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**Maximizing The Value Of Expert Witnesses And Consultants**

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**Appendix A: Summary Of This Paper’s Key Recommended Practices & Tips**

# Introduction

Retaining an expert witness is one of the most significant decisions in construction disputes. No matter how skilled a trial lawyer is, the case will literally rise or fall on the strength of the expert witness(es) responsible for explaining the technical and financial aspects of the claim to the finder of fact. For this reason, the importance of retaining the “best” possible expert for your particular matter cannot be overstated (although “best” can certainly mean different things for different disputes—and often does).

The purpose of this paper is to discuss key issues confronting legal counsel, their clients, and, ultimately, the experts themselves in any construction dispute.

# Section 1: How To Find And Retain The Expert

There is no specific rule devoted to the way in which attorneys or their clients go about selecting and retaining experts[[1]](#endnote-1). Unfortunately, many practitioners don’t devote nearly as much attention to this important task as they should. Moreover, many clients fail to understand the significance of the expert retention process, and often have misimpressions about the process that can lead to bad judgments with respect to finding the right expert for their case. The purpose of this section is to provide a set of “best practices” to be utilized in selecting and retaining the expert(s) that may be required in any matter.

## Find And Retain Your Expert(s)As Early As Possible

This rule of thumb can be applied to every matter for which an expert or consultant is necessary: Do it as early in the process as possible. There are multiple reasons for starting the process early.

When the process is begun early, the attorney (and the client) will have the opportunity to discuss the case with the expert before too many strategic decisions have been made (or implemented). This can be critical to the success of the case, because it enables the expert to provide guidance on the claims and to identify possible challenges with or defenses to the claims. Having an expert fully engaged early in the process will enable a plaintiff’s attorney to file a Complaint that is more technically complete and accurate, and will enable a defense attorney to develop sound strategic defenses before a responsive pleading is filed. Similarly, having an expert on board at the earliest possible opportunity enables the expert to assist in the discovery process. This can be helpful in ensuring that the right documents are requested and questions are asked, as well as that the appropriate responses are provided. The expert can also provide valuable assistance preparing for and attending depositions. Further, having the benefit of your expert’s insights and opinions can be beneficial when weighing potential settlement options and scenarios.

Additionally, getting your expert on board at the outset will allow the expert to visit the site early, which is especially important if there is still work in progress, but is also important if construction has been completed. At or near the end of many construction projects, key project personnel often scatter to other projects or even other companies. You want to ensure your expert has the benefit of meeting with these people, if at all possible, before their availability diminishes or disappears altogether. There is no question that the sooner the expert makes his first visit to the site, the better prepared he or she will ultimately be on the engagement.

Finally, beginning the expert search as early as possible will ensure that you will be able to retain the right expert before another party does. If other parties to the matter (or potential matter) are aware of the dispute—and they nearly always are—they will be looking for experts of their own. Few things are worse in this regard than calling one of your “go to” experts in a particular discipline, only to find that your adversary has already retained that expert.

While there are attorneys and clients who believe that delaying the retention of an expert will save on expert costs, in the long run, it can often be more costly to wait. Although an overly simplistic way of looking at this issue is “the less time an expert has to spend on the matter, the less it will cost,” that is rarely the case. Strategies, tactics, and analyses that are hastily *developed* can lead to more confusion and inefficiencies, and in turn waste time and money. In addition, as noted above, not having the expert on the team early does not allow the legal team to benefit from the expert’s insight at the beginning of the process. There are many potential inefficiencies associated with late retention, and there can even be an undermining of the relationship between counsel and client with respect to preparing the best possible case for trial (or settlement). After all, there is little use in retaining an expert if not to maximize his or her experience and expertise to develop the best possible case for your client.[[2]](#endnote-2)

If you, the attorney, are concerned about sharing critical or strategic information with the expert, consider retaining a ‘consulting expert’ along with, or before, your testifying expert. You should retain the consulting expert in such a way that you can freely share critical or strategic information with him without concerning yourself about that information later being discoverable. If you hire both a consulting expert or team, as well as a testifying expert or team, consider retaining them separately, but from the same firm. If from the same firm, they should be able to work well together. Teamwork will be important and can lead to much greater efficiencies and therefore lower total fees.

Yet another tactic is to hire your expert as a consulting expert first under one Engagement Letter, and then setting up a separate engagement (and Engagement Letter) if and when you determine to retain him or her as an expert witness.

Either way, it is critically important that great care is taken to insulate the testifying expert from being exposed to any materials that counsel does not want disclosed. The consulting expert should review any and all materials and coordinate with counsel on materials that are to be shared with the testifying expert.

## Determine What Type(s) Of Expert(s) Will Be Necessary

While this may seem to be obvious, selecting the right type of expert can be critically important in a construction dispute. There is very rarely a “one-size-fits-all” expert, and sometimes, seemingly straightforward issues will require a multidisciplinary approach.

During the expert search (discussed below), it is advisable to have open discussions with potential experts about their (and their firms’) capabilities and areas of expertise, as well as their limitations. Many construction disputes involve a combination of architectural and engineering issues, and often, within the various engineering issues, there is the need to retain engineering sub consultants in specialty areas. It is common for even full-service architectural/engineering firms to look to sub consultants, particularly in the design of mechanical, electrical and plumbing systems and other specialty areas, such as vertical transportation, curtain wall, and roofing systems.

Similarly, while the success of a delay-related claim is very heavily dependent on the quality of the Critical Path Method (“CPM”) expert, most delay claims also involve other architectural or engineering issues for which experts in those disciplines will be necessary. When a contractor is delayed because of architectural or engineering issues (including issues related to constructability), a design expert will likely be required to establish liability for the issue, and a CPM expert will be required to establish the impact of the issue on the schedule. In addition, it may be necessary to utilize the services of an expert to either prove or rebut any claim for damages. Such damages experts may be Certified Public Accountants, experts in the area of real estate appraisal, construction cost estimators or cost consultants, or professionals in a variety of disciplines. The bottom line is that a holistic approach to expert retention is necessary in order to ensure that you have adequately covered any proofs that will need to be made in your case by way of opinion testimony.

## Identify The Anticipated Scope Of The Expert’s (Or Experts’) Role

Identifying the scope of the expert’s (or experts’) role in a matter is extremely important. Careful consideration should be given to the path the matter could take, whether it is the intended or expected path, or otherwise. Usually, if you are comfortable with the choice of an expert, it is assumed that the expert will be equally effective regardless of whether the matter is resolved through settlement (including mediation) or if the matter must proceed to trial or arbitration. There are circumstances, however, in which the legal team may wish to use a different expert for purposes of mediation than the expert who will testify in trial or arbitration, should the mediation be unsuccessful.

Identifying the work scope to the greatest extent possible early on will also enable the team to prepare a more accurate budget. It is helpful to have an expert provide an overview of his or her expected fees for the various phases of a matter, including initial groundwork, claim preparation, discovery, formal report, mediation, deposition, and trial.

## Search And Vet

Once the need for an expert has been clearly established, and after thought has been given to the areas for which you will need expert assistance and the scope of the expert’s role, the search process can begin. Most practitioners (or their firms) have a list of preferred experts in particular disciplines. Of course, such a resource can be the easiest and quickest way to identify potential experts in any matter. If you have exhausted your battery of contacts, and those of your intra-firm colleagues, it is helpful to seek input from colleagues outside your firm, or from other experts whose guidance you trust. After these sources have been exhausted, there are always internet and publication searches and other expert database sources that can be utilized. For example, the ABA Forum on the Construction Industry developed and maintains an expert database that is a resource that could produce expert candidates.

Once a potential expert (or list of potential experts) has been identified, it is time to make contact. Generally, the initial communication is made by telephone, where it is first critically important that care is taken to determine whether there is any potential for a conflict of interest. Although most experts are not governed by the same conflicts of interest rules that attorneys are, conflicts of interest with experts can still be problematic. It is prudent to address potential conflicts at the earliest possible juncture. Until you and your potential expert have determined that there are no conflict issues, it is best not to disclose anything of substance regarding the matter. Most reputable experts will be very helpful to you here, as they will be wary of obtaining any substantive information from you prior to clearing conflicts.

After any potential conflicts have definitively cleared, the next conversation—whether telephonic or in-person—should include a more detailed conversation about the matter to determine whether the expert is a good “fit” for the case. This is an excellent opportunity to ask detailed questions of the expert regarding prior experience and expertise related to similar retentions. Ask whether the expert has faced “Daubert” or other challenges to his or her opinions. Have these challenges been overcome? If so, how? If not, why not? Are there any written decisions—whether from a trial court, appellate court, or arbitration panel—in which the expert’s work has received any comment?

The expert should be asked to provide: a current copy of his or her *Curriculum Vitae*; a complete list of all matters in which the expert has offered opinions or authored reports (including matter names and case numbers, if possible, as well as the counsel on both sides of the matter); specific details of experience in similar matters; a list of references; and a draft Engagement Letter. While this is certainly more than may be required under the disclosure rules, it is prudent to request this level of detail when performing the initial search for an expert. In addition to the review of these materials, counsel should perform his or her own searches at this stage to identify any “red flags” that may exist with respect to the potential expert, including any internet posts concerning his or her past testifying experience. Thoroughness at this stage is key. Identifying any potential issues up front can help counsel and client avoid potentially significant challenges later on.

