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Expert Advocacy: Beyond Selection

by Bradley K. Overcash and David E. Stovall



Introduction

Expert witness selection is critical to pre trial litigation. However, an advocate's work is only beginning once the expert is

selected. Unless frequently involved in litigation, most expert witnesses will not have an understanding of the ever changing legal rules and case authority by which they are judged and by which their opinions are judged. It is the attorney's role to educate the expert witness on the necessary requirements and to properly support the expert with information to withstand a challenge from the opposing party. Moreover, a party must provide the proper factual support for the expert and information upon which he or she will base his or her opinions. This can become a balancing act given the applicable rules allowing for the discovery of information provided to an expert by the party's attorney in certain circumstances.

In addition, each attorney must take the proper steps to challenge the opposing expert witness and his or her opinions. An attorney should rely upon his or her expert witness to provide ammunition for challenging the opposing party's expert witness's credentials, specific past experience, and bases for opinions.

A central component of pre trial advocacy is to provide the proper support to protect your expert witness and to raise the proper challenges to the opposing expert and his or her opinions.

Support Your Expert

"Expert, *n.* A modern seer, often self-styled, whose pronouncements are received as if emanating from an oracle. A 'recognized expert' is one whose pronouncements are closest to conventional wisdom." Edmund H. Volkart, *The Angel's Dictionary: A Modern Tribute to Ambrose Bierce*, p. 75 (1986).

Expert witnesses depend on the information provided by



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- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B)(i-vi). Given that the expert witness's report must disclose the "facts and data considered," the attorney should be wary of providing written information reflecting work product that must be disclosed during the course of discovery. In sum, while it is important to communicate often with an expert witness, an attorney must use his or her best judgment in what information is provided.

The above quote is accurate in that members of the jury will be more likely to accept an expert witness's opinion that they are able to comprehend. An attorney who clearly communicates the overall theory of the defense to the expert witness will benefit in that an informed expert is more likely to recall the theory and theme in explaining his or her opinions to the jury. As such, the jury will more readily accept the testimony as it fits within the larger picture the defense team is trying to present at trial. Attorneys who keep the lines of communications open, although remembering to appropriately filter given Rule 26, will place the expert witness in the best possible position to provide opinions that are integrated with the overall defense theory and themes.

Strike the Opposition's Expert

"The grand aim of all science is to cover the greatest number of empirical facts by logical deduction from the smallest number of hypotheses or axioms." Albert Einstein, In Lincoln Barnett, *"The Meaning of Einstein's New Theory,"* *Life*, 9 January 1950.

An expert witness should have an understanding of the adverse party's position in order to support his or her own testimony on direct and cross-examination; however, such an understanding will also provide the attorney with valuable support for challenging the opposing expert. A major part of appropriate communication with the expert witness is to

learn from him or her which areas are appropriate in which to challenge the opposing party's expert witness.

In the quote above, Albert Einstein highlights the importance of "logical deduction" as a part of what constitutes scientific understanding. Expert witness opinions must flow from the proper facts and "logical deduction" to meet the standards required by courts in determining reliability. It is often impossible for an attorney to catch all logic gaps and imprecise opinions by the opposition's expert witness. The supporting expert is an excellent source to quickly and accurately expose problems with the opposing expert and his or her opinions. Then, the attorney can work to set the stage for a legal challenge.

Moreover, an opposing expert witness may have a *curriculum vitae* that includes experience that appears to be similar to the area in question. However, the supporting expert will be able to assist the attorney to note whether the experience is specific enough to be appropriate. If one type of medical doctor conducts a procedure in a certain way, his or her credentials may appear to be sufficient upon first review. However, if the procedure in question was performed in a similar, but critically different way, then the attorney will need to appreciate the difference and consider a challenge to the opposing expert's experience. The supporting expert can play a major role in moving from the general to the specific when considering such potential challenges.

Conclusion

Proper communication with the supporting expert witness throughout the litigation will increase the likelihood that the supporting expert will withstand challenges by the other side, will provide compelling and coherent testimony, and will provide ideas and a framework to challenge the opposing expert witness. Any communications with the expert must be undertaken with Rule 26 in mind. However, appropriate communication throughout the litigation will provide a better defense for the client in the case. The proper selection and support of the supporting expert witness, and the proper challenge to the opposing expert, will aid in the attorney's quest to fully advocate for his or her client.

Brad Overcash and David Stovall are attorneys at Wilkins Tipton, P.A., with offices in Jackson and Greenville, Mississippi, Nashville, Tennessee, and Mobile, Alabama, and primarily practice in the area of defense litigation. They may be contacted at (601) 366-4343, or via email at bovercash@wilkinstipton.com and dstovall@wilkinstipton.com.

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