



WILMER CUTLER PICKERING HALE AND DORR LLP ®



## *When You Should Call in The Experts!*

# *Practical Tips on Hiring, Vetting, and Managing Experts in Litigation and Company Investigations*

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Presented by Brent Gurney and Rachael Kent (WilmerHale),  
Jessica Morrison (KPMG), and Alex White (Bank of America)



## *Introductions*



**Brent Gurney**  
*WilmerHale*



**Rachael Kent**  
*WilmerHale*



**Jessica Morrison**  
*KPMG*



**Alex White**  
*Bank of America*



“No, you weren’t there. But in your expert opinion as a certified brainiac, do you *think* he did it?”

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# *Selecting an Expert*



## *When Do You Need An Expert?*

- Consulting expert
  - Helps attorneys to understand and evaluate technical issues in a case and to develop strategy
  - Not expected to be called as a witness
  - Work product not subject to disclosure
- Testifying expert
  - Expected to testify
  - Materials may be subject to disclosure
  - Role is to persuade fact finder



## *When Are Experts Allowed?*

Generally:

- Expert witnesses who are qualified by “knowledge, skill, experience, training or education” may testify if
  - That will help the trier of fact to understand the evidence or to determine a fact in issue;
  - The testimony is based on sufficient facts or data;
  - The testimony is the product of reliable principles and methods; and
  - The expert has reliably applied the principles/methods to the facts of the case

Source: Federal Rule of Evidence 702



## *Qualities Of An Effective Expert Witness*

Depending on the case and tribunal or court, need to balance and rank:

- Subject matter expertise
- Perceived independence
- Credentials and seniority
- Experience testifying
- Experience writing expert reports
- Availability for hands-on engagement in analysis and preparation of evidence
- Availability of assistants and professional staff
- Ability to speak language of the court or tribunal
- Cost



## *Vetting Expert Witnesses*

- Independent Research
  - Publications
  - Prior testimony
  - History with client
  - Consult with other counsel
- Exploratory Conversation
  - Gauge fit, qualifications, and interest
  - Ask the tough questions
  - Gauge ability to communicate and present
  - Explore prior testimony in similar cases or on similar issues
  - Conflicts: Ask expert and independently verify
  - Discuss potential timing and resources (including rates)





## *Expert Testimony In International Litigation And Arbitration*

- Expert evidence is often submitted on:
  - The content and application of the governing law, especially if it is outside the knowledge of the court or tribunal
  - Industry practice (e.g., meaning of standard contract clauses, how risks are typically allocated, “commercially reasonable” or “reasonable efforts” provisions)
  - Technical issues
  - Quantum issues
- Subject matter may be limited by national law or court rules:
  - E.g., in England, permission of the court is required (CPR 35.4(1)) and the test is “strict necessity”



## *International Practice: Party-Appointed vs Tribunal-Appointed Experts*

- In common law systems, typical to have party-appointed experts
- Civil law systems typically have procedure for court-appointed experts
  - May be at the request of the parties or through the court's own initiative
  - May be selected from a register of experts maintained by the courts
  - Parties may be able to provide input on selection of experts and instructions
- Civil law systems may also allow parties to submit their own expert reports, but those are often given less weight
- In international arbitration:
  - Typical to have party-appointed experts
  - Also possible to have tribunal-appointed experts, particularly in civil-law seats or with civil-law tribunals



## *International Practice: Standard Of Independence*

- Court-appointed experts generally owe duty only to the court; civil procedure rules may allow or exclude contact with the parties
- In some jurisdictions, even party-appointed experts may have a high standard of independence and may owe a duty to the court or tribunal
- For example, in an English court:
  - The expert's duty is "**To help the court** on matters within their expertise"
  - "This duty **overrides any obligation to the person from whom experts have received instructions** or by whom they are paid"
  - "Expert evidence **should be the independent product of the expert uninfluenced by the pressures of litigation**"
  - "Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate"

# *Working with the Expert*



## *Utilizing The Expert*

Experts can help the counsel team in:

- Developing a theory of the case
- Fact discovery
  - Assist in development of document requests and interrogatories
  - Identifying helpful documents to produce
  - Identifying public record materials that support the case
  - Record building on direct of friendly documents
  - Advise on lines of cross-examination for deposition of adverse witnesses and third parties
- Providing affidavits in support of summary judgment and other motions
- Expert reports



