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Column
Trial Practice

***832** THE EFFECTIVE USE OF EXPERTS DURING DISCOVERY AND TRIAL

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EXP -- Use of Experts in Practice & Proceedings

Both large and small cases can be enhanced by the wise use of an expert. An expert who testifies effectively at trial can sometimes ignite life in an otherwise doubtful trial. Of course, the decision to use an expert should be well thought out, and the expert should offer guidance to the trier of fact.

The expert selected to testify must have a strong commitment to a thorough analysis of the case. The client can be harmed and a case destroyed by an expert who is ill-prepared or sloppy. There is almost nothing worse than having your own expert take a damaging position contrary to your client's interests. You may sometimes discover that your adversary's expert has not formulated any opinions about the case until the eve of his deposition. This kind of last-minute analysis should be avoided at all times. One way to avoid this situation is to make sure that you are in contact with your expert on a regular basis, and to require your expert to focus on the issues well before deposition.

Who is an Expert?

MRE 702 states:
If the court determines that recognized scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

See also Price v Long Realty, Inc, 199 Mich App 461, 502 NW2d 337, 341 (1993).

The uses of experts can vary. Creative and inspired attorneys can effectively use an expert in ways that may not seem readily apparent. Here are some of the areas where an expert can be used to testify effectively:

• Custom and usage, and industry standards-An expert can be used to prove custom, usage, and industry standards when those matters are relevant, such as in Uniform Commercial Code transactions involving merchants.

• Premises liability-An expert can testify about the dangerousness of certain conditions, such as low-hanging pipes, "trip"

steps, and uneven sidewalks.

• Valuation-Many times a case may have good liability but problematic damages. An appraiser, economist, actuary, or other business analyst can marshal the facts to prove lost profits, lost income, or the valuation of assets.

• Causation-One of the more challenging issues to prove or refute is the issue of causation. Through carefully focused questions and the use of hypothetical questions, an expert can bring together all the facts and provide opinions on causation.

• Loss of life damages-A growing use of experts involves economists valuing the loss of the pleasure of living in wrongful death cases.

• Future damages-An expert can be used to establish projected loss of future profits, loss of reputation, and loss of goodwill in breach of contract cases and business tort cases where those damages may seem speculative. In one of our cases, our expert provided significant support to our claim that the defendant's breach of contract and fraud would cause the plaintiff to lose additional accounts over the next four years.

Experts can also be engaged for purposes other than to testify at trial, such as to offer consultation and guidance. Nontestifying experts are subject to different rules regarding discovery than those of testifying experts.

What Experts Must Be Identified and May Be Deposed During Discovery?

MCR 2.302(B)(4) provides that experts who are expected to testify at trial must be identified in answers to interrogatory questions, and these experts are subject to examination by deposition:
(4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
(a)(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial.
(iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope of such provisions (pursuant to subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.

The language in subrule (B)(4)(a) is confined to experts "retained or specially employed" to testify at trial. Apparently, the rule does not apply to experts informally consulted or to those experts who will not testify at trial. Therefore, the identities of experts who are employed for litigation but not expected to testify at trial do not have ***833** to be disclosed, and, generally, these experts may not be deposed by the opposing party.

In Nelson Drainage District v Bay, 188 Mich App 501, 470 NW2d 449 (1991), the Michigan Court of Appeals reversed the trial court's order to compel a deposition of a nontestifying expert. The court stated:
Subsection b gives more protection against discovery of these experts' opinions than subsection a does of testimonial experts. The greater degree of protection appears to be a function of the consultive or advisory role played by nonwitness experts. Day, Expert Discovery in the Eighth Circuit: An Empirical Study, 122 F.R.D. 35.38 (1988). Moreover, the reason for the more restrictive discovery standard in subsection b is that "while pretrial exchange of discovery regarding experts to be used as witnesses aids in narrowing the issues, preparation of cross examination and the elimination of surprise at trial, there is no need for a comparable exchange of information regarding nontestifying experts who act as consultants and advisors to

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counsel regarding the course the litigation should take. (Nelson, 188 Mich App at 505, 470 NW2d at 451.) (Emphasis added.)

