Experts on Experts: How to Use Finance and Accounting Experts to Prove Your Case

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ROBERTO SCALESE: Good afternoon. The Association of Corporate Counsel and SmartPros Legal and Ethics welcome you to today's broadcast, "Experts on Experts: How to Use Finance and Accounting Experts to Prove Your Case."

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Our presentation today will be moderated by Kerry Schalders, co-chair of the ACC's litigation committee. Kerry will introduce today's topic and speakers. Take it away, Kerry.

KERRY SCHALDERS: Thank you Roberto. Again, this is Kerry Schalders. We welcome all the audience members to the ACC Litigation Committee webcast titled "Experts on Experts: How to Use Finance and Accounting Experts to Prove Your Case." Our webcast today is sponsored by Ernst & Young, and the ACC thanks Ernst & Young for their generous support in presenting this important topic.

We have a distinguished panel today. Truly, two gentlemen who are experts in their own right. Stephen Seliskar is a partner with Ernst & Young. He is responsible for quality and risk management of the fraud, investigation and dispute services practice, and has more than 30 years of experience in forensic accounting. He's been on both sides of the rail, as a highly sought expert witness as well as an arbitrator in matters including purchase price dispute.

We are also joined by Mr. Robert Ducatman, a partner with Jones Day. He practices in the areas of litigation and intellectual property law, including patent, trademark, trade dress, unfair competition and trade secrets. He has considerable experience in cybersquatting litigation and global experience in helping his clients protect the value, in particular, of their intellectual property assets. So, we're very pleased to have them with us today. My name again is Kerry Schalders and I'm the webcast chair of the ACC Litigation Committee, and we'll be moving right into the agenda.

We will be covering a number of topics designed to give in-house counsel a taste and some practical tips about using and leveraging your finance and accounting experts. Especially in these tough financial times where we can use experts to better inform our own case and analyze the risk of proceeding with litigation, it's all to the better for our corporate client.

We're going to go ahead and start with a poll question for the audience. Roberto, would you go ahead and put the poll question in place?

ROBERTO SCALESE: Great. Thank you, Kerry. We ask all of our listeners today to please complete this sentence: As in-house counsel, has your interaction with experts been mostly: Selecting/approving the use of an expert, gathering factual material for the expert's analysis, reviewing draft expert reports, handling all aspects of the expert's engagement as lead counsel, or other. Please take your time to select your choice and then we will give you a couple more seconds before we close the poll.

OK. As you can see, we have somewhat of a split crowd today. Half of our respondents said that they have [had] interaction

with experts selecting and approving the use of an expert, and others, the—50%—have selected other. Back to you, Kerry.

KERRY SCHALDERS: Thank you, Roberto. Stephen, let's go ahead and start the conversation by giving some background about what exactly we mean by an expert.

STEPHEN SELISKAR: Thank you, Kerry. Pleased to be here with you today.

A couple of things, and keep in mind that when you evaluate what is a real expert, the end game here is to make sure that what that expert does with the engagement team—with the litigation team—ultimately ends up as being admissible evidence in the court of law or whatever forum you're operating in. So, if you back up from that, what we're trying to do is to find someone with expertise beyond that of a layperson that can assist the trier of fact to understand the evidence or determine the fact at issue in the dispute. So in this regard, it's someone that's engaged by one of the parties, generally through legal counsel, to assist them and, ultimately, the trier of fact. Next slide, please.

Leading from the expert to what then is expert testimony: An expert is the one element of testimony that can express opinions as opposed to what they saw as a fact witness. So, we're dealing now with professional judgments that are made throughout this person's rigorous efforts in the case to ultimately express an opinion as evidence in the dispute, and so we go back to—the original thought is that the objective is to end up with an opinion that is admissible in the court of law (or whatever forum that is being worked at this time).

It is also to help the litigation team understand the complexities of science, or financial aspects of damages, for example, that are involved in the matter. So, it's also to assist the team, clearly, but ultimately to end up with admissible evidence in court.

It is not, if you look at the second bullet, an exhaustive search of cosmic understanding. So, it needs to be grounded in fundamental evidence and facts that are relevant to the case at hand and be able to translate the very deep complexities of the professional area into layman's terminology while retaining the accuracy and professionalism, but also to be able to communicate that to the court of law. Next slide, please.

ROB DUCATMAN: Good afternoon, Kerry. This is Rob. The next thing that we're going to focus on is the legal aspects of expert testimony, and you're going to see six bullet points on your slide. The first is the rules of evidence, and there are differences between the Federal Rules of Evidence and the rules of evidence in most state courts. So, you need to know in what jurisdiction you're proceeding, because the differences can be substantial.

For example, under the federal rules today, one can have an expert rely on any kind of factual information whatsoever, including hearsay. That is not so in most states, and it changes both the method and the manner in which the expert is going to be protected for testimony. We will focus on the federal rules through most of this webcast. We will also show later slides with respect to how to qualify an expert, the admissibility of expert opinions and the roles of an expert, both consulting, testifying, and, in fact, rebuttal.

With respect to rules of reporting, in many jurisdictions—and in most federal courts—the expert is restricted to what's in his or her report, and this drives many things, including when you might retain an expert. So, you need to make certain that if you want the expert to express an opinion on any particular issue, it is in the report.

