia, materials otherwise protected by the work product doctrine must be disclosed under Rule 26 if considered by an expert. Lamonds v. General Motors Corp., 180 F.R.D. 302, 305 (W.D. Va. 1998).

E. FIRST CONVERSATION OR MEETING WITH POTENTIAL EXPERT

You’ll have lots of occasions to communicate with your potential or hired expert, and thus lots of opportunities to mess up. There’s the first phone conversation, the first meeting, the engagement letter, other phone conversations, other meetings, e-mails, letters, the process of writing a report, preparation for deposition and preparation for trial. There are land mines everywhere. You’ll be constrained by practical considerations of time, geography, discipline and the level of your knowledge. You can blow everything by being careless at any stage, even in the initial interview. Here are some tips for the first conversation and/or first meeting:

1. Explore potential conflicts of this particular expert or others in his or her company, if applicable. If he or she doesn’t know, be sure a conflict check is performed promptly, and before proceeding with any substantive conversations.

2. Explain to a potential testifying expert that everything said in both directions, all writings, including notes (“such as those you are taking right now”), are discoverable and can later be read to the judge and jury. Ask the expert to “pretend as though there is a video/audio camera on everything you do, including all conversations with counsel.” “You should be proud of everything you say and do.”

3. Be careful about notes you take and what you say to the expert about taking notes. You might want to say, "Take them as you need to, but remember they will or may be discoverable." Bear in mind that even your own notes may be discoverable if there's no other good source of evidence of what was said.

4. Make it clear the potential expert is not yet retained.

5. Consider an initial relationship as non-testifying expert for the time being, even if you think it likely you will eventually retain the person as a testifying expert.

6. Emphasize that you're really looking for independence -- not for a particular opinion. You're not trying to talk the expert into anything. Rather, you seek the potential expert's best professional judgment, untainted by what counsel may say or by what the expert may think counsel or the client want to hear. And you want everything done straight up, fairly, honestly, no tricks. There are at least two reasons to act this way. First, it's the right thing to do. And second, your expert will respect you for treating him or her that way. You may not be able to accurately measure the extent to which that respect will bring value to you and your client down the road, but it will. The really good experts don't want to work for shady lawyers.

7. Discuss the need for confidentiality.

8. At least once, say, convincingly, "Whatever you do throughout this case, always tell the truth."

9. Ask thorough questions regarding credentials, including education, degrees, licenses, awards, etc.

10. Find out who this potential expert believes are the other top experts in the field.

11. Fully explore the expert's background, including engagements, speeches, testimony. Any disqualifications? Any motions to disqualify? Any critical remarks by judges?

12. Request copies of all prior transcripts.
13. Request copies of all marketing materials.
14. Present facts clearly and evenhandedly, and, wherever practicable, from source documents. It's generally ok to give copies of publicly filed pleadings, especially those from your opponent, so your expert can make his or her own judgment about the other side's position. Do not withhold unfavorable information. It's really bad if later, in court or a deposition, or even privately, your expert says, "Gee, I wish I had known that."
15. Test demeanor. Look for any signs of arrogance.
16. Ask most of your questions hypothetically.
17. Establish a game plan for gathering additional necessary facts.
18. Agree on a clear timetable going forward.
19. Discuss fees and expenses. No contingencies or bonuses.
20. Put a plan in place to find all information you can use to test the potential expert's credentials and to be sure there's no resume enhancement.
21. Discuss availability for deposition and trial.
22. Identify materials to be exchanged.
23. Agree on a timetable for next discussion.
24. Warn against bragging about his or her participation in your case.
25. Discuss whether the expert will need help in doing calculations, research, etc. and, if so, who will do that and under what controls. Bear in mind issues of discoverability.
26. Discuss the need to be very careful in use, if any, of e-mails.
27. Discuss the issue of saving communications. Interrupt any document retention (i.e., destruction) protocol.

28. Discuss the drafting process, saving drafts, overwrites, redlines, etc.
29. Don't malign the other side.

F. THE ENGAGEMENT LETTER

There should almost always be an engagement letter. As with any contract, this will help avoid misunderstanding in the future. It is also a way, through careful drafting, to memorialize for your opponent and, if necessary, the court, that the engagement was straight up and you were seeking independent expertise.

Be wary of the expert's own form letter.