## *Scope Of Expert Reports*

- Affirmative – Report sponsors a key idea or theory in the case
- Rebuttal – Report responds to opponent's expert report
- Hybrid – Report both responds to opponent's expert and offers affirmative opinions on ideas or theories in the case
- Choose narrow issues



## *Expert Reports*

Fed. R. Civ. P. 26(a)(2)(B) – The report must contain:

- (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;

Also information on compensation, prior testimony, and qualifications



## *Tips For Dealing With Outside Counsel*

- Provide clear guidance about your role and expectations
  - Budget
  - Extent of in-house counsel involvement in selecting and working with experts
  - Periodic updates on themes, issues development
  - Feedback on expert performance
- Insist on adequate time for review
  - Draft expert reports
  - Deposition and trial testimony outlines





## *Expert Reports: Traps For The Unwary*

- Drafts discoverable?—depends on jurisdiction
  - FRCP: Discovery of draft expert reports now prohibited
  - Rule 26(b)(4)(C) protects communications between a party's attorney and expert witness *except to the extent that such communications*
    - Relate to compensation
    - Identify facts or data provided by the attorney and considered by the expert in forming his or her opinions
    - Identify assumptions provided by the attorney and relied on by the expert in forming his or her opinions
- Rule 26(a)(2)(B)(ii) no longer requires that an expert report disclose all “other information” the expert relied on in forming his or her opinions.



## *Motions To Exclude*

- Can make a motion to exclude if expert testimony was not timely disclosed
- Can make a motion to exclude if testimony fails to meet the standards for admissibility
  - Federal Rule of Evidence 702
  - *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)
- Considerations before filing *Daubert* challenge:
  - It may show your hand for cross-examination
  - The other side may cure the deficiency
  - It may be helpful to give the judge/tribunal an early primer on the science issues



## *Depositions - Objectives*

- Lock the expert in to his or her written opinions
- Understand scope and basis of expert's opinion
- Understand process that led to forming opinions
- Explore expert's background (e.g., to discredit)
- Create record for motion in limine
- Admissions for summary judgment and trial



## *Always Keep An Eye On Trial*

- At every stage of fact and expert discovery:
  - Revisit the **elements of proof** and consider whether you have admissible evidence to prove / disprove the elements
  - ***Review model jury instructions during discovery***
  - For any helpful / unhelpful evidence, ask:
    - How would this be admitted—or kept from being admitted?
    - What can we do to maximize (or minimize) admissibility?



## *Always Keep An Eye On Trial*

- Refine the **narratives and themes** in light of the evolving record
  - Sometimes the narrative and themes will change dramatically over the course of a case
  - Need to be willing to take a fresh look based on newly developed evidence—or new and creative ideas
  - And, as with the elements of proof, need to constantly ask:
    - How will we prove (or disprove) this theme through admissible evidence?



## *How To Be A Good Prep Lawyer*

- Prepare, prepare, prepare in advance.
  - Have a clear plan and clear teaching framework ready.
  - Be organized, and don't have too many people talking to the witness.
  - The person who will present the witness needs to be the clear leader of the prep, even if some prep sessions occur without that person.
- Don't make the sausage in front of them.
  - Don't show stress.
  - Set aside 20-30 minutes after prep to debrief AFTER witness has departed.
  - Now is the time to discuss problematic answers and strategy for the next prep.
  - "Play the other side of the chessboard" outside the presence of the witness.



## *How To Be A Good Prep Lawyer*

- Do not overload them with too many tips before mock practice.
  - Don't want to overwhelm them.
  - Don't want to overcorrect them.
  - Need them to digest the material, and not become over-anxious—streamlined advice helps accomplish these goals.
- Don't focus only on the negatives.
  - Don't only practice the difficult cross modules.
    - Could result in the witness being defensive during testimony.
  - Always have a proposed solution to every challenge—be affirmative and supportive.
  - If witness is lacking in confidence, revisit modules they excelled at to bolster psyche.



## *Working With Experts In International Litigation And Arbitration: Differences From US Litigation*

- Contact with court-appointed experts governed by national civil procedure rules
- Affirmative evidence generally comes in through written reports
- Document discovery may be limited or non-existent
- Depositions are generally not used
- Need to consider what privilege rules apply
- Direct testimony may not be allowed
- Tutorials or summary presentations by the expert may be allowed
- Experts in similar disciplines may be required to meet and confer to try to narrow issues in dispute
- Court or tribunal may require or allow “expert conferencing” or “hot-tubbing” where experts appointed by both sides are examined together





## *Working With Experts In International Litigation And Arbitration: Expert Meetings*

See, e.g., International Bar Association Rules on the Taking of Evidence in International Arbitration, Article 5(4):

“The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues **meet and confer** on such issues. At such meeting, the Party-Appointed Experts **shall attempt to reach agreement on the issues within the scope of their Expert Reports**, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefor.”