And finally, you should focus on the aspects of expert witnesses that are going to be subject to discovery in your lawsuit. Experts can be sacrificial. If you need an expert but you are uncertain as to whether he or she will testify at trial, you can always use them as a consulting expert, or, in many cases, before the case proceeds very far. In particular, areas of technology or complex litigation, in which there is a minor area for two experts, you will see one party try to retain them all before the case even proceeds through the case management conference. Next slide, please.

STEPHEN SELISKAR: Qualifying as an expert has several attributes. At the bottom of the slide, they deal with knowledge,

skill, experience, training and education, and I'll come back to those in a second, but generally speaking, it is not particularly difficult to qualify as an expert. It may be increasingly difficult to remain an expert, and remain qualified in a matter, but up front it's not particularly difficult.

Knowledge would be the kinds of things you may have learned through research. Skill may be evidenced by certifications, such as a CPA. Experience may be as indicated on the expert's resume. Training could be special courses and curriculum. And education would be, for example, college degrees (bachelor of science or M.B.A. in accounting, in my situation).

There are other guidelines to think about here and that is that, as a professional, what memberships does that individual have in various—like the AICPA or ASA—because it deals with professional standards that that person must follow, and ultimately that becomes important to remain as an expert. We'll talk about that in a little bit. But all of these factors listed here should be considered and evaluated when selecting an expert—qualifying one, as it will—for your particular needs.

One of the attributes that must be kept in balance here is the ability of the professional to conduct the necessary work in accordance with the professional standards that apply to them, but also, as it were, to play that sport—or that game—under the rules of the legal process. So, there's really a two—sometimes a tension in standards at play here. One is that it needs to be—certainly follow the rigor of the profession, but it also needs to follow the legal requirements for it to ultimately be admissible. I remind you, again, that that's really the end game, so that all of the hard work ultimately has probative value. Next slide, please.

ROB DUCATMAN: There are four rules in the Federal Rules of Evidence that relate to expert testimony that we'll speak about today. The first is Rule 702, and it essentially provides when an expert may be permitted to testify in a United States court. The rule essentially provides that if scientific, technical, or other specialized knowledge can assist the trier to understand the evidence, or to determine a fact at issue, a witness who is otherwise qualified by skill, education or experience may testify in the form of an opinion or otherwise. Now, the "or otherwise"—the disjunctive portion of the rule—is rarely paid any attention. But it should be, because the "or otherwise" portion of the rule essentially allows the expert at trial to hypothesize or theorize, or, depending on what side of the "v." you might be on as a litigant, speculate or guess. And it's very important that you understand that the federal rules permit that type of breadth in expert testimony.

Rule 703 provides for the basis of the expert's opinion, and the expert can essentially rely on anything and everything that someone in that particular field may consult in rendering that opinion. And that includes hearsay. In fact, experts can rely on entirely hearsay evidence in rendering the opinion.

The third rule is Rule 704, and it's equally important because it permits the expert in any civil case—not in a criminal case, because we don't want an expert sitting on the stand saying, "Yes, the defendant should go to jail for life"—but in a civil case, to opine on the ultimate issue in the case: whether the defendant is liable or not.

And finally, you have [Rule] 705, which is the order of testimony. And this was also a huge change in the federal rules from the common law. You can essentially put an expert on the stand, run through his or her credentials, simply ask them if they have an opinion, and if the answer's in the affirmative, to give it. There's no way on direct examination that you can be required to actually ask your expert what the bases of his or her opinion might be. Those bases, however, can be inquired into in cross-examination. Next slide, please.

STEPHEN SELISKAR: So, we've been talking a bit about the rules as to how we must proceed here so far, and I've been reinforcing the notion that the end game is always to have the expert's opinions be admissible, so in this slide, let's attend to another level of discussion in this regard.

Admissible opinions require that the expert indeed be qualified—and remain qualified—through knowledge, training, and etc., etc., that we said. Juxtapose that to basically *ipse dixit*, wherein one says, "It's so because I say it's so." We really do need some evidence.

And that takes me to the second point here, of the source data. Facts and assumptions need to be not only in evidence but verified. That is, the expert needs to take a level of professional responsibility for them, demonstrate the understanding of them, and basically own and be prepared to defend the data on which I would rely as an expert. This then requires rigorous data analysis in order to do calculations, computations, analyses to support ultimately the opinion. Typically, this is an element of the expert's report.

And finally, which, we'll use the term somewhere along the lines here—I'm sure it's now embedded in the federal rules that Rob attended to a minute ago—but deals with *Daubert* challenges, or challenges of the expert. One of those key attributes, in order for that expert opinion to be admissible, it needs to have followed an accepted methodology. You might be familiar with the term "subject to peer review," those kinds of things, but certainly supportable in the profession that this is an accepted approach to doing a particular type of analysis. I recall days in the high school chemistry lab where the definition of an experiment was that it required the ability to re-perform the experiment and end up with the same results. That thought process, I think, follows nicely when it comes to evaluating a methodology.

