

**I (MIGHT) GET BY WITH A LITTLE HELP FROM MY EXPERT:
EXPERT WITNESSES IN TRUST AND ESTATE LITIGATION**

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I. Introduction

Parties often use expert witnesses when litigating a trust or estate dispute. This “cast of characters” includes the following:

- **The standard-of-care expert:** This witness opines that the trustee met the standard of care or failed to do so in the case at bar. (See, e.g., *Pizel v. Whalen* (Kan. 1993) 845 P.2d 37, 41-42 [expert testimony on trustee failure to meet standard of care by not reading or understanding terms of trust]; *Allard v. Pacific Nat. Bank* (Wash. 1983) 663 P.2d 104, 107, 109-110 [expert testimony offered on trustee failure to meet standard of care by not seeking appraisal of trust property marketed for sale].)
- **Investment experts:** This witness testifies on matters such as whether the trustee prudently managed the trust assets and whether a particular investment was sound or unsound. (See, e.g., *Law v. Law* (Del. 2000) 753 A.2d 443, 447-449 [expert testimony on hypothetical investment strategy trustees should have used]; *Robertson v. Central Jersey Bank & Trust* (3rd Cir. 1995) 47 F.3d 1268, 1274-1275 [expert testimony on trustee’s failure to diversify by retaining high percentage of its own corporate stock].)
- **Construction-of-instrument experts:** These witnesses testify on matters such as the construction of trusts and wills, the reformation of trusts, etc. (See e.g., *In re Trust for Gore*, 2010 WL 5644786 (Del.Ch. 2010) [“I am satisfied that their opinions, if accepted, with respect to, for example, the context, circumstances, and drafting techniques animating estate planning almost forty years ago and how the two instruments would achieve (or fail to achieve) the Settlor’s estate and tax planning objectives would assist the Court in gaining a better understanding of the Settlor’s intent.”]; *Estate of Verdisson* (1992) 4 Cal.App.4th 1127, 1134 [expert testimony from a French lawyer on the probable meaning of terms used in the will of a decedent who was born and raised in France]).
- **Competency experts:** These experts opine on whether an elderly transferor was incompetent for the purpose of making a certain disposition or whether the elderly transferor was susceptible to undue influence. (See, e.g., *Estate of ACN* (509 N.Y.S.2d 966, 970-971 [expert testimony by forensic psychiatrist that formerly brilliant attorney had dementia and lacked capacity to execute charitable remainder unitrust]; *Conservatorship of Estate of Davidson* (2003) 113 Cal.App.4th 1035, 1044-1045, disapproved on other grounds [expert testimony by geriatric forensic psychiatrist that dependent adult had capacity and was not susceptible to undue influence by care provider].)
- **Treating physicians:** These witnesses might opine on matters such as whether the elderly transferor was competent and whether his or her mental faculties were

diminished by physical ailments or the effect of certain medications. (See, e.g., *Estate of Clines* (N.Y. App. Div. 1996) 226 A.2d 269, 270-271 [expert testimony by long-time treating physician that decedent's organic brain syndrome prevented him from making voluntary inter vivos gift]; *Rands v. Rands* (2009) 178 Cal.App.4th 907 [expert testimony by treating physicians as to reasons for issuing capacity certifications for trustor seeking to revoke trust].)