# *Expert Testimony*



*"Is this really necessary, Your Honor? I'm an expert."*



## *Preparing Your Expert For Trial*

Effective expert testimony:

- Provides clear, simple explanations, helping the judge or jury to understand the concepts and key issues
- Establishes the expert's credibility and makes the judge or jury want to learn from the expert
- Provides context when appropriate
- Yields when appropriate to maintain credibility
- Is not perceived as partisan



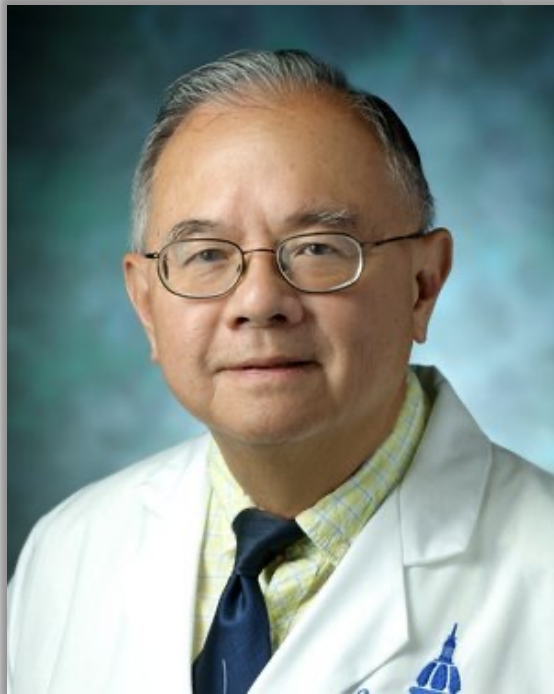
## *Cross-Examination: Objectives*

- Gain concessions on points of agreement that support your own expert's analysis
- Establish what is based on established law or practice and what is opinion or assumption
- Demonstrate how changed assumptions would affect conclusions
- Demonstrate lack of reasonableness and positions that are too extreme
- Demonstrate lack of commercial, real-world plausibility
- Show court or tribunal where expert strays into application that usurps their job
- Point out incorrect or missing factual assumptions
- Point out inconsistencies and errors
- Demonstrate lack of expertise or credentials



## *Attacking Expert Bias: An Example*

Dr. Daniel Chan, Ph.D.



### Works for Defendant

14	Your work on this case is not the first time you	
15	have worked for Roche, if I understand your previous	
16	testimony correctly; isn't that right?	
17	A No. I never worked for Roche.	
18	Q You have been doing work -- you have been working	
19	with Roche for several years before this case?	
20	A Are you talking about evaluation work?	
21	Q Several years ago Roche approached you and Johns	
22	Hopkins and asked you to try out the Elecsys	
23	instruments and asked you to evaluate it in your	
24	laboratory; isn't that right?	
25	A Yes, that is correct.	



# *Attacking Expert Bias: An Example*

## Luxury Trips

2 Q Also Roche has given you something as well,  
3 correct?

4 A Given me something? What do you mean?

5 Q In addition to the money that has been paid to  
6 the laboratory and apart from what you have received in  
7 this case, Roche has given you some trips to Europe,  
8 correct?

9 A I don't see that as giving me trips to Europe. I  
10 go there to work. I have to present the data. I sit  
11 down and discuss with the European clinical chemists,  
12 professors like myself about the result. It's a lot of  
13 work.

14 Q Roche paid to send you to Paris; is that right?

15 A There was one meeting in Paris, yes.

16 Q And you went there business class, correct?

17 A I told your attorney I went on business class.  
18 Actually, I don't remember the detail, but I'm assuming  
19 business class, yes.

20 Q That cost about \$5,000; is that right?

21 A Let's say it cost 5,000.

22 Q Roche paid for that, correct?

23 A That's a typical business class. I mean it's not  
24 extra money. Yes.

## Luxury Trips

14 Q So with three trips to Europe, we are talking  
15 about, say, \$15,000 in airfare and say another 5,000 or  
16 so in expenses for these three trips? Is that about  
17 right?