Now the challenges to an expert can come across by (1) challenging the expert on their expertise, but most recently I think many of the challenges go to when an expert begins to encroach into other fields or extend themselves way out of their arena of expertise. So, as I said before, it's typically easy to initially qualify as an expert. To remain qualified as an expert is a secondary consideration. Certainly, when you read judges' opinions for those that have been eliminated from the ability to provide testimony in their court, bias would be a very bad no-no and get one tossed generally as an expert.

The use of unsupported guesswork or speculation—Rob used that term before—in thinking that speculation is neither acceptable in front of the court or the jury, it's really the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge. In other words, it's guesswork. Now, one can answer hypothetical questions as an expert, but you really do, in order to have probative value, need to have, as I mentioned before, verified data, rigorous data analysis, and an accepted methodology.

A flawed methodology might be one where the methodology itself is acceptable but was misapplied; that is, they used the wrong formula. An example of that might be an interest calculation. Generally, interest calculations are defined as to what is permissible in a specific court, and you must follow that type of interest calculation or your methodology may be flawed or subject to just a factual error. An error would be just that: a mistake in application of the facts or something as simple as an arithmetic error.

When we talk about methodology, for example, one of the cases that's frequently cited is *Como Tire*, and an illustrative point there is that the expert initially tried to rely on photographs of tires, rather than inspecting the original tire in his analysis. And that was one of the hearts of the *Como Tire* case which led into *Daubert* and the like. Next slide, please.

ROB DUCATMAN: There are generally two roles of an expert: The first is consulting and the second is testifying. The rules provide that a consulting expert need not be disclosed or be subject to discovery. They can be very helpful early on in the case, particularly if you're dealing with complex subject matter, and you are looking at issues such as causation or perhaps infringement of a patent, and you're trying to determine whether what process or product you're manufacturing or using infringes certain limitations in a claim. This—the fact that you don't have to disclose the expert—allows him or her to provide you with confidential information concerning any kind of fact investigation they might perform and you can maintain the privilege.

A testifying expert, on the other hand, has to be disclosed, will be subject to discovery, and will be subject to deposition. That expert is one who is to assist the trier of fact and provide opinions at trial. Obviously, as Steve mentioned, able to answer hypothetical questions and those people have to be objective and they have to maintain their integrity.

A couple of things that you need to make the determination of as in-house counsel—and of course you use your outside counsel to do this—but you should do it early on. I think most experienced litigators would tell you that the American system of justice is a bigoted system; it just happens to be better than what's out there. So, when you're evaluating an expert, you need to not only evaluate the credentials but evaluate how, in fact, they appear and how they may testify, which may

lead you to make the determination that a particular person should only serve as a consulting expert rather than a testifying one. Next slide, please.

KERRY SCHALDERS: Thank you. Roberto, can you go ahead and introduce our second poll question for the audience?

ROBERTO SCALESE: Sure can, Kerry. Would our respondents please take a look at this question: "Have you ever engaged a consulting expert to help prepare your company for litigation?" Please select "Yes" or "No."

I'll leave the poll open for just about three more seconds. It looks like everyone who's going to vote has voted. OK. And as you can see by the results, 75% of our respondents have, in fact, engaged a consulting expert to help prepare their company for litigation. Kerry, back to you.

KERRY SCHALDERS: Thank you so much. And I'll admit I'm one of those. All right. Next gentlemen, let's go ahead and cover briefly the rules of reporting.

STEPHEN SELISKAR: I'm reminded of the judge's admonishment in one trial that I was involved in where they basically said "if you need an expert, you better have one." I think that's the fundamental rule to follow, and frequently that's to aid the trial team in understanding the complexity of the situation, certainly before any sort of settlement discussions may be realized and then ultimately, of course, if there's a need for actual opinion testimony at trial.

The rules of reporting are covered here just to refresh everyone's recollection as to what ultimately is going to be required of that expert in the level of detail, so that these are really expectations of what you will need to work with your expert and engage in. Generally, the report that the expert will issue will be defined by the local forum, but Rule 26 is the federal forum for that. Many states have adopted, in whole or in part, these. And if, candidly, you don't follow these rules, it's the first 10 questions of a deposition in any regard. So, it will be in the record. But it is limited to the particular case in which it's filed.

A complete statement of the opinion: Now, you heard Rob express very clearly before the need to have the opinions in the report. There's kind of the four-corners rule out there in many jurisdictions that if you can't demonstrate where you express the opinion in the report, come trial time you're not going to testify to it.

Now, we talked a little bit about the data on which the expert witness considered, and there's a difference or divergence between courts and forums as to whether or not that data or documentation or information needs to be everything they considered or everything on which they relied. And that's a fundamental difference between federal court and most state courts. But be prepared that any document that's exchanged or provided ultimately would be something that was potentially considered, as opposed to a more brief subgroup of documents or information that the expert ultimately relied upon.

Any exhibits that one would expect should be in support of the opinions. Now, this comes into play because in many jurisdictions if it's not, in substantive form, an exhibit in the report—an attachment—it's not going to be a trial exhibit at trial. So, I know there's a wide range of thinking in this regard, but be prepared that if the analysis isn't provided in the report, it may never be a trial exhibit.

Obviously, the qualifications of an expert are that person's resume, any publications that they've produced in the last 10 years. And I know that this list is getting laborious, but this is an area where you really need to do your research. Read the publications, know the content, know the point of view that the expert has expressed in those publications, because it is mission-critical to your engagement of a particular expert.