The initial interview process should also seek to identify specifics about the expert’s preliminary thoughts regarding the matter, as well as a description of any and all opinions on similar issues that have previously been offered by the expert—even tangentially. During this process, the legal team (as well as any necessary client representatives) should brainstorm with the expert, which will simultaneously enable the team to assess the expert’s expertise and communication skills, but—of equal importance—allow the team to assess the expert’s credibility and demeanor, including his or her ability to think quickly and interact with others. Also important is to gauge the general “likeability” of the expert. This is everyone’s opportunity to determine whether they will be able to work with each other. Everyone needs to have an understanding of and comfort level with what, in general, the expert will and will not say regarding the particular issue(s) at hand. And while experience is generally a positive thing, it is always better to avoid retaining an expert who appears to be nothing more than a “hired gun,” willing to testify for whoever is going to pay the bill. Consistency of past positions, based on sound principles of damages analysis is a definite plus. Any expert who stretches beyond the areas of his or her expertise and experience can detrimentally impact their credibility—and your case. Be sure to test your potential expert well in this regard.

This is also the time for both counsel and the expert to articulate their expectations regarding the working relationship—understanding that regular, effective communication will be the key to a successful engagement. Both counsel and the expert should be available by e-mail and telephone (office and cell) whenever needed. While it is a given that counsel will expect prompt responses to communications, it is no less important that the expert’s inquiries be timely addressed.

## Select And Retain

Once all potential experts have been vetted, counsel and the client should assess the potential candidates. Prior to making the final determination, it is important to follow through with checking references provided by the expert(s). Similarly, to the extent the expert has worked with or for any of your colleagues, it is important to get an open and honest assessment of exactly what it was like to work with the expert. Also, be sure to conduct adequate independent research to uncover any available public information. Potential sources should include Westlaw and Lexis, Linked-In, and general Google searches on the expert. All of these things take relatively little time, but they will demonstrate to the client that counsel takes the expert selection process seriously, as you should.

As soon as the determination is made, it is time to actually retain the expert. While it is generally unimportant who actually retains the expert (i.e., counsel or client), the terms of the retention should be made clear. For example, everyone involved in the retention—expert, counsel, and client—should understand what the terms of payment are, and who will be responsible for making payment to the expert. More details on the Engagement Letter are discussed below.

## Conclusion

Retention of an expert can be one of the most important developments in any matter requiring expert involvement, and this can be especially true in construction disputes. The decision to retain and the process of retaining an expert should begin as early in the engagement as possible. And while the concepts and practices discussed above are by no means intended to be rigidly applied in all instances, they should be considered whenever reasonably possible.

# Section 2: “Kicking Off The Expert Engagement”

Once the expert is selected, it is important to carefully initiate the engagement to help ensure that counsel, the expert, and the client all have an understanding of the expert’s role (e.g., consulting or testifying), the business terms of the engagement, the scope of the assignment, the key issues in the case, significant deadlines, and other protocols.

## The Engagement Letter And Other Administrative Issues

As mentioned above, the Engagement Letter is an important initial step in outlining the understanding between counsel, client, and the expert. Typically, the expert will provide a draft Engagement Letter to counsel, but counsel or the client may have its own form of Engagement Letter they wish to use. Regardless of the approach, the Engagement Letter serves as the contract with the expert and should at least include the key business terms, such as the date of the expert’s retention, the party that is retaining the expert, billing rates and terms, policy on reimbursable expenses, payment responsibility and timing, file management and retention, and identification of key personnel.

Sometimes the expert is initially retained in a non-testifying or consulting role and the Engagement Letter should clarify this and identify the possibility that the assignment may turn into a testifying expert role. Alternatively, counsel may determine that it is best to prepare a separate Engagement Letter relating to the testifying expert; once it is ultimately determined that testimony will be required. Other terms to consider including in the Engagement Letter are:

* Confidentiality restrictions, including reference to any protective orders to which the expert has been admitted;
* Confirmation that the expert has done a review to determine there were no conflicts;
* How, and under what terms, the engagement can be terminated;
* How disputes with the expert will be handled;
* Indemnity limitation language;
* Preservation of the expert’s objectivity and independence by allowing the ability to work for currently adverse parties in unrelated matters; and
* Any billing limitations, such as a cap on hours per day, and limitations or markups on out-of-pocket expenses, as well as the required level of work task descriptions to be included in the billing. .

Since the Engagement Letter is likely discoverable, it will likely not specify all administrative procedures in detail. Therefore, it is wise to discuss with the client and expert such details as the format and level of detail of their billing. Often, experts are reluctant to provide detailed, “diary billing”, as it may end up being used for unnecessarily extensive discovery and added costs. If the engagement requires segregation of the hours incurred by separate tasks (e.g., a portion of the work may be funded by another party such as a joint venture partner), this is a key time to discuss this segregation requirement with the expert and agree to what level of detail the expert will document his or her billings. Client, counsel, and the expert should be mindful of potential discovery issues and the significant additional costs that can be incurred related to providing significant levels of billing detail.

Once the terms of the Engagement Letter are finalized, the Engagement Letter should be signed by or on behalf of the expert or his or her firm, and both parties should understand that performance of the work by the expert or his or her team represents an acceptance by the retaining counsel and client of all the terms in the Engagement Letter.

Finally, counsel and the expert should exchange all necessary contact information and agree on periodic meetings or conference calls to discuss the status of the engagement, preliminary findings, and any issues that may arise during the expert’s analysis, including needs for additional budget or time to complete the analysis for either originally identified or added scope work.

## Brief The Expert On The Case

Once the business terms are settled and the expert is officially retained, the next step is to fully brief the expert on the case. Often, it is helpful to have an initial face-to-face meeting consisting of counsel, the expert, and key client personnel so that any overall facts can be transmitted to the expert. This “kick-off” meeting also allows the expert to understand what type of documents were prepared and maintained during the Project, the various issues that will require analysis, and the identification and availability of key client personnel. At this time, the expert, working with the client and counsel, can begin to develop an initial budget for the first phase of the engagement.

In advance of this initial meeting, the expert should have received at least the complaint and other key filings in the case, to the extent they are available. As part of the “kick-off” meeting, counsel should update the expert on the status of the case, including recent filings, and the status of discovery to date, as well as the overall discovery and trial or arbitration schedule—with particular emphasis on all expert submission deadlines, discovery deadlines, interrogatory dates, hearing dates, and directions regarding expert submissions. Counsel should outline any needs for the expert’s (or his or her consulting team’s) assistance with document requests and interrogatory questions and answers or the depositions of key fact or other expert witnesses.

To the extent that questions posed by the expert and the expert’s team at the kick-off meeting were unanswered, a schedule should be established to follow-up on these questions to ensure timely resolution (i.e., well before the expert’s report is issued).

## Obtaining Client Data

Whether the expert has been retained on behalf of the plaintiff or defendant, a process of providing client information to the expert should be developed, which should include protocols for the transfer of documentation to the expert either by counsel directly or by client personnel, as well as whether or not discussions between the expert and the client require the presence of counsel. As counsel, you will want to be kept fully apprised of the information and data provided to the expert or his or her team.

While the basic information may be accounting, or schedule data, the expert will also very likely need access to job files containing correspondence, meeting minutes, daily reports, and other information relevant to the matter. Keep in mind that these files may require a privilege review prior to providing the expert with access.

It is generally a best practice for the expert to have a single point of contact with the client who can then be responsible for directing the expert to the proper custodians of the required data. This person should maintain a record of information provided to the expert, as this collection of information will need to be coordinated with counsel and, in any event, will likely need to be disclosed with the expert report.

To access client files, the expert may be provided with limited or full access to electronic discovery databases that have been developed, which may require some training of the expert (or his or her team) on the document management system employed. It is then important to consider what type of access makes the most sense under the engagement. Options may include:

* Full access to allow for a neutral review of the issues, including any document issue coding that may have been prepared by counsel;
* Access to the documents in an uncoded environment; or
* Access to only a subset of the total documents, depending on the expert’s scope.

Occasionally there is sensitive information in the case file that counsel does not want to expose to the testifying expert. This could include information on settlement negotiations, discussions between client and counsel regarding the Project, analyses the client may have been asked to develop by counsel, and any other items prepared by the client in anticipation of litigation.

If such information exists, it may be wise to have separate, “non-testifying” experts of the expert’s firm be given access to the information so they can assist counsel in developing a plan that insulates the expert from this type of information. However, extreme care needs to be taken if the expert is working with less than full disclosure of all of the potentially relevant information. For instance, counsel should consider the impact on the expert’s testimony if the withheld data were to suddenly appear as part of cross-examination. This can be critically important, because of the possible ramifications. If it can be demonstrably proven that data were deliberately withheld from an expert, the expert will, at minimum, be subject to having his or her opinion severely undermined. Moreover, there is a distinct possibility that the entirety of the expert’s opinion may be stricken, or that the legal team (and the client) could be sanctioned. Accordingly, the prudent practitioner will make sure that the expert is given access to all relevant factual documentation and information. Similarly, the prudent expert will make sure to ask for access to anything and everything that could possibly bear on his or her opinion.

## Discovery

If you represent the owner of a construction project, you may be able to obtain information through the audit clause of the Contract, if one exists. If the owner is a U.S. Government agency, the contract will almost certainly contain a standard audit clause, as well as other clauses from the Federal Acquisition Regulation (“FAR”) relating to obtaining information. Quite often, the Contract provides access to all supporting information for any claim submitted, or as part of the invoice and change order review processes. If the matter has proceeded to litigation, however, this avenue may already be closed.