If an expert who is expected to testify at trial changes an opinion about the case, his or her deposition can be avoided if, prior to the deposition, the witness list is amended to remove the expert's name. For example, in Nelson, the plaintiff had originally intended that the expert would testify at trial and, accordingly, included the expert's name on the witness list. Subsequently, the expert's name was removed from the witness list. Stating that only experts who will testify at trial may be deposed, the Court of Appeals refused to allow the deposition of the nontestifying expert.

There is, however, a line of federal court cases holding that a nontestifying expert may be deposed if his or her affidavit has been tendered in opposition to a motion for summary judgment. In the leading case of Cox v Commonwealth Oil Company, 31 FRD 583, 584 (SD Tex 1962), the court held:
When a party offers the affidavit of an expert witness in opposition to, or in support of, a motion for summary judgment, it waives its right not to have the deposition of said expert taken. The testimony of the expert, for all practical purposes, has already been offered in the case, and the taking of his deposition by the party against whom the affidavit was used is nothing more than cross-examination.

This holding was adopted in the more recent case of US v Hooker Chemicals & Plastics Corp, 112 FRD 333, 338-341 (WDNY 1986). See also Berkey Photo v Eastman Kodak Company, 74 FRD 613 (SD NJ 1977); Julian v Raytheon, 93 FRD 138 (D Del 1983); Boring v Keller, 97 FRD 404 (D Colo 1983); Herbst v International Telephone and Telegraph Corp, 65 FRD 528, 530-31 (D Conn 1975) ("Once the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, there is no reason to treat an expert differently than any other witness.")

What Information is Discoverable from Experts?

One critical issue always lurking in the background is whether information and documents imparted to the expert by the attorney are discoverable. It is important for an attorney to be sensitive to what materials are given to the expert because the attorney runs the risk that any material may be discoverable by the opposing party. Thus, detailed memoranda, confidential client statements, and other attorney work product materials should not be given to an expert.

MCR 2.302(B)(4) provides that the opinions and facts about which an expert is expected to testify are discoverable by deposition and interrogatories. As a general rule, then, a party cannot even require production of documents prepared by an opponent's expert, including reports prepared for the case.

In Backiel v Sinai Hospital of Detroit, 163 Mich App 774, 415 NW2d 15 (1987), the Court of Appeals reversed the order of the circuit court which compelled the production of reports prepared by testifying experts. The court held that MCR 2.304 (B)(4), which differs significantly from the federal rule, does not permit discovery of an expert's written communication unless a showing of "substantial need" or "undue hardship" can be made by the party seeking discovery:
In the instant case, the circuit court granted discovery of the reports in an erroneous belief that defendant was entitled to them without making the showing of need required by MCR 2.302(B)(3)(a). Therefore, we reverse the order compelling the production of the experts' reports and remand without prejudice to defendant's right to seek a determination that it is entitled to them because of "substantial need" and an inability to obtain a substantial equivalent by other means "without undue hardship." (Backiel, 163 Mich App at 799, 415 NW2d at 17-18.)

C.f., In Re Air Crash Disaster at Stapleton International Airport, 720 F Supp 1442, 1444 (D Colo 1988) ("[a]ll materials proposed by an expert in relation to a case in which he is expected to testify are discoverable.") ***834** Quadrini v Sikorsky Aircraft Division, 74 FRD 594, 595 (D Conn 1977). ("Expert testimony will undoubtedly be crucial to the resolution of the

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complex and technical factual disputes in this case, and effective cross-examination will be essential. Discovery of the reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date.")

The Backiel court also held that an expert's report formulated from the interplay of ideas between the expert, the attorney, and the client, is generally protected from discovery as work product:
The arrangement of those facts and opinions in a report, made directly responsive to the inquiries of an attorney, is however, work product; a disclosure of the report itself would betray those thoughts, mental impressions, formulations of litigation strategy, and legal theories of the attorney that are protected by the work-product doctrine. To hold that a party to a litigation could attain copies of those reports by merely making a demand for production without more would have the practical effect of chilling the ability of an attorney and his retained expert witness to freely communicate in writing. Backiel, 163 Mich App at 779, 415 NW2d at 17.