The compensation that's paid [is] certainly something that is near and dear to the expert and probably near and dear to anyone that's writing the check. A list of all other cases in which the expert has testified in the last four years; again, this is a point of due diligence. Go back and look at the testimony that was in those cases. I think you certainly, as a general rule, want to avoid any conflict in types of testimony or expressions of what was the best methodology to use or etc., etc. So, be

aware there.

Certainly the report—and this is fairly fundamental—needs to be signed personally by the expert. And my view of the world is that because [of] the time lapse in many trials and discovery process, and certainly from the issuance of an expert report to trial and perhaps appeal, it's very important that the expert's report be very well-supported. I like to use annotation all the way down to base numbers references. And while this may seem to be gratuitous, it ultimately pays huge dividends. I believe it ultimately lends a thoroughness and appearance of rigor and dependability, reliability. These reports may be put in front of the judge way before any trial would occur, and so I think it serves a very good purpose, not the least of which is to have a thorough documentation so that an appeal that may take years, for example, it remains very, very well-documented. Next slide, please.

KERRY SCHALDERS: Before we move on, we've had a question which I think would be a great time to address it now. A lot of the litigation that we handle as in-house counsel is—the three major players here are going to be our outside counsel, the in-house counsel member, and the expert. And in your experience, gentlemen, where do you think that in-house counsel could be more helpful in sort of setting this foundation with the reporting?

ROB DUCATMAN: This is Rob. The in-house counsel can be far more helpful if they would get involved earlier in the process and if they were involved both with the compilation of the report, and, in fact, the review of the report before it's served. It's much more helpful to have the in-house lawyers, particularly, interface between technical people within the company and outside counsel as soon as possible so that there is a clear understanding of what the function of the expert is retained for that particular case, and what the expert can testify to, and, in fact, how the expert will testify. If the in-house lawyer attends no other depositions in a case, he or she should attend the deposition of the expert. Is that sufficiently responsive, Kerry?

KERRY SCHALDERS: I think it is. Well, I'm sure we'll see more come in if there's more detail desired. Thank you very much, Rob.

ROB DUCATMAN: OK. The next slide, please. All right, what's discoverable between a testifying expert and the opposing party? Everything. All oral communications are discoverable. The expert report itself is discoverable and can be subject to deposition. Any testimony at prior depositions can be discoverable. Any affidavits or any other documents that may be prepared for purposes of litigation. The rebuttal report (if one is used) is discoverable. Prior trial testimony is discoverable. All work papers, documents, drafts are discoverable, as are bills. You must remember that the expert, even though retained by you as a litigant, is not subject to the attorney-client privilege between you as a litigant and your outside counsel, so any and all discussions will be the subject of discovery by your opponent.

With respect to drafts, I have seen countless depositions in which the expert and my opposing counsel spend hours discussing drafts and revisions to drafts—who made them, why they were made, when they were made—and the practice has become silly. So, one of the things that I suggest to in-house lawyers in terms of instruction to outside counsel is when experts are retained, tell your outside counsel to try and reach an agreement with the opponent that no drafts will be produced and all drafts will be destroyed. And the only discovery will be directed to the actual expert report itself in final form. It'll save you money, it'll save you time, and the only thing that's pertinent is the report itself in any event.

Another thing that is problematic is: In-house counsel tend to become enraged many times at the bills that experts submit, and there's this theory that there is a great deal of bias that can be generated in a courtroom from them. The answer to that is, yes, bias can be shown because the expert is billing time by the hour or by the engagement. However, the bias is minimal and really doesn't do you much in the way of impeachment of the expert before a judge or a jury. In fact, what I like to see are experts who actually provide me with very detailed statements as to what they did, when, and why, so it can be shown to a judge and a jury how much effort they actually expended in preparing the opinion that's now being entertained in the courtroom. Next slide, please.

STEPHEN SELISKAR: Thank you, Rob, and I was recalling in your response to how can in-house counsel be most beneficial. I mean, you have the ability, I think, as general counsels, to provide the roadmap through the organization. In

many respects, your view of the history as to how we got to where we're at is just vital. Your ability to provide that sense of direction, I think, is a great opportunity to be most efficient and save costs and expenses that are troublesome to begin with. So I think that the ability to provide the roadmap and the history is just mission-critical.

I would also add that in certain particular industries that may be unique, or the way a particular company operates, those things, if brought to the forefront early on are very important knowledge that you may take for granted, but I think a healthy dialogue about, "Here's what we do; here's how we do it; here are the players," is just superbly important. Early on, and don't just say it once. I would say it multiple times to the litigation team.

Evaluating potential experts is obviously a critical decision. So, I think when you evaluate what is really needed, I think in terms of the role. What is that person's role? What is their contribution going to be to both the team and ultimately the court? I think, if things work very well, you never make it to court, and that's how you've got to do litigation work, from my view as an expert. So I think being involved early on in potential discovery, settlement discussions, and the like, is really the way to win at this game, as opposed to having to try every matter for sure.