Further, the audit clause may not provide access to all the information necessary to fully review a claim, such as project schedules, daily logs, meeting minutes, and e-mails. Therefore, consideration should be given to negotiating an agreement with the opposing party to allow informal access (i.e., outside of the formal discovery process) to exchange information and supporting data. While relatively rare, this kind of an agreement can dramatically shorten the time and reduce the expense of this process.

If there are no audit rights and the parties cannot agree on an informal process, counsel and the expert can work together to prepare appropriate interrogatories and document requests as part of formal discovery. Experienced experts will have standard document requests that can be fashioned to the matter at hand, which fully describe the records required so that the respondent cannot legitimately stall the request by claiming a particularly named document does not exist. For example, the expert may seek a “Job Cost Report” that the respondent may claim does not exist, when in fact they have a report that is called a “Project Status Report”, (i.e., a different title, but containing substantially the same information being sought.) A well-crafted document request will describe the required documents in sufficient detail, and possibly list the various titles of such documents, so that stalling tactics will be minimized and ineffective.

Parties will often resist fully cooperating with an interrogatory or document request on the basis that the request is burdensome, that it seeks information that is not necessary to evaluate the claim, or that the information is proprietary. The expert should prioritize the information he or she is requesting, and discuss these priorities with counsel in advance of the request. The expert and counsel should also discuss why the requested information is necessary for the matter. This will help counsel determine when to make the case for further disclosure, if necessary, and understand what requests can be reasonably “given up” in negotiating with the respondent.

## Conclusion

The early stages of an expert’s engagement are foundational to building an optimal case. The Engagement Letter, early discussions of administrative protocols and logistics, and a thorough briefing of the case and its status all contribute to a productive start that will help significantly throughout the progression of the case. In addition, a thorough description of the information that the expert will require in order to complete his or her analysis and a game plan to get that information are also critical to an effective and efficient engagement.

# Section 3: Investigation, Research And Documentation

The process of gathering and providing documents from your client to the expert can be time consuming and expensive. Careful forethought can reduce the time and efforts required and maximize value to your client.

## Obtaining Documents And Data

As discussed above, the first step in gathering relevant case documentation is a meeting with the expert, key client personnel, and counsel to discuss the locations of all the potentially relevant documents retained by the client. On a construction project, for example, documents may reside in a number of locations and forms. The jobsite may maintain “job files” such as plans, specifications, change order-related documents, requests for information (RFIs), schedule-related data, daily reports, subcontracts, purchase orders, and correspondence. These documents may be maintained in hard copy, or may be consolidated into an electronic database such as Prolog or a number of other systems.

The accounting records and related data are more likely available or more readily accessible at the client’s home office. This may include payment information, payroll records, transaction registers and supporting source documents, such as invoices and time card data. Again, these records may be in various forms but, in most cases, cost data can be downloaded from company accounting systems to Microsoft Excel spreadsheet or Access database software so that it can be analyzed efficiently by the expert or the expert’s team.

Any requirement for Bates stamping the documents needs to be considered early on as well. If Bates stamping will be required, it should be determined whether an entire population of documents or just those turned over as support by the expert will be Bates stamped. Establishment of these requirements at the onset of the process can reduce the need and potentially greater cost required to prepare a separate Bates stamped version of the documents at a later time.

Given the high likelihood of electronically stored information being a substantial part of the expert’s data collection, timely consideration also needs to be given to how this information will ultimately be produced (to the expert, as well as to the opposing side, as necessary). For example, the complete collection of data provided to the expert may include cost information on areas that are not a subject of the dispute. However, the other side may not accept a subset of the cost database without some assurance that it is complete and that it comes directly from your client’s accounting system. One potential solution may be an agreement in advance as to how this data is to be produced, possibly including a site visit by the opposing expert to observe the data identification and exporting process.

Establishing which documents need to be reviewed for privilege is important, as that review process can impact the timing of the overall expert analysis. The longer the privilege review, the longer it could take to get a complete set of Project records available for review and analysis by the expert.

Once the documents have been compiled, counsel should consider the review process that makes the most sense from a legal, as well as a cost/benefit perspective (i.e., should the documents be reviewed first by a non-testifying consultant from the expert’s team, with irrelevant documents culled, or directly by the testifying expert?) Obviously there are certain risks any time the testifying expert is not provided all the documents, but these are strategic decisions counsel should make, potentially with input from the expert, since a good expert will have an understanding of which types of documents are important for him or her to see directly, depending on the key issues in the matter.

## Independent Research

In addition to the Project documents and analysis of damages and technical issues, key legal points can drive the claim. A good expert will likely raise a number of issues that should be considered as early in the engagement as possible, such as:

* Legal interpretation of the Contract and related documents;
* Legal precedent in the venue at issue for contract, cost, and schedule analysis methodologies;
* Jurisdictional issues related to economic issues, such as interest and cost of capital statutes;
* Venue enforcement of “no damages for delay claims”;
* Venue enforcement of bans on consequential damages;
* Requirements that proof of costs be based on particular documents or types of documents;
* Other legal or venue-related issues that could impact the expert’s analysis.

Once these issues are identified, counsel should take the lead in the specific research and should direct the expert how to proceed regarding particular issues. For example, even though home office overhead calculated using the Eichleay method might not be explicitly recoverable in the case’s particular jurisdiction, it may make sense for the expert to include it in his or her expert report, as it could be relevant to settlement negotiations. In this case, the expert may want to include a reference in his or her report that he or she has been “assumed, based on direction from counsel” that this element of damages is recoverable.

## Expert’s Documentation Process

Another step in counsel’s work with the expert is to establish protocols for the expert’s level of detail in the documentation supporting his or her analysis. The expert will likely determine what ultimate level of support he or she requires in order to form and properly support an opinion. For example, the expert may have performed a number of assignments for a contractor client in the recent past. In so doing, the expert has learned that he or she can rely on certain summary accounting reports in performing his or her analysis. On the other hand, if the expert is not familiar with the client, the expert may need to “drill down” further, at least on a test basis, to understand the client’s accounting and cost systems and to establish specific summaries as reliable. In this case, the expert would include the additional documents supporting that process as part of his or her support.

However, the amount of detail the expert will include with the submitted expert report may also have some bearing on how much data the expert assembles in this process, which should be timely discussed with counsel. For example, it may make sense for the expert report to “stand alone” such that the opponent can understand completely how a damages analysis was performed. In this case, the report will likely be submitted with multiple binders of supporting data, such as invoices, time cards, and purchase orders.

In other cases, counsel may determine that it is more appropriate for the expert report to be written at a summary level (or even in the form of a summary declaration), and be subject to further discovery requests by the other side to obtain more detailed support for specific findings or assertions. This approach should not be seen as limiting the expert’s report and analysis or the level of underlying support he or she deems appropriate. Rather, it simply limits the level of detail to be provided with the submission of the expert report, which is but one avenue of communicating the expert’s opinions.

## Conclusion

Early in the expert’s assignment, consideration should be given to the population of the client’s relevant documents, how they will be reviewed and produced, and the level of detail required in the expert’s final work product. Doing so streamlines the document management process and also allows the expert to provide more accurate estimates of the time and cost to complete the assignment.

# Section 4: Discovery And Disclosure Issues Involving Experts

There are various tools available to obtain discovery regarding experts. These tools broadly fall into three categories: disclosures, reports, and depositions. Under the Federal Rules of Civil Procedure, as well as most state court rules, parties must disclose the identity of each person that a party may call at trial. A written report must accompany the disclosures if the witness is expected to provide expert testimony. All expert reports must contain a complete statement of all opinions the expert will express and the bases for each of those opinions, the facts or data considered by the expert, any exhibits used to support the opinions, the witness’s qualifications (including a list of all publications authored in the previous 10 years), a list of all cases in which the expert has testified in the previous 4 years, and a statement of compensation.[[3]](#endnote-3) (The expert report is discussed in greater detail in Section 5, below).

In most jurisdictions, once the expert report has been finalized and served on opposing counsel, the expert may be deposed.[[4]](#endnote-4) When deposing the expert for the adverse party, it is almost always beneficial to involve your own expert in the process. Many practitioners prefer to have their own expert (or a key member of his or her team) present during the deposition of the opposing expert, if possible. This practice enables counsel and the expert to compare notes as the deposition is taken, and allows the expert to provide real-time input throughout the course of the examination.

## Discoverability Of Drafts And Communications

As discussed above, experts can be extremely valuable during the discovery process in any matter. It is advisable to work with your expert prior to preparing discovery requests, and it is important to involve your expert in any discovery responses, especially when they involve technical or cost/accounting-related issues. But significant care should be taken when communicating with experts, so as to protect all communications to the greatest extent legally possible.

Irrespective of venue, disclosure issues involving experts are governed, in the first instance, by the Rules of the Court or other dispute resolution body. Generally, the protections available to communications between experts and counsel will depend on whether you are in state or local versus federal court. Historically, a number of states provided more protection than was available under the Federal Rules of Civil Procedure, but recent changes in the Federal Rules (effective as of December 1, 2010) now protect more communications, similar to state rules.