While Backiel prevents the automatic discovery of the reports of experts, it does not bar absolute discovery of expert reports. It may be possible to obtain discovery of reports prepared by an opponent's testifying and nontestifying experts if a party can show exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. In Nelson, however, the court broadly construed this requirement as meaning that "if other experts are available with respect to the same subject, the exceptional circumstances do not exist." Nelson, 188 Mich App at 508, 470 NW2d at 452. Whether undue hardship exists depends on the facts of each case.

Because there is always a risk that expert reports may be discoverable, attorneys should not provide confidential reports or trial strategy memos to their experts. Oral communications generally permit a freer interchange of ideas between the expert and attorney. Nevertheless, oral communications tend to promote inaccuracies. While a paper trail of notes is not advisable in working with an expert, neither is a complete absence of documentation advisable. Experts may become forgetful. If a key aspect of the case is not memorialized in an expert report, a case can be destroyed if the expert deviates from a key theory of the case. Moreover, if an expert puts his or her ideas in writing, he or she is forced to be more precise in the analysis. Thus, documentation between the expert and the attorney should be weighed for the competing risks of possible disclosure during discovery and of possible failure to adequately solidify the opinions of the expert in a report.

What Fees May Be Paid to an Expert?

Michigan statutory law prohibits contingent fee arrangements with expert witnesses. MCLA 600.2164(1) provides:
No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly.

MCLA 600.2169(4) provides:
In an action alleging medical malpractice, an expert witness shall not testify on a contingency basis. A person who violates this subsection is guilty of a misdemeanor.

By eliminating financial ties between an expert and the outcome of the litigation, Michigan statutes seek to prevent fraudulent and purchased testimony.

The fee arrangement and the scope of the work should be confirmed in writing. The fee arrangement is important not only to

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establish the parameters of the financial obligation of your firm and your client, it may also be used as a tool to curtail the costs of litigation. To allow an expert free reign to bill without restraint is irresponsible. The attorney has the responsibility to negotiate with the expert and to monitor and control the expert's fees.

Further, by not specifying the scope of the work, the attorney runs the risk that the expert may procrastinate and never actually render an opinion in the case. If the expert is not pinned down early enough in the litigation on the scope of work to be performed, the case will lack direction and focus. The expert's role is to bring the case together and solidify ideas. Without this focus, the theories of the case never emerge and the case stagnates.

Fees Are Required to be Paid by the Opposing Party in Deposing the Expert

It is necessary for a party seeking discovery of an opposing expert to pay the expert's reasonable fees for time spent in the deposition. MCR 2.302(B)(4)(c)(i). In addition, the party seeking discovery of the opposing party's expert may have to pay the opposing party a share of the expert's fees in preparing for deposition. MCR 2.302(B)(4)(c)(ii) provides:
[W]ith respect to discovery obtained under subrule (B)(4)(a)(ii) or (iii), the court may require, and with respect to discovery obtained under subrule (B)(4)(b) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Conclusion

An expert can marshal the facts and bring them together in a coherent and organized fashion for the trier of fact. The effective use of an expert depends on the attorney's ability to give the expert direction and establish the strategy of the litigation. The use of an expert allows the attorney to present his case from a seemingly objective point of view. This objectivity can add legitimacy and credibility to the legal theories of the case and can offer a dramatic way to persuade the jury.

Note 1. Gerard Mantese, E. Powell Miller, and Theresamarie Mantese are shareholders at Mantese Miller and Mantese, P.L.L.C., in Troy. Marc L. Newman is an associate at the firm. Mr. Mantese, Mr. Miller, and Ms. Mantese have taught and lectured on various litigation issues. They have also authored various articles on diverse litigation topics. The firm specializes in commercial, health care, and personal injury litigation.
Note 1. "Trial Practice" appears regularly in the **Michigan Bar Journal.** This column is designed to provide advice and guidance on how to effectively prepare for and conduct trials.
Editors Gerard Mantese and Theresamarie Mantese are trial attorneys at Mantese Miller and Mantese, P.L.L.C., and proposed articles may be submitted to them at 2855 Coolidge Highway, Suite 107, Troy, Michigan 48084.

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