Ethical Hurdles, Snares, and Pitfalls in Prepping and Using Experts

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Ethical Hurdles and Sanctionable Snares Involving Expert Witnesses

by Andrew Crain

“An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specified knowledge.” Translation: Experts are an integral part of modern litigation, whether as testifying witnesses or as nontestifying consultants. In complex litigation, lawyers oftentimes utilize multiple expert witnesses, each specializing in a different technical or legal area and having a narrow and/or specific role in the case. The roles that experts can take in litigation can, thus, vary widely, such as from providing a fact-finder with base-level information for which the disputed facts and issues in a case depend, or in explaining highly technical subjects in a manner understandable by a judge and/or jury. For these reasons, and with so many cases involving expert testimony, associations of expert witnesses have formed, focusing on specific types of litigation. Thus, the significance of the expert witness, at both trial and during pre-trial activities, including hearings and depositions, can have great impact on the successful outcome of the case.

The use of experts in litigation today presents many challenges for advocates and the court. Prior to recent rule changes, advocates danced a fine line in communicating with expert witnesses in order to avoid waiving the attorney-client privilege and/or work product protections and, thus, opening up the prospect of disclosure of trial strategy to an adversary. However, even with recent changes to the Federal Rules of Civil Procedure, which now provide greater protection to the channels of communication between counsel and their client’s testifying expert witnesses by making such communications less likely to be discoverable, there
exists a potential mine field of ethical and other types of issues for advocates in how they engage and use expert witnesses.

This article examines some of the potential ethical snares and other pitfalls that exist for today's advocates practicing under the new Federal Rules regarding expert witnesses. In addition to identifying those potential trouble areas for advocates to avoid, this article also suggests precautions for advocates in their use of experts, as well as potential steps to be applied against sloppy or even unscrupulous opposing counsel in their use of expert witnesses.

**Who is an Expert?**

Rule 702 of the Federal Rules of Evidence provides the starting point for who can be an expert witness. Rule 702 provides that:

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

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.⁴

As the Committee Notes to Rule 702 point out, the rule wisely does not identify those that might normally be considered “experts” in the strictest sense of the word, such as physicians, physicists, and architects, for it instead leaves open the prospect of including anyone that could be a “skilled” witness, such as a banker, plumber, or landowner (testifying as to land values).⁵

In testifying as an expert witness, the expert may, as Rule 702 expressly states, testify in the form “opinion or otherwise.”⁶ That “otherwise,” may be commonly overlooked, for “[m]ost
of literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded."\(^7\) Expert testimony can and oftentimes does, especially in more complex litigation, such as, for example, patent litigation, allow for “dissertation[s] or [the] exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.”\(^8\)

Of course, “When a trial court ... rules that an expert’s testimony is reliable [and, thus, admissible], this does not necessarily mean that contradictory expert testimony is unreliable.”\(^9\) Indeed, a great number of litigations may be characterized as a “battle of the experts,” for it is not necessary to establish that assessments of experts are correct, but instead just that they are merely reliable.\(^10\) However, it is long before trial when advocates must make many decisions regarding the experts they engage on behalf of their clients, which if not done correctly, can result in ethical compromises and possibly even sanctionable actions.

Confidentiality Issues Involving Experts

In utilizing expert witnesses, for many years there has been a delicate balance between what counsel could and could not communicate with experts while preserving attorney-client privilege and work product protections. In 1993, Rule 26 of the Federal Rules of Civil Procedure was modified to require expert reports to disclose the data and other information considered by the expert.\(^11\) The point behind this change was to prevent litigants from arguing “that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are deposed.”\(^12\) As a result, the “expert’s file was basically an open book.”\(^13\)
For this reason, it was not uncommon for litigants to go to extraordinary lengths to communicate with testifying expert witnesses in a manner meant to avoid waving privilege or work product protection so as to prevent giving opposing counsel an opportunity to discover and exploit trial strategy. Draft expert reports have probably highlighted the lengths that attorneys went to best, as the 1993 rule change made clear that such reports were discoverable. As a result, attorneys would oftentimes go to great lengths to avoid disclosure of communications with experts during the report-drafting phase of the case. Indeed, attorneys and experts, at great costs to clients, would routinely travel so as to conduct in-person meetings where preliminary report drafts could be discussed and feedback from counsel provided without creation of discoverable information. It was not unheard of during this period for counsel to almost literally stand over an expert’s shoulder at a computer to provide insight in helping shape the expert’s ultimate report.