Points to consider covering:

1. Not yet engaged as trial expert.
2. Purpose.
3. Independence. His or her best professional judgment.
4. Privilege and work product.
5. Confidentiality.
6. Return materials on request.
7. Terminable at will.
8. Compensation. No contingency.
9. Budget.
10. Restrictions, if any, on other engagements on same issues or for same parties.

G. COMMUNICATIONS GENERALLY WITH ENGAGED EXPERT

1. No communications with any experts, testifying or non-testifying, fall within the attorney-client privilege (except, arguably, in some states, non-testifying experts can be

considered to be in the shoes of a counsel's hired assistant and thus fall within the privilege -- but don't count on that).

2. Don't disclose matters of attorney-client privilege to either type of expert. If you're meeting with an expert and your client, and the client asks for legal advice on an issue, don't answer with the expert present or you'll blow the privilege.

3. Communications with a non-testifying or consulting expert are generally protected as work product. But they may lose that status to the extent passed along to the testifying expert.

4. Don't unnecessarily disclose to your non-testifying expert work product he or she doesn't need to see in order to provide the service you're seeking.

5. Communications with, and materials prepared for, a testifying expert are not protected as work product and thus are discoverable.

6. Again, even opinion work product, if shared with a testifying expert, is discoverable in some courts. See e.g., Lamonds v. General Motors Corp., 180 F.R.D. 302 (W.D. Va. 1998); but see Ladd Furniture, Inc. v. Ernst & Young, 1998 U.S. Dist. LEXIS 17345; 41 Fed. R. Serv. 3d 1633 (M.D. N.C. 1998).

7. Remember that a person you initially consider as a non-testifying expert could later become a testifying expert if enough things go wrong, or if the non-testifier turns out to be better than the testifier, so be careful about those communications as well. Needs could change. Minor issues could become major ones. Keep your powder dry.

8. Communications with, and materials prepared by, a non-testifying expert are discoverable if shared with a testifying expert.

9. Special problems if you have an expert to testify on one subject and to give non-testifying advice on another; or you hire one expert from a particular firm to testify and another from the same firm to give non-testifying advice.
10. Be especially cautious about all conversations with any potential testifying expert. It's not the same as talking with your client. Don't say or do anything that smacks of the expert becoming an advocate. Keep emphasizing the expert's independence.
11. Be proud of everything you say and write to either kind of expert.
12. Again, pretend you're on video and that both your opponent and the judge are watching.
13. Balance the advantage of clarity of writing vs. discoverability.
14. Don't advise the expert to destroy anything or throw anything away.
15. Don't over- or under-communicate. Give the expert everything he or she needs to form a solid opinion; but don't so inundate the expert that he or she can't absorb everything or loses independence.
16. Consider the cross-examination implications of everything you give and say to the expert, and everything he or she overhears.
17. Don't send agendas of meetings.
18. Keep a separate file and a complete list of everything you give or show the expert.
19. Rarely disclose to one expert the results of tests done or other work performed by another expert.
20. Use extra caution when dealing with experts retained by other parties in a joint defense posture. Be sure there's a joint defense agreement. If the person is a non-testifying expert, be sure not to waive work product protection. With a testifying expert, again everything

is discoverable, but the opportunities for tainting and other problems are multiplied when other layers of personnel are added to the dialogue.

21. Attention to budget.

22. Be very careful of e-mails. They must be preserved. Don't say, or let the expert say, anything stupid in them.

H. YOUR EXPERT'S REPORT

Rule 26(a)(2)(B), as modified by Local Rule 26(D), requires:

1. Statement of all opinions and bases.
2. Data or other information considered.
3. Exhibits in summary or in support.
4. Qualifications, including publications within the past ten years.
5. Compensation.
6. Cases in which testified during past four years.

Other potential content:

1. Scope of assignment.
2. Process used.
3. Assumptions.
4. Concession of adverse facts.

Drafting process. (See "Ghost Writing" below.)

1. Hard copies.
2. Redlines.
3. Overwrites.
4. E-mail. Remember, they don't go away.
5. Viewing on line.

6. Help from employees.
7. Help from other experts.
8. Who is supervising whom?
9. Editing.
 - a. Substantive.
 - b. Stylistic.
 - c. Factual errors.

Be sure the expert retains, preferably in one place, everything upon which he or she relies. It's all subject to discovery.

Reading and responding to the other party's report. You may not have your opponent's report when your expert does his or hers. If you do have your opponent's report, you need to decide whether or not your expert should read it before finishing his or hers, and whether your expert should refer to, or even try to rebut, items in the other report. In making these decisions, consider whether you will get a rebuttal report and whether you want the other side to see, before trial, what your expert says about the other report.