- **Questioned document examiners:** These experts testify about matters such as whether handwriting is forged and whether pages in a document have been improperly substituted. (See, e.g., *Churchill v. Skjerding* (Conn. App. 1993) 624 A.2d 900, 903 [expert testimony that decedent did not sign will based on comparative analysis to signatures on attached maps]; *Papenhaus v. Combs* (W.Va. 1982) 292 S.E.2d 621, 626-627 [expert testimony that decedent's signature was forged].)
- **Forensic accountants:** These witnesses might testify in any matter that involves confusing financial transactions, particularly if the documentation is incomplete or the case involves commingled funds. (See, e.g., *Alco Industries, Inc. v. Wachovia Corp.* (E.D. Pa. 2007) 527 F.Supp.2d 399, 407-408 [expert testimony by forensic accountant as to failure to diversify investments in retirement plan in ERISA case for breach of trust]; *Dibblee v. Title Insurance & Trust Co.* (1942) 55 Cal.App.2d 286, 776-777 [non-suit for trustee upheld where expert accountant testified that discrepancy in trust value could only be explained by how third party applied formula for depositing securities in trust].)
- **Damage experts or appraisers:** Certain types of litigation may require that a party establish the value of an asset such as real property or an interest in a closely held business, while others might require that a party establish damages based on lost rents or market appreciation. In certain circumstances, an expert such as an investment expert or a forensic accountant might also serve as an expert with regard to certain types of damages. (See, e.g., *Mest v. Dugan* (Or. App. 1990) 790 P.2d 38, 41-42 [insufficient evidence of damages in breach of trust case where licensed real estate appraiser gave expert testimony on highest-and-best-use value of property, but not market-rental value for its current use as car dealership]; *Brown v. Schwegman* (La. App. 2007) 958 So.2d 721, 724-725 [expert testimony calculating damages based on expected value of trust if properly diversified in light of various factors, including performance of market indexes].)

Because experts are so prevalent in this type of litigation, counsel should understand how to deal with them – both friend and foe – before embarking on a significant piece of litigation in this field. Where experts are concerned, experience can be a rough teacher, and counsel will find that they provide better results when they have thought about these matters ahead of time rather than waiting until it is too late.

III. Dealing with your own expert

A. Confidentiality. Counsel must understand whether communications with an expert will be confidential. The lawyer who assumes that communications with an expert will be protected by the attorney-client privilege or the work-product doctrine may be in for an unpleasant surprise. For planning purposes, the lawyer should assume that all communications with an expert will be non-confidential unless the lawyer has researched the matter under the laws of the appropriate jurisdiction and concluded that confidentiality exists, and even then the lawyer should be aware that confidentiality can be lost by waiver or by designating the expert to testify at trial. Generally, there are two types of experts for discovery purposes: testifying experts whose identity must be disclosed and consulting experts whose identity need not be disclosed. When uncertain about whether consulting experts might be designated to testify, attorneys should be cautious about providing them with damaging information that may have to be disclosed later on.

B. Attorney-client privilege: The attorney-client privilege rarely applies to experts for the simple reason that the expert is almost never the client and hence communications are not confidential. The federal rules and many state rules are similar in this regard. (See 73 ALR2d 12, “Statements of parties or witnesses as subject of pretrial or other disclosure, production or inspection” [while cases can be divided between federal and state “in recent years several states have adopted statutory rules which follow more or less closely the federal provisions.”]. [pin cite? Eliminate the title?])

1. Possible exceptions: There are nonetheless exceptions where the attorney-client privilege may apply, e.g., where an expert is in effect acting as an agent of the client (such as where the expert “translates” into technical language experiences that the layperson client cannot express) or where the expert is him or herself an employee of a corporate client. (See *Upjohn Co. v. U.S.* (1981) 449 U.S. 383.) In any event, if an exception applies, the expert should be cautioned against inadvertently waiving the attorney-client privilege by talking or writing about the matter.

C. Work product doctrine: This aspect of the law will usually shield the opinion of a consulting expert if that expert was retained by the attorney. As a result, it is important that the attorney – and not the client – retain the expert. While an expert’s opinion may be protected in this way, the expert’s percipient knowledge of the case generally is not, i.e., if the expert was also a percipient witness, he should not be able to avoid testifying about matters that he saw or heard.

1. Applicability: Under the federal approach, which many states appear to follow, work product (including the work of experts) must have been prepared for the predominant or sole purpose of anticipated litigation or trial in order to be protected. (See Fed. Rule Civ. Proc. 26(b).) If the work product satisfies this test, federal law then applies a two-level analysis and provides that some material is entitled to absolute protection from discovery (e.g., the attorney’s impressions, analysis, research)

whereas other material is only entitled to conditional protection (e.g., notes of interviews, the results of expert testing, etc.) and thus may have to be disclosed under certain circumstances.

