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PERSPECTIVES

USING EXPERT WITNESSES TO RESOLVE COMPLEX ISSUES AND PROVIDE INDEPENDENT PERSPECTIVE

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Expert witnesses are indispensable in complex litigation, particularly in sophisticated financial and multijurisdictional disputes. There are three types of expert witnesses. First, consulting experts, who provide advice and analysis to lawyers as they investigate and prosecute (or defend) the case. Second, testifying experts, who testify at trial to enhance the jury's understanding of complex issues requiring specialised knowledge to understand. And third, foreign law experts, who advise parties and the judge on matters of foreign law. A consulting and testifying expert sometimes are the same person, but potential disclosure issues may arise if this is done.

Litigants who involve experts early in a case can benefit enormously from their outside perspective, which can inform many aspects of case strategy, including discovery and settlement. This article explains the roles these three types of experts play and certain key rules applicable to their work.

Consulting experts

In many complex cases, the first type of expert retained is a 'consulting' or 'non-testifying' expert.

As these words suggest, such an expert does not testify at trial (or provide a report). Rather, the party retaining the expert consults with the expert to help understand complex aspects of the case within the expert's area of expertise, which allows the party to better evaluate the case's strengths and weaknesses.

Both plaintiffs and defendants often retain consulting experts. It is not unusual for a plaintiff to do so before filing a case, to investigate the merits of its claims and possible damages. For example, plaintiffs investigating a complex fraud may retain a forensic accountant or similar expert to understand how the fraud worked, who was involved and what happened to stolen funds. Plaintiffs also often retain a damages expert before suing to develop damages theories and understand the amount of potential damages. These analyses can inform important decisions of the case, including whether to bring the case at all and how much to invest in the case.

Similarly, defendants often retain consulting experts after being sued (sometimes beforehand, if the plaintiff issues a pre-suit demand or the defendants think they will be sued). Not infrequently, defendants retain a damages expert early in the case to analyse and help the defendant understand the plaintiff's damages theories (and thus the defendant's possible exposure). That analysis can inform a defendant's case and settlement strategy.

For both sides, a consulting expert typically informs decisions regarding the information to seek in discovery.

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Under Rule 26 of the Federal Rules of Civil Procedure, the identity and opinions of a consulting expert are not discoverable, except on a showing of "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means" or in cases involving physical or mental examinations under Rule 35 of the Federal Rules of Civil Procedure.

Testifying experts

In complex cases, testifying experts typically play a significant role in explaining aspects of both liability

and damages to the jury. In some cases, experts may play as large a role as, or a larger role than, fact witnesses.

In US federal courts, Rule 26 provides the requirements applicable to testifying experts. It requires a party to disclose the identity of its testifying experts and to provide written reports containing the substance of their testimony. An expert's report circumscribes the scope of the expert's testimony at trial. Each US state has its own rules regarding testifying experts, although many state rules now are similar to federal Rule 26.

It is typical for the adversary to move the court to exclude the proffering party's expert. The adversary will typically depose the expert and attempt to identify weaknesses in the methodology or the bases of the opinions, undermine the expert's qualifications, or identify other flaws in the opinions. That deposition will lay the groundwork for the motion to exclude, based on the Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* (1993), which set forth the standard for admitting expert testimony in federal courts.

Under *Daubert*, expert testimony may only be offered into evidence if: (i) the expert is qualified; (ii) the evidence is relevant; and (iii) the evidence is reliable. Many states also use the *Daubert* test; however, other states, including large states like New York and California, use the older *Frye* test, set forth in *Frye v. United States*, (1923), which considers

whether the expert's methodology is generally accepted in the relevant scientific community. A small number of states have their own formulations for the standard governing admissibility of expert testimony.

A common challenge to an expert's proffered testimony is that it duplicates and usurps the role of the jury. An expert must use professional standards and principles, and utilise specialised knowledge, to avoid the criticism that the testimony is invading the province of the jury. For example, an expert cannot testify to a person's state of mind, but an expert can testify to the significance of information known to a person in a particular field. Thus, in a complex fraud case against an auditor alleged to have aided the fraudster, an expert on auditing standards cannot testify as to whether the auditor knew about the fraud, but can testify about the significance of information available to the auditor and how that information was indicative of the fraud. It is critical to be mindful of potential challenges to an expert's work from the beginning of an engagement and to work with the expert to focus the opinions to avoid or defeat such challenges.

Although testifying experts are hired by the parties, they are viewed as providing independent perspective to the jury regarding the subject matter of their testimony. It is advisable to retain an expert who presents as professional and independent rather than partisan.

A common issue is whether to use a 'professional' expert, i.e., someone with extensive experience testifying as an expert witness, or an expert with little to no testifying experience (e.g., an expert whose professional experience is largely in the field or in academia). A party must carefully weigh the costs and benefits of using each of these types of experts. Professional experts are generally more adept at preparing reports, and they can ably present to juries given their familiarity with the courtroom setting. However, professional experts can sometimes be perceived as 'hired guns' who are less independent.

Experts with less testifying experience may be perceived as more independent and enjoy additional credibility with the jury as a result, but they are often less polished and less adept on cross examination.

A testifying expert's report is required to be disclosed to the adversary. Drafts of the report, however, are shielded from disclosure under Rule 26. Most communications between a testifying expert and the party's attorney are also protected under Rule 26. However, communications regarding the expert's compensation or in which the attorney provides facts, data or assumptions relied on by the expert are not protected. It is critical to be mindful of the foregoing in all communications with testifying experts.

A party sometimes uses the same person as a consulting expert and a testifying expert. For instance, a party who retained an expert as a consulting expert to help develop the case may find it beneficial, because of that person's familiarity with the case, to use the same person as a testifying expert. However, using a consulting expert as a testifying expert may raise disclosure issues, because the adversary may learn through the expert's deposition or other discovery requests about the expert's work as a consulting expert, including work that may undermine the proffering party's case.

Foreign law experts

In many complex cases, foreign law may govern one or more issues or claims. For instance, a choice-of-law clause in a contract may provide that foreign law governs claims arising from the contract. As another example, foreign law may determine the duties owed by a person or entity located in a foreign jurisdiction. In these instances, it is invaluable to retain a foreign law expert early in order to help the party use knowledge of the applicable law to shape case strategy.

In addition to advising the party on foreign law, a foreign law expert may submit testimony to assist the court in determining foreign law. In US federal court, under Rule 44.1 of the Federal Rules of Civil Procedure, "[t]he court's determination [of foreign law] must be treated as a ruling on a question of law". This means that the judge rather than the jury

determines questions of foreign law. State courts have their own procedures for determining foreign law.

Like a consulting expert or testifying expert, a foreign law expert should be qualified. In many complex cases, it may be advisable to retain a foreign law expert specialising not only in a particular jurisdiction's law but also specialising in a specific type of law in that jurisdiction (e.g., Swiss bank secrecy law, Dutch contract law principles, etc.).

Conclusion

In complex cases, it is important from the outset of the case to think about the experts that can be helpful. Consulting experts, testifying experts and foreign law experts all typically have a role to play: consulting experts help a litigant develop and understand its case, testifying experts explain complex issues to the jury, and foreign law experts advise the parties and court on foreign law. The sooner experts are involved, the sooner they can help a party achieve its litigation goals. CD

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