Under the Federal Rules of Civil Procedure Rule 26, a party must disclose to the other parties the identity of any witness it may use at trial to present evidence.[[5]](#endnote-5) As noted above, a testifying expert is required to produce a report that contains the “facts or data considered by the witness in forming [the witness’s opinions].”[[6]](#endnote-6)

Under the previous version of Rule 26(a)(2)(B), testifying experts were required to submit a report disclosing the “data or other information” they considered in reaching their conclusions. The current rule, which was amended in 2010, reduced the amount of information subject to discovery. More specifically, as the 2010 Advisory Committee Notes to Rule 26 clarified, the amendments to Rule 26(b)(4) provide “work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.”[[7]](#endnote-7)

By way of background, before 1993, litigants were required only to produce the *substance* of their experts’ opinions, which was never defined.[[8]](#endnote-8) Therefore, there was considerable uncertainty regarding the discoverability of core or opinion work product that had been reviewed by an expert. In 1993, however, Fed. R. Civ. P. 26(a) was amended to provide that the adversary was entitled to the basis of an expert’s opinion and all materials *considered* in forming his or opinions.

The 1993 Advisory Committee Notes stated that because of this disclosure obligation, litigants could no longer contend that anything provided to their experts was privileged or otherwise protected from discovery. Thus, any material provided by an attorney to an expert was discoverable. Even if an expert did not rely on documents sent to him or her by the attorney, those documents and transmittal letters were discoverable because, it was reasoned, a decision to not rely on something is significant for testing or refuting an expert’s conclusions.[[9]](#endnote-9)

Although the 1993 amendments broadened expert discovery, the courts were still divided regarding whether “core” attorney work product that was provided to an expert was discoverable.[[10]](#endnote-10) Some courts adopted a bright line rule that any and all documents exchanged between the expert and the attorney must be produced.[[11]](#endnote-11) In *W.R. Grace & Co. - Conn. v. Zotos Intern., Inc.,* for example, the court stated that “[w]hen an attorney communicates otherwise protected work product to an [E]xpert [W]itness retained for the purposes of providing opinion testimony — whether factual in nature or containing the attorney’s opinions or impressions — that information [was] discoverable if it [wa]s considered by the expert.”[[12]](#endnote-12) Some courts unequivocally rejected the bright-line rule approach reflected in *W.R. Grace*. Because of the absence of “clear and unambiguous language” in the rules or in the Advisory Committee Notes, however, other courts have found that the expert discovery rules, as amended in 1993, were intended to trump the rules governing the privilege protection afforded attorney work product.[[13]](#endnote-13)

For example, in *Krisa v. Equitable Life Assur. Soc.*, the court was hesitant to adopt a bright-line rule that any information provided to an expert is discoverable.[[14]](#endnote-14) In this case, the defendant insurer attempted to foreclose discovery of preliminary reports and other documents created by its expert, asserting that they constituted work product under Fed. R. Civ. P. 26(b)(3). Here, the court emphasized that the Court of Appeals for the Third Circuit had liberally interpreted the degree of protection to be afforded to attorneys’ mental impressions.[[15]](#endnote-15)

In reaching its decision, the *Krisa* court relied on *Bogosian v. Gulf Oil Corp*.[[16]](#endnote-16), where the Third Circuit stated that even if an expert opinion evolved, or was influenced by an attorney, the protection afforded to core work product should not be overridden by discovery rules regarding expert disclosure.[[17]](#endnote-17) Despite *Krisa’s* reliance on *Bogosian*, it was far from certain that core attorney work product provided to a testifying expert was protected, because *Bogosian* was decided before the 1993 amendments.

For that reason, the *Krisa* court declined to adopt a bright line rule that materials containing core work product, which are provided to an expert, are discoverable. After the 1993 amendments, the Court of Appeals for the Third Circuit had reaffirmed that core work product was afforded heightened protection by the courts, regardless of liberal discovery rules.[[18]](#endnote-18) It is worth noting that several other circuits have been critical of the Third Circuit’s protection of core work product, but that *Bogosian* has not been expressly overturned.[[19]](#endnote-19) Similarly, several lower courts within the Third Circuit have concluded that the 1993 amendments to Rule 26 required disclosure of all information considered by a testifying expert in formulating his or her report, without regard to the asserted privilege.[[20]](#endnote-20)

Applying a similar line of reasoning, at least one Federal appeals court has also ruled that as it relates to discovery of non-testifying experts, Rule 26(b)(4)(B) (as amended in 1993) did not supersede Rule 26(b)(3)’s protection against the disclosure of core work product.[[21]](#endnote-21) For example, in 2009 the District Court for the Eastern District of Pennsylvania found that the report of a consulting firm hired by a contractor was an opinion of a non-testifying expert and was protected from disclosure in the subcontractor’s breach of contract action. The court reasoned that the consulting firm was retained to provide pre-litigation advice and was thus not disclosed as a testifying expert in the case.[[22]](#endnote-22)

In 2010, the rules were again amended. Rule 26(a)(2) now requires disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limits the expert report to facts or data, rather than “data or other information,” as in the previous rule.[[23]](#endnote-23) The 2010 amendments additionally provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or information” disclosure prescribed in 1993.[[24]](#endnote-24)

The Advisory Notes specifically state that the amendment was intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.[[25]](#endnote-25) The change is explicitly made by providing “work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.”[[26]](#endnote-26) The change is meant to limit disclosure to factual material by excluding theories or mental impressions of counsel.[[27]](#endnote-27) However, courts and attorneys are instructed to interpret the discovery rule broadly in order to require disclosure of any material considered by the expert, from whatever source, that contains *factual* information. Additionally, it extends to any facts “considered”, not just relied upon, by the expert.[[28]](#endnote-28)

## Conclusion

Rule 26(b)(4)(A) was amended to “provide work-product protection against discovery regarding draft expert disclosures or reports, and—with three specific exceptions—communications between expert witnesses and Counsel.”[[29]](#endnote-29) Importantly, these protections extend to all communications, ***regardless of the form of the communication***.[[30]](#endnote-30) Therefore, e-mails and other forms of electronic communication are expressly encompassed by the protections now afforded under the Federal Rules (which, as noted, now more closely mirror a number of State Court rules).

# Section 5: Expert Reports

An expert report is an important and useful tool in many disputes. Depending on the matter at hand, it can be crucial to your case. A well-prepared and supported expert report assists the trier in evaluating the expert’s testimony and significantly reduces or eliminates many of the potential surprises that can occur at trial. But besides its value for trial, the process of developing an expert report can expedite and focus the discovery process. Additionally, the expert report can also provide a convenient summary of pertinent facts and theories of the case for counsel, client, opposition, and even the trier. The process of preparing the expert report also allows counsel and the client to identify potential challenges in their case and prepare appropriate defenses, as well as possible alternative theories to address these challenges. Often, a well-prepared expert report becomes the basis of a successful mediation or settlement negotiation prior to a trial or arbitration.

## Initial Steps In Preparing The Expert Report

While the expert is responsible for the entire content of the expert report, to maximize its value and minimize costs and inefficiencies, counsel and the client should participate in the expert report development process from the beginning through the report’s submittal.

The initial step in working with your expert on an expert report is, as discussed above, to clearly outline the scope of the expert’s assignment. For example, is the expert to assume that a compensable delay occurred, or be asked to prove it (e.g., by using a schedule analysis)? The scope should be determined early in the engagement process and clearly reflect the overall strategy of the case. To the extent possible, it should also be clear from the outset the level of detail that will be contained in the expert report and supporting work papers.[[31]](#endnote-31)

As the expert’s assignment progresses, it is good practice for counsel to have frequent discussions with the expert to review the expert’s analyses, and preliminary opinions and conclusions. “Kicking the tires” with the expert in the early stages of the engagement can greatly enhance the quality of the ultimate product and save costs by limiting analyses of areas that may be unnecessary or of lesser importance to the case. However, it is important that this process not evolve into the appearance that counsel was “drafting the report” or directing the expert’s opinions in any way.

At least for matters beginning after December 1, 2010, since the drafts of expert reports are generally not discoverable under the new federal rules, it may be advisable for counsel to receive an outline prior to the initial drafting of the expert report and to discuss this outline in detail with the expert. Setting expectations with your expert early and executing periodic, timely review of his or her work product helps to ensure accuracy. It also prevents the “mad dash to the finish line” and the inherent inefficiencies and cost impacts of intense last-minute efforts.

## Content Of The Expert Report

The venue of the case will greatly influence the level of detail included in an expert report, as well as the level of supporting information provided in the underlying work papers. For example, in a federal court, the expert report requirements are specified in Rule 26 (a)(2)(B) and are very comprehensive. Rule 26 attempts to eliminate surprise by requiring a very detailed and full disclosure in the expert report. In some instances, the expert report may serve as the expert’s direct testimony, as there may be no oral direct testimony at the arbitration or trial. On the other hand, state and local courts often have a far more lenient view of the information required to be included in supporting an expert report. Some jurisdictions may only require an affidavit, a declaration, or a simple disclosure of the expert’s name and general testimony role. In contrast, an arbitration in either the U.S. or an international venue often falls somewhere in between in terms of the nature and detail of expert disclosures, as the arbiters and counsel for both sides often contemporaneously work together to determine the requirements for any expert report and the level of underlying support.