When I say scope, it's what will be the types of opinions? What will be the coverage of that opinion that will be required in court? Will it be a calculation of damages for lost profits, or would it be something beyond that? Would it be a patent infringement reasonable royalty, or would it be beyond that? So, I think, while you cannot necessarily predict the future, I do think you can make a very informed decision in the engagement of an expert as to: Can this person fulfill the multiple roles that we see in all likelihood being there? And will they be able to express that kind of an opinion based on their knowledge, skills, training, resume, etc.

What expertise is critical? In many instances, the expertise of "I have done this kind of a patent infringement calculation" may be the most important. However, increasingly in complicated litigation settings we see that the industry knowledge may really be the most important and the other functional expertise or experience may be secondary. It's still very important, but perhaps it's the jargon, the lingo, understanding the real operational aspects and the financial consequences of transactions in a unique industry that are really the most important. So, I routinely see—and we're going to get to beauty contests—in the questioning: What is your relevant experience on this subject in this industry? And generally, again, industry is going to carry the day here.

What is the likely impact of [an] opposing expert? I think you need to really think through, and many times, because you know what legal counsel is on the other side, you may have a foregone conclusion as to who the opposing expert may really be, but the conventional wisdom is: You generally want a little more experienced expert than the other side, for sure. I mean, no sense in fighting this game fairly.

I think the other attribute of it is that damage calculations, for example, can be done by different professions. One is certainly the accounting and CPAs out there, and then also, on the other side frequently are economists. And I think you need to wade through the nature of your case and make that kind of an informed decision too. So think about matching up with who the opposing expert might be or what they typically appear with.

Conflicts and relationships—and the rules here get increasingly convoluted, and I think it's just something you need to really think through and have a good hard look. And conflicts, in this sense, is beyond that of the legal definition, but I think it goes also to thinking about the relationships and where else this resume has been with respect to other clients, other customers, your vendors, etc. So, [it is a] pretty complicated world of relationships out there. Not that these will be the ultimate influence on a decision, but I think there's things you should be aware of and consider going in.

Cross-examination: Here, I wanted to come back to a couple of the points I made before. Think through the publications. Think through the prior testimony. Also think through prior employment and where that expert has been. If they've come out of industry, you need to really think through that process, particularly if it's just a recent event. There may be some baggage there that is neither good nor bad, but I don't like surprises, and I doubt that you do, either. Next slide, please.

So, we have kind of set the table for now evaluating that potential expert, and this is a different view than the prior slide, and I think these are attributes that you might think about [and] keep in mind. You're really looking to this expert to help you through the nature, facts, circumstance of the case, and really bring to bear their expertise to help the litigation team. Relevance: Has their experience been on point? Have they testified successfully on the particular elements of the matter? Are they familiar with the industry as we talked about just a minute ago? So, these are things that you should consider when evaluating a potential expert.

Credibility goes beyond the mere notion of credibility; it goes to the ability to persuade. Not persuade beyond the obvious or the facts, but to really be able to present the factual presentation and defend it with a great deal of rigor.

Reliability: Are they dependable? Are they there on your team working hard in your interest and can they back up those initial bold statements that are made?

Specialized knowledge: We talked about industry, which is very, very important in my mind.

Qualifications: The resume is it. But I want to go beyond the search through the resume of just looking for the attributes that you like, as to whether or not they support the position, but consider the resume in its totality. Look[at] what's there, look [at] what's not there, and go beyond to the entirety of the resume. So, do the due diligence.

Cost: I think it's important to understand how the expert is going to work; what they need. A very, very strong piece of advice I would give to this group today is that the more dialogue you have with the expertise, and how they're going to approach things—what do they need—ultimately means a much more efficient, much less disruptive approach. And this is at a time when—let's face it—the executive capacity in a large company doesn't have the time to be distracted by this, so you can be very helpful in this if you approach that up front with counsel and the expert. Rob? Next slide, please.

ROB DUCATMAN: So, what do you do when you're going to engage an expert when you're being told that you should engage an expert as early as possible in litigation? Well, many companies and outside counsel have interviews with various experts right when the matter is beginning. And you have limited information at that time; generally, all you have is the complaint, perhaps some prior correspondence with the opposing party, and some perhaps basic understanding of what might be the facts in issue. What do you look for?

The first thing, as an in-house lawyer, that you ought to look for is: You ought to have your outside counsel in a meeting with the expert along with you, and the outside counsel should be the person who is going to put that person up at trial if it's going to be a testifying expert. Right away, you've got to pair those two together.

What do you look for when you're interviewing the expert? Well, the first thing you look for is what kind of representations they've had in the past. What are their qualifications and what are their points of experience? Just basic things. And you should go beyond the CV, because many times the CVs can be misleading, or there are things on the CV that can come back and haunt you during cross-examination. You look at prior publications or testimony, and what you want to see are prior publications in something that is relative or at least close to the subject matter of the lawsuit, so that testimonially your witness will at least have some prior experience.

You have to evaluate independence. For Sarbanes-Oxley purposes, that could be a terrible problem. For example, if I wanted to retain my friend Stephen here, and somebody on his tax accounting side is auditing the client that I currently represent, I can't do it and I have a problem. You also want to look at potential conflicts. There are some rules in some professions—accounting—and in some jurisdictions that provide that if an expert is working in a certain field, or someone else is working in his firm in a certain field, he or she may not be able to testify. Or if they have testified adverse to an issue, there may be decisions in certain states that the expert can't work opposite the positions they've taken in the past.