2. Waiver: The protection offered by the work product doctrine can be waived, and thus caution must be exercised. Unless the law of the applicable jurisdiction provides otherwise, counsel should assume that once an expert becomes a testifying witness, any work-product protection will be lost, both as to the expert's own work and opinions and as to any materials or communications that the expert received from the attorney. (However, note that in December 2010, Federal Rule of Civil Procedure 26 was amended and now expands the protection for work product that was supplied to or created by a testifying expert. The revised rule (1) states that an expert's report must provide only the facts or data considered in forming the opinion; (2) grants work product protection for communications between an attorney and any witness required to provide a report, with some exceptions; and (3) protects drafts of reports from disclosure.)

D. Materials provided to or from the expert: The expert should be supplied with all information about the case necessary to form an opinion on the issues desired (including, e.g., relevant documents, deposition transcripts, interrogatory answers, etc.). Failure to provide complete materials can result in a flawed opinion that can easily be challenged on cross-examination. Asking the expert to provide an opinion based on assumptions provided by the attorney are cheaper and simpler, but might only be appropriate for certain types of experts (e.g., standard of care experts) and may be inappropriate for others (e.g., capacity or medical experts). Again, a full and accurate assumption is important if the expert's opinion is to stand up to challenge. The attorney should remember to supplement the information to the expert as more comes becomes available. However, care should be taken not to provide experts who may testify with any of counsel's own written notes reflecting thoughts, analysis, or summary of the case. Written communications with the expert should be kept formal (without socializing comments or editorializing by the attorney) and kept to a minimum, as should the expert's note-keeping and preparation of preliminary reports that do not reflect his or her considered or final opinion given the potential for discovery.

E. The report: A report may be required, depending on the rules of the particular jurisdiction. Otherwise, whether the attorney should request a report depends on the nature and complexity of the case. For example, when the expert is opining on one issue that turns on a limited number of facts, a report may be unnecessary and may only serve to generate possible impeachment material. On the other hand, in a complex case, a written report may be necessary, particularly if the expert is being asked to opine on a wide variety of matters.

F. Whether to designate the expert to testify at trial: When deciding whether to designate an expert, counsel should weigh the benefit of obtaining that testimony (i.e., how important the testimony is to the case, how strong the expert is, etc.)

against the potential costs (i.e., the financial cost, any risk of unwanted disclosure as mentioned above, etc.). Furthermore, counsel should consider the issue of whether the applicable law will allow him to restrict the scope of the expert's testimony and whether the expert will cooperate with that attempt. At a deposition, it is not unusual for opposing counsel to attempt to "make the expert their own" by asking questions about matters that are outside the scope of the requested opinion. Before designating an expert for trial, counsel should consider (1) the extent to which this poses a threat; (2) whether the applicable law permits counsel to restrict the scope of the expert's testimony at deposition and trial; and (3) whether the expert intends to cooperate with any such attempt.

IV. The Disclosure Process

A. In general: This process varies according to the laws of the particular jurisdiction. Many states appear to follow a version of the Federal Rules of Civil Procedure. Generally, the discovery of expert-witness information in the federal courts is governed by Federal Rule of Civil Procedure 26, but the federal courts have authority to establish the timing and scope of disclosure requirements, so attorneys must comply with any specific requirements set by the judge as well as with Rule 26. The timing of expert disclosure is typically set by court order or party stipulation or, if neither, must occur at least 90 days before the trial date. Rebuttal disclosure must occur within 30 days after disclosure by the other side.