While different forums and venues can have different standards, it is important to keep in mind that an explicit agreement between the parties can often negate the normal requirements. Early in the case, counsel should consider whether agreeing to such alternative requirements might benefit the client’s case. For example, parties can agree beforehand on the level of detail that will need to be included in expert reports in the matter, including supporting documentation. When such agreements benefit both parties from a time and expense standpoint, and “scorched earth” discovery is not a necessity, coming to alternative terms can represent significant cost savings and result in expedited outcomes.

Experience has generally shown that the more complex the issues in a particular matter, or the more need there is for transparency to the opposition in discovery, the greater the level of detail that will generally be needed in the expert report and its supporting work papers. The range of complexity of the issues, nuances of the case, and expectations of counsel and client can all greatly influence an expert’s role and the resulting cost of the effort. It is of utmost importance that counsel communicates to the expert as early as possible the report requirements, as well as the overall expectations of the level of detail that will be necessary, based on the specific issues in contention and the rules applicable in the venue (or those that have been agreed to by the parties).

This communication by counsel will also greatly assist the expert in preparing realistic budgets for his or her analyses and for ultimately developing the expert report and supporting materials. Budgets that are developed in phases and timely communicated amongst the working team (counsel, client, and expert) help ensure that the expert remains in line with expectations. It should also be made clear to everyone at the outset that if there are any deviations from the budgeted amounts, these variances should be addressed in “real-time,” *before* they become a potentially significant issue.

Even though the venue will largely determine the report requirements, a good expert report should generally include the following information in the body and attachments. First, the expert report should identify each and every opinion and conclusion about which the expert is expected to testify, as well as the bases and reasons for each of those opinions and conclusions. An expert is at significant risk of not being allowed to testify to any opinion if it was not provided in his or her expert report and underlying work papers in some way. For example, if an expert concludes that his or her client was delayed on a project by 125 days, the report should include an explanation of exactly how the expert determined that magnitude of delay. The report should also identify what documents, interviews and other supporting facts and information the expert used to determine the 125 days of delay, as well as the cause and the identification of which party is responsible.

The expert should identify specific key documents relied upon for each analysis and conclusion, as well as provide a summary list of the types of documents and other information reviewed and considered. This list may include typical project documents, such as various schedules, correspondence, labor reports, and daily logs, as well as case pleadings, depositions, observations from site visits, and discussions with the key knowledgeable client personnel. The expert can note specific documents through the use of footnotes or list the considered and relied upon documents as an exhibit or attachment to the report. Federal Rule 702 (regarding Evidence) requires that the expert’s opinions be sufficiently grounded in the facts and data pertinent to the case.[[32]](#endnote-32)

Second, the expert report should include any exhibits that would help summarize or support the opinions, which may include tables, charts, and graphs. The exhibits would also be supported and linked or referenced to an organized package of specific support documents and any analyses performed by the expert relevant to the exhibits. Some venues do not allow experts to use demonstrative exhibits in testimony that are not directly used in the expert’s report or work papers. Thus, the presentation strategy and the rules of your particular venue for the anticipated testimony should be known and considered well before submitting the expert report.

Third, the expert’s work papers that support the report should be well organized and well documented. A “referenced*”* package of analyses and supporting documents (i.e., one that shows the specific flow of information—or “audit trail”—from the summary level to the detailed underlying documents and other information) allows for a relatively direct and thorough review of the expert’s findings by the opposition, counsel, the client, and the trier of fact.

Time should be allotted for counsel and appropriate client personnel to review the expert report and work papers prior to the submission of the expert report to timely identify potential inaccurate interpretations of project records, as well as privileged information. Clearly, the time to identify such potentially embarrassing and damaging information is well prior to the submission. The preparation of the work papers supporting an expert report can itself take significant time. However, experience shows that the more organized your expert’s documentation, the less costly, time-consuming, and disruptive the required discovery will be to counsel, and particularly to the client, and ultimately, the more organized and efficient the testimony presentation will be at mediation, trial, or arbitration.

Fourth, it is important to establish the expert’s qualifications in the case. The inclusion of the expert’s Curriculum Vitae, which outlines his or her overall and specific expertise and experience, is the bare minimum that should be included. Additional information that may be required or useful to include are lists of relevant cases on which the expert has worked (potentially with a short description of each, depending on the circumstances of the specific matter at issue), prior testimony, and any publications the expert has authored. Anything that helps to establish the necessary experience of the expert and to give credibility to the opinions and conclusions should be considered.

Rule 26 (a)(2)(B) requires a list of all the cases in which the expert has testified as an expert at a trial or by a deposition during the previous four years. But this temporal specification is only a minimum requirement. The expert’s Curriculum Vitae can go beyond this minimum if it helps to support the expert’s credentials—especially on the particular opinions rendered and conclusions drawn on the specific matter at hand. Such additional detail may help avoid challenges to the expert’s qualifications to testify in the specific matter at hand. However, in balancing this potential benefit, counsel and the expert should be mindful that the more that is included in the Curriculum Vitae, the more the expert may be subject to deposition and cross-examination on that additional information.

Lastly, Rule 26 (a)(2)(B) requires an expert’s “statement of compensation,” which usually takes the form of the hourly rate charged by the expert, but can also include the total amount invoiced by the expert or his firm. In fact, the production of invoices for an expert and any supporting team members from his firm can often be required. As in other areas, counsel can potentially reach an agreement with the opposition early in the case regarding the non-production of the detailed invoices for both sides. In order to ensure that the expert maintains a neutral, objective, and “non-advocate” position, it is also crucial that the expert’s compensation does not in any way depend on the case’s outcome.

The expert’s opinion often deals with or can be affected by information that is the subject of other filings, fact witness affidavits or depositions, the opinions of other experts on your team, as well as the rebuttal of the opposing experts’ and fact witnesses’ statements from the opposing side. Therefore, it is important to provide these documents to the expert in a timely manner along with other experts’ reports and depositions, fact witness depositions, and court filings that may have a significant impact on the expert’s work or anticipated testimony. On a related point, to avoid potential problems, no filing should be made by counsel that could have an impact on your expert’s opinions without timely notice to and prior review by the expert.

One additional point often overlooked until the end of the process or close to it, is the detailed logistics regarding the expert report. Be sure to determine key issues well in advance for your specific case and venue, including, but not limited to the following:

* How much time will be required for privilege review, as well as for substantive counsel and client review of the expert’s opinions and support?
* Does the report need to be manually signed (as opposed to using an electronic signature)?
* Exactly how does the report need to be delivered (e.g., electronically, hard-copy or both)?
* How many hard copies are needed and who should get them?
* Do work papers need to be produced in hard copy along with the report or can they be provided within some reasonable or agreed-to amount of time after filing the report?
* Is it sufficient for the supporting work papers and other documents to be hyperlinked in the expert report and provided on CDs, or must bound volumes of the work papers be provided?
* What “Bates-stamping” needs to be performed?
* Do “live” electronic files of work paper schedules and underlying data need to be produced and when?
* Will any supplemental report(s) need to be filed and, if so, what will be the required timing and process?

## Conclusion

In the final analysis, it is important to remember that the expert report must address all of the requirements of the rules applicable to your case, as well as the potential questions or criticisms raised by others, such as the findings of other experts, the opposing parties’ filings, or trier orders that have a bearing on the case. Furthermore, the format and extent of the expert’s disclosure will depend upon the rules of the jurisdiction in which the expert’s disclosure is filed, as well as the overall strategy of the case. In any event, a well-prepared and well-supported expert report will assist in educating the relevant parties and be fully congruent with the overall case strategy.

# Section 6: Preparation For Trial

Perhaps even more than most things in life, the key to success at trial, particularly with respect to witness testimony, is preparation. Preparing the expert for trial should begin at the earliest possible opportunity. Even if your expert has previously testified many times before judges, juries and arbitration panels, proper preparation for your specific case will be necessary and provide the greatest possibility of a successful testimony. Few things could be worse than having a false sense of security arising from your expert’s Curriculum Vitae and past experience, only to find that he or she is not good when testifying live on your matter, and the then-hindsight knowledge that that testimony could have been dramatically improved through adequate preparation.

While there is no commonly accepted “script” for witness preparation, it has been found that there is a great deal of overlap to the approaches employed by most practitioners.[[33]](#endnote-33) The process has generally been summarized as incorporating three basic components: Witness Education; Counsel Education; and Modification of Testimony Delivery.[[34]](#endnote-34)

## Expert Witness Education

Expert witness education can be summarized as the period when trial counsel and the expert witness jointly review all of the facts and legal strategies in the case. It is an opportunity to go over all documents that are important to the expert’s opinions, and to review deposition transcripts, discovery responses, and other items in the record that can either further support (or perhaps challenge, and even potentially alter) the expert’s opinions. It is also important to assemble and organize all necessary relevant documents at this time.

This is also the appropriate juncture to discuss the potential need for and use of demonstrative exhibits. Many good construction and other experts are capable of generating their own demonstratives for use at trial. Whenever possible, it is preferable to have the expert create the demonstrative, because the expert is in the best position to know what will assist him or her in testifying, as well as be able to make any necessary changes most readily. Regardless of who creates them, however, to maximize their effectiveness, demonstratives should be well vetted and understood by the expert, as well as by counsel.