When in-person meetings with expert witnesses were not possible, counsel might listen to the expert read the draft report on a teleconference and discuss changes thereto. In the years leading up to the 2010 rule changes (discussed below), counsel and experts utilized PC emulation technologies, such as GoToMyPC, to enable temporary remote viewing of preliminary expert draft reports, which enabled trial counsel to review and have input on modifying the expert’s draft report without creating any actual draft versions containing notes or suggestions from counsel. Such approaches would give control of the expert’s PC to trial counsel, who could then actually modify the draft report. By taking these approaches and jumping through these hoops, advocates could have an impact on the expert’s final report and
testimony without creating discoverable events or waiving attorney-client privilege or similar work product protections.

Despite these lengths that advocates commonly went through in engaging and working with expert witnesses, most juries – likely the result of TV – actually assume that attorneys work together with the expert to write some if not all of the expert’s report. Perhaps based in part on this perceived reality, everything changed in December of 2010 when the scope and type of information obtainable from expert witnesses in discovery under Rule 26 was substantially modified. These modifications greatly changed the 1993 rule that essentially required the expert to disclose all communications with trial counsel, including, as discussed above, all drafts of the expert’s report.

Rule 26, as amended in 2010, did not change the fact that discovery may be conducted on an expert’s opinions, including the factual foundation for such opinions.\(^{14}\) Rule 26, as amended, now requires disclosure of “facts or data” as opposed to “facts and other information” in the 1993 version, clearly limiting disclosure to material of a factual nature and not the theories and mental expressions of counsel.\(^{15}\) Yet, to the extent that material is considered by an expert, from whatever source, that contains factual ingredients, disclosure is still required\(^ {16}\) under the revised version of Rule 26.

Indeed, Rule 26(b)(4)(C)(ii) expressly makes discoverable the facts or data that the party’s attorney provides to the expert and that the expert considers in forming the opinions to be expressed.\(^ {17}\) This exception applies to communications identifying the facts or data provided by counsel, whereas further communications about the potential relevance of facts or data now are protected.\(^ {18}\) Another exception is found in Rule 26(b)(4)(C)(i), which leaves the
expert’s compensation structure as discoverable. Likewise, Rule 26(b)(4)(C)(iii) leaves discoverable the communications between experts and attorneys pertaining to assumptions to be made, by the expert, as instructed by counsel.

As a result of the 2010 rule changes, experts no longer are required to disclose preliminary versions of the expert’s report as well as communications with trial counsel leading up to production of the report.19 Thus, attorneys are no longer required to go to such great lengths to avoid even an inadvertent waiver of privilege. Similarly, work product protection now covers most communications between attorneys and retained experts.

However, that has not resulted in the removal of potential trouble areas for attorneys in interacting with testifying expert witnesses. One such problem area deals with the very issue that the new rules now protects, which is draft reports. As the commentary to the 2010 rule change points out, discovery is permitted as to facts and data provided by a party’s attorney to its testifying expert witness if considered in forming the opinions to be expressed.20 It is not uncommon, however, for an expert’s draft report to change substantially from version to version. As information is added and/or deleted, caution is required to insure that proper identification of included subject matter is identified. For, if the expert’s opinion, as expressed in the final report, even indirectly contains information sourced from communications with counsel, which perhaps may have been more overtly stated or developed in a prior draft but was largely removed or deemphasized in the final report, the communication identifying the facts or data provided by counsel properly remains discoverable. Over-aggressive counsel that takes the position that such communications are now protected, since the final report was at least thought to have not expressly included content included in an earlier draft, may not only
be incorrect, but may also be in breach of their ethical duty or subject to sanctions if found to be in violation of the new rules.