B. The report: In some jurisdictions, a report is not required. However, under the federal approach, if an expert is retained or specially employed to provide expert testimony, a written report, prepared and signed by the witness, must be provided. The report must contain a complete statement of all opinions and the grounds therefore, the facts and data considered, any exhibits to be used, and the expert's compensation and qualifications, including a list of any publications over the last ten years and a list of other cases in which he or she has testified or been deposed in the last four years. The report requirement may be waived by court order or stipulation. The expert's actual testimony at trial must track as nearly as possible the substance of his or her report, or may result in exclusion. The expert is also subject to further discovery by deposition, interrogatory and subpoena *duces tecum*. The court may require a party seeking discovery to pay a reasonable fee for the time spent by the expert responding to discovery. For testifying experts who do not have to supply a report (e.g., treating physicians), the disclosure must state the subjects on which the witness is expected to present evidence and a summary of facts and opinions on which testimony is expected. The federal rules provide for a separate process for discovering the identity or opinions of experts who have been retained or specifically employed, but who are not expected to testify at trial, but only on a showing of exceptional circumstances, e.g., inability to obtain equivalent information from other sources. (See Fed. Rule Civ. Proc. 26(b)(4)(B).) The scope and application of these provisions, including the meaning of exceptional circumstances, appears to be a matter of debate among the federal courts.

C. Supplementing the disclosure or report: Federal rules require a disclosing party to supplement its report and other discovery according to the court's scheduling order or by 30 days prior to trial. A supplement is also required to correct disclosure if a party learns that the information provided was materially incomplete or incorrect in a way not otherwise communicated to the other side. The designation of additional expert witnesses is generally not permitted under Rule 26, although a judge may specifically allow them after weighing such factors as prejudice, disruption, and bad faith. There is some conflict among federal courts over whether a designated expert witness may be withdrawn, but in general a party may be allowed to undesignate a testifying witness if no disclosure or discovery has yet occurred. On the other hand, limited discovery may still be available of any tests or examinations made by the expert witness who has been withdrawn.

V. Deposition of the Opposing Expert: This can be the most important part of dealing with an opposing expert. The attorney should learn all of the opinions that the expert will give if called as a witness at trial, including the reasons for each opinion and the facts or assumptions on which each opinion is based. Failure to take a thorough and competent deposition can leave counsel at a significant disadvantage if the matter proceeds to trial. In jurisdictions that do not require a report and mandate the contents, the deposition may be the lawyer's only chance to gain the information needed for trial, and even when a report is provided, the deposition may be critical in letting the questioner expose weaknesses and flesh out any ambiguities or omissions in the report. When deposing an expert, counsel should obtain the expert's file and systematically inquire about matters that include the following:

A. The expert's qualifications: The examining attorney will want to know about matters such as the expert's education, work history, experience, and previous work as an expert. The questioner will typically ask for a copy of the curriculum vitae, inquire about whether it was specially done for this case, and later compare it against any other copies or the expert's website. In general, the questioner will want to focus on matters that may be relevant to the opinions at issue and that may serve as the basis for a possible attack. In many cases, being an "expert" in a certain subject matter does not necessarily make one an "expert" in every specific issue that comprises that subject matter. The examiner will have two things in mind: (1) developing material for voir dire (i.e., objecting at trial to the introduction of the witness' opinions on the grounds that he does not qualify as an expert); and (2) developing evidence to suggest that the expert's opinion should not carry weight and/or that he is not credible (i.e., that he is testifying to matters for which he could not reasonably claim to be an "expert," even if he was judged to be such for the purpose of his testimony's admissibility).

B. Initial retention: The examiner will normally want to cover this in detail, including date on which the expert was retained, discussions that the expert had with counsel or the client, the assignment given, payment arrangements, etc. This may reveal irregularities such as a changing assignment, an opinion formed before the work was done, etc.

C. Work done on the case: The examiner will normally want to ask about matters such as the time spent on the case; discussions that the expert had with attorneys or others; what material was reviewed; whether the expert was assisted by anyone; whether the expert contemplates further work; whether any tasks were discussed but not performed; whether the expert failed to perform something that he usually would have done, etc. When inquiring about work that was performed, counsel will want to use the timesheets or invoices, if possible.