To the extent possible, at this stage the expert should also be provided with an orientation of the courtroom or arbitration setting and the general logistics of the process employed by whatever tribunal will be hearing the matter.[[35]](#endnote-35) Again, no matter how many times the expert has testified, it is critically important for counsel to communicate this information to the expert. Properly orienting the expert to particular procedures employed in a specific court or arbitration setting will only help in the long run, and will aid in preventing the expert from being or appearing nervous or out of his or her element.[[36]](#endnote-36) Further, if an expert lacks familiarity with a particular court, he or she should visit the courtroom — while a trial is underway—to get a sense for the lay of the land.

During the expert witness education phase, it is also important to perform “dry runs” of the expert’s testimony, including at least the most likely areas of cross-examination. For arbitration proceedings, to the extent possible, the expert should do at least some preparation in the actual room in which the hearings will be conducted. The more comfortable the expert is in his or her surroundings and logistical procedures, the less he or she will be distracted by these comparatively less important aspects at the time of testimony, allowing more complete focus on the issues at hand.

## Counsel Education

The counsel education component of preparing the expert for trial is no less important than the expert education process. This component involves counsel learning how knowledgeable the expert is on the details of the matter, and becoming familiar with the expert’s expected testimony and the effectiveness of the expert’s delivery.[[37]](#endnote-37) This is an opportunity to assess the expert’s strengths and weaknesses, and to make a determination as to how—if at all—the expert’s delivery will need to be modified, as well as the amount of additional work that may be required to get the expert ready to testify—on both direct and, especially, on cross-examination.

## Modification Of Testimony Delivery

Modification of testimony delivery is probably the most important of the three components of trial preparation with the expert. This phase involves working with the expert to improve and hone their testifying and overall delivery skills. Included in the analysis of the expert’s delivery skills is a candid assessment of the witness’s overall “witness characteristics,” including physical appearance, courtroom demeanor, and communication style.[[38]](#endnote-38)

How a witness behaves on the stand—and an expert, in particular—can have a profound impact on the outcome of the proceeding. Various studies have been undertaken, and “witness preparation manuals” have been published on the topic. In the article, “What Do We Really Know about Witness Preparation?” author Marcus Boccaccini summarized the fundamental testifying skills as follows:

Answering Questions

1. Always tell the truth.
2. Listen carefully to the question being asked, then pause, take a breath, and answer the question. This allows the witness to relax and, during cross-examination, gives counsel a chance to object if necessary.
3. Only answer the question that is asked. Do not attempt to fill “awkward” silences.
4. Avoid slang and jargon. Use language that everybody can understand.
5. Do not memorize answers to anticipated questions.
6. Speak loudly and clearly. Nervous witnesses speak too quickly. Shy witnesses speak too softly.
7. Do not argue with opposing counsel about their questioning.
8. It is OK to ask counsel (or a trier) to repeat or rephrase a question.
9. It is OK to say ‘no’ and ‘I don’t know.’ Do not guess.
10. Avoid qualifiers like ‘I think’ and ‘I guess.’

Non-verbal behavior

1. Maintain good posture. Do not slouch and try not to shift posture excessively or quickly.
2. Do not forget to look at the jury when testifying, but don’t stare at the jury.
3. Do not “look to” counsel (or anyone else) for answers.
4. It is appropriate to use mannerisms and gestures, but do not use them excessively.[[39]](#endnote-39)

During the preparation process, as noted above, it is critically important to identify likely areas of cross-examination. Often, if your expert has been deposed (or relevant fact witnesses have), some of these areas may have already been broached, and preparation for cross-examination should be fairly straightforward. Put simply, your expert should be prepared to respond directly to areas of attack regarding his or her analysis or methodology, or any other criticism of the opinions presented.

Sometimes, however, the areas of attack may be less obvious. For this reason, it is important to have open and honest discussions with the expert during the trial preparation process. The expert should be asked how he or she would attack his or her opinions and conclusions if the expert were on the other side. Even if it makes the expert uncomfortable to do so, this is the time for another exhaustive look at the expert’s opinions and conclusions (having, of course, already done so prior to submission of the expert report). This preparation will hopefully assure that there is a good response to any and all areas of attack. Also look to the expert’s team for ideas of potential areas of attack or risk, in general. As well, look to your colleagues and key client personnel. It is during testimony preparation that everyone on your side should certainly feel free to explore significant areas of potential challenge to your expert’s positions. The more it is done in preparation, the better chance that there will be no negative surprises during the actual time of testimony.

This is also the time for counsel to ask the expert the most difficult questions they can think of, given counsel’s intimate knowledge of the broader aspects of the case—and to prepare the expert for any specific practices (or “tricks”) of opposing counsel. Will the cross-examination likely be cordial, or combative? Will opposing counsel engage in personal attacks? Does the opposing counsel have any seemingly odd quirks that might be off-putting to a testifying witness? Some experts get flustered over questions that are so straightforward that counsel doesn’t think it’s worth the time to review, such as whether (and how much) the expert has been paid for his or her services. The expert should be prepared to calmly and confidently answer any question about the terms of retention, including how much they have been paid to date.

It is important to note that while many attorneys think this should go without saying, the expert should be reminded not to be combative, arrogant, or condescending in any way (i.e., don’t be a “jerk”). There is nothing to be gained—and much to be lost—by the expert being argumentative with opposing counsel or providing sarcastic, or otherwise unprofessional responses. In addition, if the expert has substantial ground to cover, it is advisable to instruct the expert to be prepared to spend the appropriate length of time—not to try to unduly rush through detailed concepts. Counsel too should be fully prepared to allocate and take the time necessary for the expert to deliver effective testimony.

Finally, all participants at trial, including experts, need to be reminded that they are “on trial” from the moment they leave for trial on the first day until the trial is over. experts should always be on their most professional behavior during a trial—even before and after hours. That person who stole “your” parking space outside the courthouse might be Juror Number 1. The annoying guy in front of you in line at the newsstand could be the arbitration panel chair. The importance of having your expert put on his or her “game face”—and leave it on—cannot be overstated.

## Conclusion

As with most things of importance, preparation for trial should begin as early as possible. Following the steps outlined in this section will not guarantee a victory at trial, but it will greatly enhance the likelihood of the expert having a positive impact on the overall outcome.

# Section 7: Daubert Challenges—Fighting Junk Science (Including Economic Damages And Schedule Analyses And Conclusions)

## Daubert Challenges, Generally

The Supreme Court has declared, in no uncertain terms, that expert opinions based on junk science or pseudo-science have no place in federal court. In *Daubert v. Merrell Dow Pharmaceuticals, Inc. [[40]](#endnote-40)*, and in *Kumho Tire Company v. Carmichael*[[41]](#endnote-41), the Court stressed the role of the district court judge as a gatekeeper who must ensure that “any and all scientific testimony or evidence admitted is not only relevant, but reliable.”[[42]](#endnote-42) Federal Rule of Evidence 702 sets forth the admissibility requirements for expert testimony:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an Expert by knowledge, skill, experience or training, or education, may testify thereto in the form of an opinion or otherwise.[[43]](#endnote-43)

Analysis of the admissibility of proffered scientific testimony is committed to the sound discretion of the trial judge.[[44]](#endnote-44)

Initially, a trial court faced with proffered expert testimony must determine whether the witness qualifies as an expert under Rule 702, (—*i.e.,* whether he or she has “sufficient qualifications in the form of knowledge, skills and training.”)[[45]](#endnote-45) If a witness does not qualify as an expert, his or her testimony must be excluded.[[46]](#endnote-46)

If a witness qualifies as an expert, the court must then determine if the witness proposes to testify to “(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”[[47]](#endnote-47) To perform its “gatekeeper function” as to the admissibility of expert testimony, the trial court must make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”[[48]](#endnote-48) This standard of reliability and relevance also embraces the credibility of the witness proffering the expert opinion.[[49]](#endnote-49) When screening proffered testimony, the trial judge is charged with ensuring that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”[[50]](#endnote-50)

## Reliability

Under the first prong of the standard for admissibility of expert testimony established by *Daubert*, proffered expert testimony may be admitted, “so long as the process or technique the expert used in formulating the opinion is reliable.”[[51]](#endnote-51) This prong requires that the proffered opinion be “based on the ‘methods and procedures of science’ rather than on ‘subjective belief or unsupported speculation,’ the expert must have ‘good grounds’ for his or her belief.”[[52]](#endnote-52) Generally, acceptable scientific methodology “is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.”[[53]](#endnote-53)

When specifically determining whether a particular scientific methodology is scientifically valid and therefore reliable, district courts are directed to consider, at a minimum, the following factors established by the Supreme Court in *Daubert*[[54]](#endnote-54):

(1) whether a method consists of a testable hypothesis;

(2) whether the theory has been subject to peer review;

(3) the known or potential rate of error;

(4) the existence and maintenance of standards controlling the technique's operation;

(5) whether the method is generally accepted;

(6) the relationship of the technique to methods which have been established to be reliable;

(7) the qualifications of the expert witness testifying based on the methodology; and

(8) the non-judicial uses to which the methodology has been put.[[55]](#endnote-55)

Of course, the reliability analysis ultimately remains “flexible,” and the district judge has wide latitude in determining which, whether, and to what extent the above factors apply in specific cases.[[56]](#endnote-56) As such, the Third Circuit distilled the comprehensive list of factors as follows: “The ultimate touchstone is helpfulness to the trier of fact, and with regard to reliability, helpfulness turns on whether the expert's technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results.”[[57]](#endnote-57) It is clear that each and every analytical step taken by an expert in reaching his or her opinion must be adequately supported by “good grounds”. Indeed, “any step that renders the analysis unreliable under the *Daubert* factors *renders the expert's testimony inadmissible*.”[[58]](#endnote-58)