Moreover, what is “considered” by the expert should be “considered” by counsel to make sure that in fact counsel truly accepts disclosure of all such information. As discussed above, required disclosures under Rule 26(a)(2)(B) include what the expert considered in forming the opinion, and at least one court has found “considered” to include "any information furnished to a testifying expert that such an expert generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected." Thus, if counsel provides what constitutes a privileged communication between trial counsel and the client, and such communication is reviewed or even listed in the report as one of the many documents received and analyzed by the expert, then it may likely be discoverable, even if it actually had no bearing on the expert’s opinion.

**Over-aggressive Classification of “Draft Reports”**

As discussed above, Rule 26(b)(4)(B) protects from discovery “drafts of any report or disclosure required” by expert witnesses per Rule 26(a)(2)(B). “Drafts,” however, do not necessarily cover all expert witness related documents, and counsel should be cautious in over-aggressively characterizing documents that are not actually drafts as “drafts” on a privilege log. In *In re Application of Republic of Ecuador*, 280 F.R.D. 506 (N.D. Ca. 2012), where the notes, task lists, outlines, memoranda, presentations, and draft letters authored by a party's expert, non-attorney party employees, and other testifying experts were asserted on a privilege log as being privileged, the court there ruled that they must be disclosed, since they were not protected as draft reports and were not independently protected as work product. Thus, counsel should be
advised that the new Rule 26 does not give counsel carte blanche to call all documents “draft reports.”

**Review of Expert’s File**

Even before a decision is made to include an assertedly privileged item on a privilege log as being a protected document under the new Rule 26(b)(4)(B), it is necessary for counsel to have first identified the universe of documents potentially subject to production and those potentially protected as being privileged. In *Gerke v. Travelers Cas. Ins. Co. of Am.*, 2013 U.S. Dist. Lexis 22254 (D. Or. 2012), the court considered the question of whether a lawyer must actually review a retained expert’s case file in preparation for making disclosures required by Rule 26(b)(4).23 Although the plaintiff had not done so in *Gerke*, the court found that the rational answer is that a lawyer must review the expert’s file.24

Because plaintiff’s counsel had not reviewed the expert’s file, the result there was the nondisclosure of certain documents and their exclusion from plaintiff’s privilege log.25 As such, the court found the requirement for counsel to review the expert’s file subsumed in Rule 26(b)’s directives and consistent with Rule 11’s requirement of lawyers to make a “reasonable inquiry” that the content of a document is true and further serving the purposes of the discovery rules.26 As a result of the plaintiff’s failure to conduct this review and produce responsive documents, which was also in violation of a prior court order, the court sanctioned plaintiff and ordered plaintiff to bear the costs of defendant’s counsel for time and costs incurred related to the nonproduction.27 As a result of the court’s sanctions, plaintiff’s counsel, most surprisingly, could possibly be subject to a malpractice claim by its client for failure to review the expert witness file.
Influencing Testimony

“The entire system of expert testimony rests upon the assumption that experts are independent of the retained attorneys.”28 Thus, it is imperative that counsel refrain from taking any action that could even appear to tarnish the notion of an expert witnesses as being someone offering objective testimony based on the expert’s area of expertise in combination with the relevant facts of the case.

Rule 3.4(b) of the Model Rules of Professional Conduct provides that a lawyer shall not “counsel or assist a witness to testify falsely.”29 An expert’s opinion can be false if it is induced by a desire to please counsel or obtain compensation, as opposed to an objective investigation of the facts and circumstances of the case. 30

These rules are not new. That is, they have existed prior to the 2010 changes to the Federal Rules of Civil Procedure discussed above. However, now that the Federal Rules have moved communications, including draft expert reports, between attorneys and experts beyond the reach of discovery (absent satisfaction of one of the applicable exceptions described above), at least the opportunity to unethically influence an expert’s opinions and/or testimony is potentially enlarged due to the lower likelihood of such improper communications being discovered, even if listed on a privilege log. However, doing so, while using the ability to conceal such inappropriate conduct under the now protected draft reports and communications between experts and attorneys, is just as unethical as attempting to convince a percipient witness to change his account of the facts.
While overtly improperly influencing a witness is an easy case to classify and avoid, counsel should also be wary of the amount of input provided that ultimately results in the expert’s final report and the impact that can have. While “[o]thers may assist in the preparation of the report[,] the expert must freely authorize and adopt the changes as his or her own, and the final report must be that of the expert.”31 Yet, in some instances, the attorney work-product protection has limits. Communications between a lawyer and the lawyer’s testifying expert are subject to discovery when the record reveals the lawyer may have commandeered the expert’s function or used the expert as a conduit for his or her own theories. When the record presents that possibility, the lawyer may not use the attorney work-product privilege as a shield against inquiry into the extent to which the lawyer's involvement might have affected, altered, or "corrected" the expert’s analysis and conclusions.32