And finally, you want to look at the expert's prior business relationships. If the expert has testified for competitors, he or she may not be one that you want to hire. And finally, you ought to look at the expert's proposed letter of engagement, or the

terms of conditions, or what kind of arrangement you want to have, because it will all be discoverable, and yours truly is still an advocate of a handshake and a bill. Next slide, please.

All right, what works with experts? As I have been proselytizing, early involvement in the case. The earlier the better. An expert can assist you with both written discovery and preparing to take critical fact witnesses. The expert should be advised and, in part, may help you formulate an objective in litigation. What would constitute a win?

Obviously when you are dealing with an expert early on, you do what to verify that the credentials the expert is bringing to the table—or that the other side's expert is bringing to the table—are supported. They should be neutral. Yhey should be objective. They should be able to tell the truth, and the truth should be one that is not necessarily an opposite of a lie; it should be one in which the expert doesn't embellish, doesn't speculate, doesn't create.

The expert should clearly have command of the facts, and again, the earlier he or she is retained, the better. That way, the expert can also allow you to evaluate the opponent's expert. And one of the things that we put in this slide is whether you want your expert to actually contradict or support statements of the attorney, or in fact, the opposing counsel. You should evaluate that early on because it will impact the expert's credibility.

STEPHEN SELISKAR: Just as a transitional comment here between slides: When we say the expert is beneficial to be involved early, let me give you kind of the horror-show phone call that I get from time to time. And that is that "We need to disclose experts tomorrow. Are you available?" And that happened to me at 7:30 this morning. I would love to be available. I would love to help in this matter, but I have no idea if I can accept that client or that engagement. I don't have the facts in the case to really say, "Geez, I could really help you. I really am an expert in this field, and [I can] really contribute to your team." I certainly want to. But at this juncture, discovery is done, so now I get to play whatever cards are dealt me. I don't get to actually do discovery and figure out what really happened. I just get to figure out what happened from the pieces and documentation—the agreements, the contracts—that are provided me.

And then finally, in this particular situation, the client has already gone through rigorous settlement negotiations, and that's why they're in the predicament they are in. So I am not quite sure how they were able to have a substantial financial settlement dialogue without the aid of a financial expert if they now need one for trial. They probably needed one before. So it's a delicate decision you need to make with respect to cost, but in all candor, the earlier we are engaged, I think the less expensive it is and the better the value. I know that's sort of ironic, but you get to work much more efficiently, and the ability to do things in a time-ordered fashion—coordinated fashion—I think is a real plus. So, when the tendency is, "We'll save some money if we don't engage an expert until we absolutely need to," I appreciate that tendency. I am also a strong advocate for, I think, at the end of the day, you save money by getting somebody on board early on. Back to Rob.

ROB DUCATMAN: All right, the next slide please. What doesn't work with experts? Although this list should be fairly simple, you see pieces of it occurring all the time. An expert that is a flagrant advocate or is biased to a particular position: If the expert continues to speak merely to hear the expert speak, or wants to educate the other side, fire the expert.

The second point is the lack of clarity, and the best way I can describe this is: I once sat through a trial in which I saw a professor from MIT, who is the foremost expert in the behavior of carbon particles and palmeric composites, answer a question by telling her lawyer she needed to place a differential equation on a blackboard. And she began about 2 o'clock, and at about 2:10 she was still putting up the same equation. The judge was sleeping. My client was passing me humorous notes. I was telling the client I couldn't cross-examine this woman because I flunked the course. By the time she was done—and she began to speak to the blackboard as she was putting this up—the judge had no idea what she had done. She had written a book, and this equation apparently had appeared in her book, and I had nothing to cross-examine her on and the judge really didn't want any cross-examination. She testified for about 30 minutes and nobody knew what she said. If there is a lack of clarity in the expert's presentation, fire the expert.

If the expert digs his or her heels in the ground and is unwilling to concede the obvious—for example, if you have a document and the expert continues to dispute the black letters that are on the white page—fire the expert.

If the expert overreaches, so they begin to move from hypothesis or theory to speculation or guess, such that things that are known as laws of physics, such as Faraday's Law, are changed by the expert, fire the expert.

If the expert doesn't do his or her homework, if they haven't learned the facts of the case, or there has been inadequate discovery preparation by the expert, fire the expert.

And I think that you can see, as I go through this laundry list, what you can actually get if you have a hastily-prepared report. If you have a report that is plainly plagiarized, and the expert contends that all of the information contained in it was actually authored or created by them, fire the expert.

If the expert is going to testify outside of the four corners of his or her report, because suddenly they feel that they must be an advocate, fire the expert.

You have to understand, too, that you can challenge experts through *Daubert* before the expert testifies at trial, and consequently you may be able to knock out your other side. The key to understanding this is: If the expert is behaving in such a way that doesn't permit you to control the expert, or the expert has gone astray, fire the expert. For example, I have trial by deposition, many experts for some reason cannot simply answer questions yes or no with "Yes" or "No," and they want to become advocates at deposition. If that is the case, unfortunately, you must fire the expert.