Emphasize importance of:

1. Clarity.
2. Neatness.
3. Spelling and grammar.

I. GHOST WRITING

“Ghost writing a testifying expert's report is the preparation of the substance writing of the report by someone other than the expert purporting to have written it.” Trigon v. United

States, 204 F.R.D. at 291. Ghost writing is not per se prohibited. It's propriety is a matter of degree and disclosure.

“[A] report can be ‘prepared’ by an expert witness even if counsel has aided the witness in preparing an expert’s report.” Id. at 292. “Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, . . . Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness” Id. “[T]he expert must also substantially participate in the preparation of his report.” Id. at 293. “In contrast, preparing the expert’s report from whole cloth and then asking the expert to sign it if he or she wishes to adopt it conflicts with Rule 26(a)(2)(B)’s requirement that the expert ‘prepare’ the report.” Id. “In other words, the assistance of counsel contemplated by Rule 26(a)(2)(B) is not synonymous with ghostwriting.” Id. “[A]n expert cannot simply be an alter ego of the attorney who will be trying the case.” Id. at 294.

So if you’re going to help your expert write his or her report, be very careful. Try not to affect the substance. Limit yourself to form. Save your communications. Even though you may not be doing anything wrong by helping, remember that the more you help, the more ammunition you give the other side to question the independence of your expert.

J. SPOLIATION

The only thing worse than a bad document is a bad document that has disappeared.

The law of spoliation is generally housed in the law of evidence mixed in with the law of sanctions, although in some states it can be a defense or even an independent cause of action.

“Spoliation is the willful destruction of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” Trigon v. United

States, 204 F.R.D. at 284. Spoliation may also include the “significant alteration of evidence”.

Id.

Thus, spoliation involves two elements: a duty to preserve evidence or potential evidence, and the intentional or perhaps negligent destruction of that evidence. The duty to preserve arises when the party to a lawsuit (or someone who can foresee becoming a party to a lawsuit) is on notice (because of discovery, an informal request or other circumstances) or reasonably should be on notice, that the evidence may be or may become relevant to pending or threatened litigation. The bad deed is punishable in one form or another when the other side is prejudiced.

In Trigon v. United States, unlike in the other leading Fourth Circuit cases on spoliation, e.g., Cole v. Keller Industries, 132 F.3d 1044 (4th Cir. 1998); Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995), the issue wasn’t the preservation of physical evidence, but communications between, among and with testifying and non-testifying experts. In this case of first impression, the Court found that those communications were discoverable and were intentionally destroyed, and therefore the conduct merited the consideration and eventual application of several remedies.

Trigon v. United States is not about drafts per se. It’s about communications. Drafts are discoverable and can be “highly useful”, id. at 289, but “there is no need to decide in this case whether a testifying expert is required to retain, and a party is required to disclose, the drafts, prepared solely by the expert while formulating the proper language in which to articulate that expert’s own, ultimate opinion arrived at by the expert’s own work or those working at the expert’s personal direction. There are cogent reasons which militate against such a requirement but the issue is not presented here” Id. at 283 n.8.

But communications between and among experts -- including between testifying and consulting experts -- are discoverable and must be maintained. “That is especially true where the experts are in the retinue of a consultant who . . . is involved in shaping the experts’ testimony and perhaps even their opinions, a thankfully unorthodox situation even in the world of today’s litigation.” Id. at 289. Drafts must be retained, and must be disclosed “where . . . they are not solely the product of the experts [sic] own thoughts and work.” Id. at 282.

K. REMEDIES FOR SPOILIATION

The power to sanction for spoliation comes from the “inherent authority to control litigation”. Trigon v. United States, 204 F.R.D. at 285. It does not require an antecedent order. Id.

There are several interesting options available when you catch the other side spoliating expert communications or materials. Which ones you push will depend on the severity of the mischief, how far along the case is, proximity to trial, the mood of the court, what the parties are able to work out, the nature of the proceeding, etc. And if you overdo it, you may be sorry. For instance, if you push to exclude the other side’s expert, the court may grant your motion and then give the other side time to hire a new expert, put off the trial, and thus give the other side a chance not only to cure the evidentiary problem, but also improve the expert’s opinion.