In this instance, where the communications between the lawyer and the expert result in reliance by the expert on the revised version, it may be that discovery is allowed on the communications resulting in the adoptions by the expert. “The fact that counsel helped with preparation of an expert report goes to the weight to be accorded to the opinions rather than admissibility.”33

It is likely under the new rules that an opposing counsel is still going to inquire about how much of the expert’s report the expert did or did not write. While this issue relates to credibility, the wholesale ghostwriting of the report by counsel could result in the expert being precluded from testifying.34 In effort to avoid such a hard result, an expert should still always be able to truthfully testify that the content of his or her report is fully adopted as his or her own opinion irrespective of who drafted the actual words in the report.
Misleading Compensation

As discussed above, one of the exceptions to the new discovery preclusions of Rule 26 pertains to “compensation for the expert’s study or testimony.”\textsuperscript{35} That is, if communications between counsel and testifying expert witnesses pertain to the expert’s compensation, then such communications remain discoverable.

Typically, an expert’s compensation is in the form of hourly or flat fees, for virtually every jurisdiction prohibits paying contingent fees to expert witnesses, as they provide the expert an unacceptable incentive to tailor the expert’s opinion to the interests of the retaining party.\textsuperscript{36} Instead, an expert’s compensation should be unrelated to the outcome of the case or content of the expert’s opinions.

Precluding discovery of communications, with the limited carve-outs for compensation communications, gives unscrupulous counsel additional cover opportunity for establishing side compensation arrangements that contradict the principles established above. Certainly, if counsel or perhaps a client were willing to strike a side deal with an expert witness that all parties agree to conceal, then there are probably much bigger ethical problems in play. But, the point remains that by making some communications privileged between experts and counsel, there at least exists a mechanism for manipulation by the unscrupulous.

Of course, avoiding such unethical conduct is incumbent on the expert witness as well. But, for those utilized as expert witnesses for the first time, it is at least conceivable that such experts may not appreciate the impropriety of such arrangements, especially if presented as acceptable or common by the unethical counsel. Thus, it is probably a well advised practice to
insure in deposition that the expert has no additional potential income prospects as a result of his involvement in the case.

These are just a few instances where counsel must proceed cautiously in the engagement and use of expert witnesses under the recent changes to the Federal Rules. Indeed, as these rule changes are still relatively new, other ethical challenges and/or short-cut temptations may arise. However, the ethical advocate will always seek to avoid and rise above such temptations to manipulate or even abuse the rules of procedure pertaining to their expert witnesses, for doing so preserves the integrity of our judicial system.

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4 Fed. R. Evid. 702.


6 Fed. R. Evid. 702.


10 Fed. R. Evid. 702, Advisory Committee Notes, 2000 Proposed Rules (quoting In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3d Cir. 1944) (“The evidentiary requirement of reliability is lower than the merits standard of correctness.”).
However, if the draft report is disclosed to the opposing party, even briefly, then the protections of 26(b)(4) may likely be waived. See Sarachek v. Luana Savings Bank (In re Agriprocessors, Inc.), 2012 Bankr. LEXIS 3361 (N.D. Ia. 2012) (finding that a temporary disclosure of an expert’s draft report during settlement discussions waived any protections against disclosure of the report under Rule 26(b)(4)(B) or (C)).


Id. at 15.

Id. at 17-18.

Id. at 15-16.

Id. at 44-45.

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Model Rules of Professional Conduct, Rule 3.4(b).

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Id.


Id. at 29.

Id. at 29.

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