## Fit Or Relevance

The second prong of the *Daubert* standard is “fit” or relevance (*i.e.*, “the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case.”)[[59]](#endnote-59) Essentially, under Rule 702, the proffered testimony must be able to “assist the trier of fact to understand the evidence or to determine a fact in issue.”[[60]](#endnote-60) This standard “requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.”[[61]](#endnote-61) Thus, there must be “good grounds” to extrapolate from the science to reach the conclusions in the matter at issue.[[62]](#endnote-62) Further, fit “is not always obvious,” and the fact that an opinion is valid for one purpose does not make it scientifically valid for another purpose.[[63]](#endnote-63) As the *Daubert* court explained by way of example, reliable science regarding the phases of the moon may assist a trier of fact in determining whether a certain night was particularly dark, but the same science may not be relevant to determine whether a person acted irrationally on the same night.[[64]](#endnote-64)

Finally, “[n]othing in *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”[[65]](#endnote-65)

## Conclusion

The teachings of *Daubert* and all of the relevant cases that have been decided thereafter are of particular concern to construction practitioners and experts. While no one would argue that disciplines such as architecture, engineering and accounting are all squarely within the types of “sciences” to which a court would apply a *Daubert*-type analysis, it is clear that critical path and scheduling analyses and opinions, as well as construction cost accounting and economic damages opinions, are all within the ambit of *Daubert*. There is considerable debate among construction practitioners and experts, and there has been, and will continue to be, significant motion practice in the courts on these issues. As such, it is critically important that the legal team focuses on the admissibility of all expert opinions to safeguard against these challenges.

# Section 8: Dealing With The Opponent’s Expert

In addition to managing the efforts of your own expert(s), it is just as important to effectively deal with the opposing experts.

If a Defendant is the first to retain an Expert, it is imperative that the Plaintiff’s counsel consider retaining a corresponding expert early in the process. As discussed above, this Plaintiff’s expert can be initially retained in a consulting role without retention or disclosure as a testifying expert. If counsel waits until just before a deadline, such as the when there is a need to submit rebuttal reports, before retaining or allowing the expert to begin work, it can significantly hamper the expert in delivering a high-quality work product in a cost effective manner, which can directly affect counsel’s (and therefore the client’s) case.

Another advantage of retaining a rebuttal expert early is that he or she might be able to give significant input that may impact the approach taken—to the benefit of your case. The world of experts, particularly on specific skills or topics (e.g. Critical Path Method—or “CPM”—scheduling), is generally a small one, and often the expert or someone in the expert’s firm may know the opposing expert as a former colleague, through first-hand experience on other matters, or by reputation in the industry. The knowledge of the opposing expert’s qualifications may shed light on the opposition’s case strategy and can give counsel, client, and your expert the ability to discuss the type and quality of expert report to expect. This is particularly relevant when counsel is representing the Defendant and will be rebutting the opposing expert report submitted by the Plaintiff.

Likewise, if you are representing the Plaintiff and your expert is aware of the rebuttal expert early, it may be useful in assisting your expert with development of his or her report. For example, if the rebuttal expert is known for using a certain type of schedule analysis methodology in most cases similar to the one at hand, your expert can use a similar methodology, or explain carefully and early-on why that methodology is not appropriate in your case.

It is often most efficient to use your expert and his or her team to research the opposing expert as soon as the opposing expert’s identity is known. Included in this work, your expert will likely perform some sort of internet, industry and other research on his or her own, but counsel and the expert should at least discuss the level of research to be done and who should perform it.

Whether counsel or the expert performs the search, the first step typically taken to research an opposing expert is a general internet search. For example, the expert’s personal or firm’s website, a Linked In page, or materials provided with an industry speaking engagement may provide a Curriculum Vitae for the opposing expert well before it is received in the discovery process in your case. Some experts also participate in blogs or other internet-based industry conversations that may provide another important source of information. Similarly, if the opposing expert has a Facebook page or a major court opinion involving him or her, it may show up in a search through Google and may allow counsel to obtain a fairly reasonable picture of some of the key characteristics and traits of the opposing expert before they ever meet.

Other potential steps include: internal research within the law firm and the expert’s firm; external research through colleagues in other law firms and expert firms; and research in legal databases such as PACER, Lexis Nexis, Westlaw, and Daubert Tracker. See also Section 1 of this paper for a more complete list of ways to conduct research on experts.

## Analysis Of The Opposing Expert’s Report

After receiving the opposing expert’s report, it is important to quickly forward it to your own expert.[[66]](#endnote-66) The opposing expert’s report will often include exhibits, work papers, and possibly data in native form. If the opposing expert’s supporting work papers are not included with the initial submissions, they should be requested immediately. If the opposing expert’s analysis is not available in native form (i.e., “live” electronic form such as Microsoft Excel or Primavera P6 scheduling files), it may be important to request the underlying data in its native form. Counsel should first discuss the cost and benefits of doing so with his or her expert. For example, the native schedule update files used to perform a schedule analysis may allow your expert to more timely and completely evaluate the opposing expert’s analysis, which may only be presented in the opposing expert’s report in the form of simplified graphics without any visibility into the underlying schedule logic.

It is imperative for your expert to get the opposing expert report and support as early as possible and begin a detailed review of the other side’s analysis and conclusions. This review will help counsel identify flaws in the methodology, highlight significant mathematical errors, and identify any controversial or unsupported assumptions, as well as any other significant issues regarding the opposing experts’ opinions and supporting analyses. If the methodology employed by the opposing expert is determined to be flawed, these findings could also be used to form the basis of a Daubert motion or to demonstrate to the opposition significant weaknesses in their case, potentially leading to a favorable settlement.[[67]](#endnote-67)

## Informal Meeting Of The Experts

International arbitrations often require that opposing experts jointly issue a report to the Tribunal which stipulates the issues and facts upon which the experts agree. Sometimes referred to as “hot-tubbing”, this allows for simple issues to be resolved in a comparatively low-cost manner, and can identify errors that stem from a misunderstanding of accepted facts. For example, the experts may be able to agree that certain of the Plaintiff’s project employees are, in fact, time-related and that the recorded cost related to those employees is accurate. Then all that is left to argue at the hearing is the amount of time for which the Plaintiff will be compensated for those particular project employees.

Although this “hot-tubbing” approach is not part of the typical arbitration or Court rules in the United States, the parties could certainly agree to adopt it in those forums on an informal basis, as a means for the experts to narrow areas of differences in a dispute. Such an informal arrangement can significantly streamline the discovery process, reduce costs and again, potentially bring the parties closer to a settlement agreement—or at least narrow the focus of what needs to be adjudicated.

## Deposition Of The Opposing Expert

The opposing expert report and supporting work papers are not always clearly presented and a misunderstanding of the methodology used or the basis for assumptions or conclusions often causes the need to depose the opposing expert. Your expert can greatly assist by preparing deposition questions for use with the opposing expert, so as to most directly identify the critical, fact-based assumptions used in the opposing expert’s analyses, as well as the full bases for methodologies employed. [[68]](#endnote-68)

Once the expert prepares a list of deposition questions for the opposing expert, counsel should work with his or her expert on prioritizing those questions based on their importance to his or her expert’s own analyses, determine the expected answers to the questions, and—importantly—ensure that the counsel fully understands the questions and why they are being asked. Sometimes, it may also be useful to discuss which of the questions or even overall areas of attack should potentially be saved for trial and not be raised at the deposition of the opposing expert.

In taking the deposition of the opposing expert, counsel may want to consider having his or her expert attend the deposition (or possibly one of the expert’s consulting team members), to be able to create or adapt previously-prepared questions in real-time, based on the opposing expert’s responses. This can be particularly helpful in addressing the more complex analyses and opinions of the opposing expert.

Counsel should also consider the best strategy to employ when deposing the opposing expert. For example, using a professional, friendly demeanor to the greatest extent possible may elicit more complete responses and potential “sound-bites” that can be used at trial or arbitration. In other cases, the objective may be to “rattle” the opposing expert and opposing counsel in order to facilitate an early settlement. In this case, a more aggressive, hardline approach may be warranted.

## Rebuttal Reports And Trial Assistance

The case rules may or may not require preparation of a rebuttal report by your expert. Counsel may also decide that a rebuttal report is not required because of weaknesses in the other side’s case, an effective deposition of the other side’s expert, or other strategic reasons. If it is decided that a rebuttal report is required, it should be decided in sufficient time to allow the expert to prepare it in accordance with the points in Section 6 of this paper.

If no rebuttal report is to be proffered, it may make sense to have the expert (or again, one of the expert’s consulting team members) attend the trial during the opposing expert’s testimony to assist in cross-examination questioning, similar to the assistance provided at the deposition stage.

## Conclusion

When dealing with opposing experts, your expert can be of invaluable assistance in understanding the other side’s case and preparing an effective defense, regardless of whether you decide to use your expert in a testifying role. Accordingly, here again it is a good approach to get your expert involved early in the case, to allow ample time to most effectively assist you and your client. Doing so will provide a valuable resource on the technical and financial aspects of a claim, assistance with development of the claim strategy, and most likely, an overall cost savings for the remaining duration of the dispute.