And finally, as early as possible, and to the extent in-house counsel can be involved in this, when outside counsel is involved with the retention early and there are these early meetings with experts, have the expert go through some model cross and see how the expert does. Next slide, please.

KERRY SCHALDERS: Thank you. Before we move on to the next slide we have a question that would be ideally answered here. And it touches on something you said about the expert basically needing to be remediated. So, at this point, let's say you are preparing for trial, you've done the deposition, and unfortunately your expert has not turned out to be what you'd hoped. And, in fact, maybe some damages calculation that they have come up with is nowhere near what our expectation as in house counsel is, or what our strategy is. So, what do we do to remediate that expert? And at what point do we want to provide additional information for consideration of that expert? And how do we go about that procedure of trying to leverage the expert into the standpoint that we, ourselves, want to come forth at trial?

ROB DUCATMAN: Well, I think this really is the function of outside counsel, and unfortunately sometimes you have to take a very hard line with experts, including, at times—and this has happened in cases in which I have been involved—withdrawing the expert. I mean it. Firing them, and eating the investment and getting somebody else, and asking the court for additional time to retain a new one.

In terms of remediating the expert, there are times, Kerry, where you actually have to sit back, look at your expert in the eyes and scream at him or her to shut up. Just plainly, shut up. And sometimes there's one or two words in between the "shut" and the "up." And that is the only way by which to do it. The expert has to be brought under control all the time.

Too often you see people who are true academicians or consider themselves truly the only expert in the field, and they are not. No matter who you retain, no matter what type of case you have, whether it's a complex product liability case, a property damage case, a patent case, no matter what it is—whether it's intricate financial accounting—there is always someone else who can be found who can be retained by the other side that might be equally credentialed or better. So, one of the things you need to do with respect to that is really take a hard line with the expert and, in part, you might have to withdraw. Another thing you might want to do is before trial—and unfortunately this is expensive—if you're dealing with a bet-your-company case or a bet-your-product-line case, retain more than one. And try and determine which one will be better testimonially faster.

STEPHEN SELISKAR: I think when it comes to remediating an expert there's a couple of things to consider, one of which is the ability to unring the bell is generally just not there, but there is frequently a lot of time between deposition and trial

where the case takes some twists and turns through various rulings and the like. So, it's not unusual to see a case become much more focal, and some of the peripheral issues may fall by the wayside that may clean up the presentation of the case with the experts involvement would be one approach. The other is: It's not unusual—it's embarrassing, but it's not unusual—to see the expert reissue a report and admit that there were things that weren't facts, things they weren't aware of, or mistakes made, and that's just a good, honest response, and reconstitute the report. Generally, it's going to be subject to a secondary level of discovery, including deposition, but hat might be the best move. I think the record that I have seen with an opposing expert is that they issued six different reports and opinions, ultimately—one of them in the middle of trial. So, I am not suggesting that that be acceptable, I am just suggesting that there is some precedence for fixing things when they're broken. If I were in a situation, though, where the expert is shown documents that they simply had never been provided and they impeach him, that expert has to sit there and say, "I am not familiar with that. Yes, it is something I would consider," and the like.

So, again, I would come back to one of the ways to increase the probability of avoiding those problems is [to] get the right expert, do the due diligence, get him on board, work with him to minimize those kinds of exposures. If the failure of the expert really demonstrates a failure of the facts in the matter, then you know you need to reassess the case. If the expert's failure demonstrates purely a failure of the expert and their expertise in what they were engaged to do, then I think Plan B is get another expert or look at the ability to, at times—and I know Rob is going to hit this in the next slide—is: Can you really get a lot of what you need in tactically through the opposing expert? They will frequently agree that certain kinds of calculations are appropriate, and you get to plug in the data with them and you can kind of recalculate, as you will, in a financial damages case sometimes through the opposing expert. So there are some techniques, none of which are as good as Plan A, and that is: Get the right expert to do the right things and really get him on board early and help you out.

KERRY SCHALDERS: OK, thank you very much. Let's go ahead and segue into the next slide.

ROB DUCATMAN: All right. One of the things I find that occurs frequently in litigation is that an opponent's expert report will be served and my client, the in-house counsel, really becomes outraged that an opposing expert could have an opinion that is somehow adverse to the position that my client wants to advocate. And the immediate reaction, many times, from an in-house lawyer or a general counsel is: Beat the living hell out of them in deposition. Attack him head on. And many think that's the only way by which you can attack an expert. And it's not. And I put together essentially the eight ways I believe an expert can be cross-examined in this slide, particularly for in-house lawyers. Because the attacking of the expert head on may work, and it may be the only way by which you can do it, the theory being that you shoot the expert full little holes, and either all the air leaks out and therefore you've destroyed his or her report or credibility, or it's a type of cross-examination in which it's not what you do in cross, but how you do it. And this is just not so. There are a number of other ways to cross-examine an opponent's expert that I think all in-house lawyers should be aware of and should ask their outside counsel about.