D. Files and report, if any: The examiner should ask what the file contains, focusing on notes made by the expert, notes of conversations with counsel or parties or those who aided in forming the opinion, and correspondence. If there is a written report, the examiner should question in detail and follow the structure outlined below. The expert may have carefully crafted the “report” to conceal weaknesses and distract away from salient issues rather than to provide a fair and complete explanation. While some jurisdictions provide that the trial court can exclude the testimony of an expert who deviates from a mandated report, counsel may well find that that practice is more honored in the breach than the observance and that many trial judges allow the expert to deviate in his testimony, particularly if the report is sufficiently ambiguous or complicated. In addition to questioning about the report, counsel should also ask if there were draft reports and if copies are in the file. If there is no report, counsel should ask why and ask whether a future report is contemplated.

E. The expert’s opinions: This is the heart of the deposition. The questioner should ask the expert to list each opinion he has reached, whether tentative or otherwise, and hence “draw a box” around the expert and eliminate potential surprise. At this stage, the questioner is not asking the reasons for each opinion – the questioner merely wants a list that will limit this expert in the future and give the questioner a sense for the expert’s place in the overall context of the litigation. As a precaution, many experienced lawyers continue to reassert the list of opinions to the expert and ask if he has formed any other opinions that he has forgotten to mention. The examiner’s goals are 1) to prevent surprise at trial; 2) to have the opinions clearly stated to better allow for questioning and attack; and 3) to set up an exclusionary effort if the expert attempts to offer an opinion at trial that he did not disclose (and even if the court does not sustain the objection, the court may consider this as relevant to the expert’s credibility and as to whether his opinion should be accorded any weight). Having obtained a list of the opinions, the questioner should then go through each one in detail and have the witness state:

1. The reasons for each opinion: The examiner will want to know everything that went into the forming of the opinion, which will prevent surprise and help isolate weaknesses for potential attack. If the matter involves judgment, the questioner will want a detailed explanation of how the opinion was reached, including a list of factors considered and how the expert ranked them. If the expert purports to be applying a standard gleaned from elsewhere, the questioner will want a foundation for that claim,

i.e., the questioner will want to know where that standard comes from, what materials or sources the expert reviewed to discern it, how he ascertained that purported standard, etc.

2. All material on which the opinion is based: The examiner will want to know everything that supports the opinion and/or each reason for the opinion, i.e., what documents the expert is relying on, whether he was told to make assumptions, etc.

3. Corroboration for each opinion, if any: The examiner will want to know whether the expert tried to corroborate the opinion or any of its constituent parts, and if so, how.

4. Material or reasoning inconsistent with the opinion: Counsel will often ask if the expert is aware of anything that is inconsistent with the opinion. A truthful answer may be illuminating, whereas an untruthful one may be subject to attack and thus help the examiner argue that the expert lacks credibility or that the opinion is not entitled to weight.

5. Sub-opinions: The questioner may find that when asked the reasons for each opinion, the expert attempts to justify himself with a sub-opinion, i.e., the questioner may find that part of the expert's reasoning is in fact another opinion that the expert did not mention when asked to list the opinions he formed about the case. When this occurs, the questioner should treat this as a separate opinion and question as above.

Following this approach in a disciplined manner will allow the questioner to prepare for trial and help ensure that the questioner has taken reasonable steps to prevent surprise and to elicit material that can be used against the expert later. At the deposition itself, some counsel may want to proceed and cross-examine the expert as if at trial. The advisability of this depends on the facts and circumstances of the specific case.

VI. Cross-Examination of the Opposing Expert: The most productive lines of cross examination at trial will depend on the circumstances of the specific case. Most experienced counsel will consider the following lines of examination:

- Obtaining admissions from the expert
- Attacking the expert's qualifications
- Attacking the facts on which the expert based his opinion, i.e., if the fact or assumption is incorrect, the opinion should have no weight;
- Attacking the expert's judgment, i.e., the expert may have reasoned improperly; competent experts could disagree on the result; or the expert's testimony may be

nothing more than a common-sense argument or legal argument disguised as an “expert” opinion.

- Attacking the expert with hypothetical questions
- Undermining the expert by pointing out mistakes;
- Impeaching the expert with prior inconsistent statements.