“Once spoliation has been established, the sanction chosen must achieve deterrence, burden the guilty party with the risk of an incorrect determination and attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation.” Id. at 287. “[T]he criteria for sanctions cannot be reduced to a formula or standardized test.” Id. “[T]he most important considerations for determining the seriousness of the sanctions . . . [are] (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of

prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.” Id. at 288. “Some quantum of blameworthiness is required before sanctions for spoliation may obtain.” Id. at 287. “[T]he Court must balance the degree of misconduct evidenced by a party’s mental state against the degree of harm which flows from the misconduct.” Id. The test is “knew, or was charged with knowing.” Id. at 289. The “failure to discharge a known duty is sufficient to support a finding under intentional destruction”. Id.

Some experts are employed by large companies, or “expert houses”, that have their own document retention policies. If there are communications between and among experts that are the subject to such a policy, the policy needs to be interrupted. Document retention policies “do not trump the Federal Rules of Civil Procedure or requests by opposing counsel, even if the requests primarily are informal.” Id.

Some of the potential remedies for spoliation are:

1. Order depositions or other further discovery to smoke out what really happened.
2. Order the forensic resurrection of spoliated evidence.
3. Grant a motion in limine to keep out tainted evidence.
4. Strike the expert’s report.
5. Exclude the testifying expert.
6. Exclude further participation in the case of any complicitous consulting expert.
7. Declare an evidentiary inference that what was destroyed would have cast doubt on independence. “While a finding of bad faith suffices to permit such an inference, it is not always necessary.” Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995). Most

cases discussing inferences are jury cases, but it is clear from Trigon v. United States that a judge can declare an evidentiary inference in a bench trial.

8. Grant summary judgment on certain issues.
9. Dismiss the entire case.
10. Order payment of the other side's attorneys' fees and costs.
11. Monetary damages.
12. Civil contempt if a court order has been violated.
13. Criminal charges in certain proceedings.
14. Ethics complaint if there is any lawyer dishonesty afoot.
15. Just ask the court to remember what the other side did.

Regardless of what else bad happens, it is enormously embarrassing to both counsel and the expert to be caught spoliating evidence. Sanctions for spoliation can have very bad future ramifications for the client, the lawyer and the expert, even in other cases and other courts.

L. OTHER PRACTICAL TIPS

1. Hire experts who are honest.
2. Try to keep your experts apart wherever practicable. Try to avoid having them confer, except in supervised setting and under strict guidelines.
3. If it's discoverable, even arguably, keep it. Or, when in doubt, save it.
4. Be very careful what you write to an expert.
5. Save all your communications with the expert.
6. Don't say anything stupid.
7. Don't ever let consulting experts hire or in any way control your testifying experts.

8. Test everything you do by the doctrine of fairness. When in doubt, don't do it.
9. Insist that all your experts, testifying and non-testifying, save every communication with anyone regarding the case. Lay down the law.
10. Don't ghost write, or let anyone ghost write, the substance of your experts' reports. You can help up to a point, particularly with format, but be very careful.
11. Ask early and often for all the stuff you want in discovery, but be prepared to reciprocate.
12. Get all your opponent's experts' advertising and document retention plans.
13. Be especially careful in using an "expert house" -- careful about who's hiring whom, who's paying whom, who's doing the work, who's supervising whom, who's communicating with whom, and who's saving what.

M. TOP 10 WAYS TO MESS UP ON THE EXPERT FRONT

1. Forget to get an expert when you need one.
2. Forget to read the rules.
3. Neglect to include your client in the decision to hire a particular expert, and then get blamed for the expert losing the case.
4. Say something stupid to a testifying expert that he or she later repeats.
5. Forget to disclose an important fact that later alters the validity of the expert's opinion.
6. Waive the attorney-client privilege.
7. Put an expert on the stand who is arrogant, combative or otherwise irritates the court or the jury.
8. Put an expert on the stand who can't teach in simple language.
9. Offer up an expert who fudged his or her resume.

10. Let your expert and/or counsel get caught spoliating evidence.

Interesting Reading

Virginia CLE, The Rocket Docket: Trying Cases in the Eastern District of Virginia (2002), Chapter II.

Dennis, Warren L., and Brinkerhoff, Susan, “Document Management Policies in the Post-Enron Environment”, 9 No. 1 Andrews Derivatives Litig. Rep. 8 (Dec. 16, 2002).

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Karfias, Stephanie L., and Bagley, Terrence M., “Spoliation of Evidence: An Overview”, Journal of Civil Litigation (Spring 1999).