18 A Yeah, okay.

19 Q That is in addition to whatever Roche paid to  
20 your lab to do the evaluation of the Elecsys?

21 A Yes.

22 Q And you indicated that that's not all to your  
23 relationship with Roche. They continue to use Johns  
24 Hopkins to evaluate Roche products; isn't that right?

25 A Yes.





# Attacking Expert Bias: An Example

## Plum Advisory Board

1 Q In addition to all this other stuff we talked  
2 about, Roche asked you to join its Scientific Advisory  
3 Board, right?  
4 A Yes.  
5 Q This is a long-term engagement?  
6 A Well, I assume long-term; although, there is no  
7 commitment that, you know, that it would be continued.  
8 Q You expect the relationship to last into the  
9 future?  
10 A Right. Unless they told me otherwise, yeah.  
11 Q For example, if they were dissatisfied with your  
12 testimony today, they could terminate your  
13 relationship, right?  
14 A That's up to them. That's what you assume. I  
15 cannot say for Roche whether they are going to do  
16 that.  
17 Q And this is a, you would agree this is a real  
18 plum assignment, isn't it, being on the Scientific  
19 Advisory Board? This is a pretty good assignment being  
20 on the Scientific Advisory Board, isn't it?  
21 A Good assignment is better than the other  
22 description you said.  
23 Q Okay. Fair enough. They pay you several  
24 thousand dollars for being on the board, correct?  
25 A No. It's \$2,000 to attend a meeting.

## Cumulative Effect Not Credible

1 Q Now tell us this, Dr. Chan, did any of these  
2 things, the \$300 per hour for work on this case, the  
3 long-standing relationship that your lab has with  
4 Roche, the five all-expense-paid trips that Roche gave  
5 you to Japan, to Paris, to Portugal, to Germany and to  
6 Lucerne, Switzerland, the \$2,000 per year paid to you  
7 for your work on the Scientific Advisory Board, did any  
8 of these have any influence on any of your opinions  
9 that you have given in this case?  
10 A Not at all.  
11 Q Absolutely none whatsoever?  
12 A Absolutely none whatsoever.  
13 Q Is that your testimony, Dr. Chan?  
14 A Yes.





## *Examination Of Experts In International Litigation And Arbitration*

- In common law systems, experts are generally cross-examined by opposing counsel
- They may also be subject to questioning from the court or tribunal
- In civil law systems, questioning is often done by the court or tribunal
- Parties may be able to add questions or submit questions to the court
  - Parties may be able to question experts with leave of the court (e.g., German GCCP sec. 397, 402)
- Experts may be questioned together through expert conferencing or “hot-tubbing”
  - IBA Rules, Article 8(4)(f):  
(f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);



## *Key Takeaways for In-House Counsel*

### Selecting Experts:

- Assign clear roles for in-house and outside counsel in vetting and selecting experts
- Utilize internal company knowledge or industry sources to identify potential industry or technical experts
- Attend initial calls or meetings to evaluate potential experts
- Consider whether potential expert or proposed testimony is misaligned with company's strategy or position in other litigation or potential litigation
- Use a standard company engagement letter or carefully review engagement letter proposed by outside counsel – including provisions related to confidentiality, conflicts, ability to terminate engagement
- Carefully consider how expert will invoice for fees and be paid – may be important in cases where fee-shifting is allowed
- Ensure communications involve counsel to protect privilege



## *Key Takeaways for In-House Counsel*

### Working with Experts:

- Assign clear roles for in-house and outside counsel for working with experts
- Ensure communications involve counsel to protect privilege
- Consider maintaining an internal company database of experts, which is helpful in identifying potential experts, recording feedback on experts used in other cases, and checking potential conflicts
- Attend periodic status meetings and calls with the expert to hear the expert's own articulation of his or her analysis and conclusions
- Ensure that experts are engaged before or during fact discovery
- Ensure that experts are paid promptly to avoid tensions and potential lack of engagement at key moments
- Review draft expert reports and affidavits



## *Key Takeaways for In-House Counsel*

### Presenting Expert Testimony:

- Attend at least some of the preparation meetings
- Consider whether the expert should meet with fact witnesses or company representatives before trial
- Ensure the expert knows key details of the company's business or products
- In-house counsel is often well placed to evaluate whether experts are presenting their analysis and conclusions clearly enough for an audience not steeped in the details
- In-house counsel is often also well placed to observe whether there are inconsistencies or tensions among the testimony of multiple witnesses and experts
- Share feedback internally on how experts performed and use that knowledge in future cases



*Questions?*