The first that I have listed here is: Make the expert your own witness. And how do you do that? Well, consider just an example. Consider, for example, a brain injury case in which the plaintiff's expert opines that the brain injury is caused by your product, and your expert believes that the brain injury was completely congenital and was just caused by growth of the being. Well, taking the expert head on in that type of situation will not work. It'll result in disaster and allow that expert to continue to testify at trial pretty much unscathed. But since neither expert really disputes what the cause of the injury was, you might want to tell your own lawyer, "Can't you restrict the cross to the injury itself?" For example, if you just put a few questions to—let's presume it's a physician—that go like this, "Now, Doctor, you don't dispute the existence of the injury, do you? And you don't dispute that the injury was serious, do you? And you don't dispute that the costs of medical care for the life of this poor brain-injured person is going to be substantial for the rest of his or her life, do you? And you don't dispute that the plaintiff will never be able to work again, never be able to enjoy life again, never be able to watch their children get married," what have you. Once you have done that, you have converted that expert, in part, to your own, and that's doable in most every case.

The second thing that you can do is: Attack the expert on his field. Many times in product liability cases you see experts, for example, who are accidentologists. Or that type of expert. And you see, because the federal rules are so broad, experts being named in all kinds of areas. And the cross of somebody like that is equally easy. You can just look at that expert and say, "Now sir, I am confused. What do I call you? Professor? Doctor? Or Mister?" Or, "Now, let me get this straight. What university did you attend to get your degree in accidentology?" Or you can use "Let me get this straight"—for example, if you're dealing with an auto accident case or a case in which there was some other terrible accident and you're dealing with

an accidentologist—“You never worked for the police or any other law enforcement agency that investigates accidents. Isn’t that right?” And again, what you’ve done is just attack the subject matter.

You can then also attack qualifications, and this field, folks, is huge. It covers any kind of training, education, or experience whatsoever. No matter how well-qualified a witness you think you have is, there is always somebody on a level that he or she hasn’t reached. And for that, you can always examine the witness. One of the things I was telling Steve about just recently is what is known as the case of the Bronze Buffalo Award, in which an expert, who truly was an expert in his field but was so vain, recorded on his resume that he had been awarded the Bronze Buffalo Award for Citizenship in his junior high school. And of course, when cross-examined he was asked, “Well, Doctor, was there a Silver Buffalo Award for Citizenship?” And embarrassingly he said yes, and of course the next question that followed was, “Was there a Gold Buffalo Award for Citizenship?” And the guy truly got embarrassed and got hot, and then kind of ruined the rest of his day when he was testifying. So, you can always attack qualifications, and you should also be very, verycareful to check the details of a resume of an expert, particularly when you’re hiring them early. If you see something like the Bronze Buffalo of Citizenship Award when the expert was 13, fire—do not hire—that expert.

We’ve talked about bias before. You can look for huge fees. You can look for prior representation in the industry. If the expert is routinely being retained by particular segments of a particular industry, they will be subject to bias. You can always attack facts. Watch for the expert who relies, for example, on the work of others. There are four simple questions for such an expert that the expert can never deal with. You can say, “Doctor, can we agree that your opinion is no greater, no better, than the information upon which it is based?” And you’re going to get an affirmative answer. And then you can ask, “If the information you were given is inaccurate, isn’t it true that your opinion would have to suffer too?” And the “would have to suffer” is my own language, because it works all the time, and it gets an affirmative answer. And then the third question is, “Which is why you would rather gather the information yourself or perform the tests yourself, or have witnessed the events yourself, rather than have to trust someone else who did before, isn’t that true?” And you’re going to get an affirmative answer. And then, of course, you always follow it up with, “But you were not given the opportunity to do that in this case, were you?” And that answer is yes.

KERRY SCHALDERS: Unfortunately, at his point we are running out of opportunity to continue the discussion. It’s clearly a topic that we can spend a lot of time addressing, and unfortunately we are, at this point, just about out of time. So thank you very much, Rob, and just to quickly go through the last couple of items here on cross-examination, if we could.

ROB DUCATMAN: They’re really very simple, which is to vary the hypothetical. You can always take facts out that you should have included, or you can always insert facts that you should have included in the reporting. You can always take facts out with the expert that should be excluded. They have to be something reasonable, but if you’re looking at a financial expert, for example, you can always vary the calculations that they’re using or the manner in which they are making computations.

Treatises: This point is really simple. If the expert you’re looking at differs from what most experts have opined on the field, all you need to do is shove a learned treatise under their nose and say, “Do you agree with Dr. Frankenstein, or that Dr. Frankenstein is learned in this area?” and then use that for cross-examination later. And finally, as we have discussed, if all else fails, you can attack the expert head on. Thanks very much.

KERRY SCHALDERS: Thank you very much, Rob. And thank you, Stephen, for your expertise as well.

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KERRY SCHALDERS: Well, Stephen Seliskar, partner with Ernst &Young, and Robert Ducatman, partner with Jones Day,

have been our panelists on this powerhouse topic. Thank you to all the attendees for coming to hear about the use of experts in finance and accounting cases. The ACC Litigation Committee invites all of us to join the call on August 25th, Tuesday at 4 PM Eastern time, if you'd like to spend some time with the Litigation Committee. And we also invite the ACC membership to attend the ACC annual meeting in Boston on October 18–21. And a final thank you to Ernst & Young for sponsoring this webcast. And please feel free to submit any final questions before logging off and we will be able to respond to you after the fact.

ROBERTO SCALESE: OK, on behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thank you again for listening to today's program.

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The program is now concluded. Thank you again and have a great day.

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