# Section 9: Trial Tips

Trial is “show time” for the entire litigation team. Although most of the expert’s work has been done at this point and is reflected in an expert report, it is very likely that the judge or jury may not study that report in detail (and the judge might not even admit it as evidence.) And, even if they have studied it, they may not completely understand the analysis or the opinions of the expert. The expert’s performance at trial then becomes critical to the overall trial strategy and success of the case.

## Trial Advice

Some important factors to bear in mind when utilizing experts to convey the client’s case to the judge and the jury during trial are:

* Courtroom logistics should be worked out well in advance. For example, does the courtroom have a projection device, or should one be brought along? Is the presentation software compatible with the projection device? Where will the expert sit?
* Advance preparation with the expert should be thorough enough so that counsel and the expert are both comfortable with the testimony, while at the same time not appearing scripted or rehearsed.
* Counsel should be sure the expert understands the key “themes” of the case and can emphasize them in his or her testimony, as appropriate. This is especially effective if the expert can incorporate these themes into his or her answers to cross-examination questions.
* Make sure your expert is familiar with relevant fact witness testimony and can reference back to that testimony, as appropriate, in the course of his or her expert testimony.
* Testimony presented to the judge and the jury must be as clear and straightforward as possible. This is particularly true when presenting numbers. When the analyses performed by the expert are complex, they should be broken into clear, logical steps. These steps should be presented in a fairly methodical manner, using layman’s terminology to the greatest extent possible and should be bolstered by concrete examples and analogies.
* Demonstrative Exhibits should be well labeled (e.g., with legible identification numbers) and very carefully prepared to support the step-by-step presentation of the expert’s testimony as he or she “walks through” them. Although these exhibits should be simple, they should also be referenced, as applicable, to more detailed exhibits in evidence so that the judge or jury can study them in more detail.
* The expert should maintain a calm demeanor and remain personable, polite, and “approachable” at all times. A good expert will be able to maintain this demeanor even in the face of difficult cross-examination. Thorough preparation increases the expert’s ability to “think on his or her feet” during this stage of the trial.
* Analyses presented to the judge and the jury on demonstratives should be absolutely correct. It should be checked and double-checked. For example, the trier is likely to re-calculate even simple calculations and may question the entire analysis if there are any such errors.[[69]](#endnote-69)
* However, if some error is determined, or new facts emerge that change the expert’s analysis, the expert should calmly respond and, if a change to a demonstrative exhibit is warranted, make the change—even by hand—and directly address the change.
* Be nice to opposing experts, even when potentially undermining their analyses or conclusions during cross-examination. Being exceptionally harsh with an opposing expert can irritate a trier and even result in a jury feeling sorry for the opposing expert and perhaps even the opposition, in general.
* In the post-trial case, rely on the expert’s help to prepare updated analyses, as well as any other analytical work that needs to be included in the post-trial motions.

## Conclusion

A well-prepared and credible expert will assist in educating the trier and reinforce the overall strategy of the case by presenting a complex analysis in the clearest, most straightforward terms possible. Sufficient time should be reserved for counsel and the expert to prepare so that the testimony is consistent with, and reinforces, the case strategy. And finally, professionalism should be the overriding rule for everything that is done at trial or arbitration.

**Appendix A: Summary Of This Paper’s Key Recommended Practices & Tips**

**Section 1: How To Find And Retain The Expert**

1. Experts can be instrumental for technical, schedule impact and financial claim issues.
2. Retain the expert early.
3. Retain an expert with experience that matches claim issues.
4. Use internal and external contacts and sources to identify appropriate experts.
5. Identify, contact, and vet (e.g., clear conflicts, confirm overall fit for issues, consult references) prior to retention.
6. Avoid “hired guns” who are not consistent in past positions.
7. Utilize the expert and his or her team when developing claim strategy and discovery requests.

**Section 2: Kicking Off The Expert Engagement**

1. Agree to an Engagement Letter with the expert that defines the expert’s role, confidentiality restrictions, how disputes with the expert will be handled, indemnity limitation language, and billing terms and conditions, among other terms.
2. Expert and key client personnel should thoroughly discuss the claim to identify the key issues and potential approaches.
3. Establish document transmission protocol and timely provide documents and information to the expert.
4. Consider using a non-testifying or consulting expert to first review sensitive information to help insulate the testifying expert.
5. Use the expert to help develop and prioritize discovery requests.

**Section 3: Investigation, Research And Documentation**

1. Coordinate with expert, client personnel, and counsel to identify the locations of potentially relevant documents.
2. Determine if, when and how documents will be Bates stamped.
3. Determine how electronically stored documents and information will be produced, whether in full or as a subset that is relevant to the claim issues.
4. Determine which documents need to be reviewed for privilege.
5. Determine whether the expert or another non-testifying consultant working with the expert will review the documents first to identify those relevant to be provided to the expert.
6. Coordinate with the expert on venue-specific and other legal issues for case that may affect the expert’s analysis.
7. Determine level of detail for the expert’s written findings (e.g., expert report, declaration).

**Section 4: Discovery And Disclosure Issues Involving Experts**

1. A party must disclose to other parties the identity of any witness that may present evidence at trial.
2. The expert must produce an expert report containing all opinions the expert will express, the basis for those opinions, the facts or data considered, exhibits that will be used, qualifications, a list of the other cases in which the expert has testified, and the witness’s compensation.
3. Effective December 1, 2010, Federal Rule 26(a)(2) was amended to provide work-product protection against discovery regarding draft reports and disclosures of attorney-expert communications.

**Section 5: Expert Reports**

1. Counsel, client and expert should outline the scope of the expert’s assignment early on.
2. Counsel and expert should regularly communicate regarding the expert’s analyses and findings throughout the engagement to facilitate submittal of the expert report.
3. Consider particular requirements of the claim’s venue that might affect the expert’s report.
4. The venue’s typical requirements on level of detail for the expert’s report may potentially be changed by an agreement between the parties.
5. The expert should identify in the expert report all opinions and conclusions, key documents relied upon, summary exhibits relied upon, the expert’s qualifications, the expert’s previous testimony experience, and the expert’s hourly rate for the engagement.
6. Counsel and the expert should coordinate on all of the logistics required for completing the expert report.

**Section 6: Preparation For Trial**

1. Counsel and the expert should jointly review all of the facts and legal strategies before trial (e.g., expert’s opinions, deposition transcripts, discovery responses).
2. Counsel and the expert should discuss the potential need for and use of demonstrative exhibits.
3. Counsel and the expert should perform dry runs of the testimony to be provided, including significant areas of potential cross-examination.
4. Counsel should prepare for expert testimony by learning how detailed the expert’s knowledge is of the matter, becoming familiar with the expert’s expected testimony, and the effectiveness of delivery.
5. Counsel and expert should work together on expert’s testimony delivery, as well as responding to potential questions expected during cross-examination.

**Section 7: Daubert Challenges – Fighting Junk Science (Including Economic Damages And Schedule Analyses And Conclusions)**

1. If a witness does not qualify as an expert, then that witness’s testimony must be excluded.
2. The trial court serves in a “gatekeeper function” and must determine if the witness proposes to testify to “(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue”.
3. The expert’s testimony must be both reliable and “fit” the disputed factual issues in the case.

**Section 8: Dealing With The Opponent’s Expert**

1. The opposing expert’s background and experience may shed light on the opposition’s case strategy.
2. Perform research on the opposing expert to identify previous positions or opinions on similar claim issues.
3. Counsel should utilize his or her expert to review the opposing expert’s report and underlying data as soon as it is available.
4. Consider having both sides’ experts meet informally to resolve comparatively simple claim issues outside of formal proceedings.
5. Counsel should use his or her expert to help prepare deposition questions for the opposing expert’s deposition.
6. Notify the expert as early as possible about the potential need for a rebuttal report, to allow sufficient time for the expert to prepare.

**Section 9: Trial Tips**

1. Courtroom logistics should be worked out well in advance.
2. Prepare with the expert in advance, including emphasis of the key issues and themes.
3. The expert should present testimony to the judge and the jury as clearly as possible.
4. All demonstratives should be fully checked and verified well in advance.
5. Admitted exhibits should be referenced in demonstratives whenever applicable.
6. The expert should always present a totally professional demeanor.
7. In the post-trial phase, rely on the expert’s help, e.g., to prepare updated analytical work required for post-trial motions.

1. In using the term “expert”, expert consultant, or “expert witness”, unless otherwise specifically stated, the authors use the term to include the collective expert team (*i.e*., his or her associates, employees, subconconsultants, or other such personnel.) [↑](#endnote-ref-1)
2. *See* AICPA and Institute for Advancement of the American Legal System, *Another Voice: Financial Experts on Reducing Client Costs in Civil Litigation*, Sept. 2012. [↑](#endnote-ref-2)
3. Fed. R. Civ. P. 26(a)(2)(B). [↑](#endnote-ref-3)
4. Fed. R. Civ. P. 30; *note* in certain jurisdictions, such as New York state court, rules regarding expert disclosures and depositions are dramatically different. *See*, *e.g.*, NY CPLR 3101(d)(1)(i); *see also* Advisory Group to the New York Federal-State Judicial Council, *Report on Discrepancies Between Federal and New York State Expert Witness Rules in Commercial Litigations*, January 10, 2012 (http://www.nynd.uscourts.gov/documents/ExpertDisclosureReport.pdf). [↑](#endnote-ref-4)
5. Fed. R. Civ. P. 26(a)(2)(A). [↑](#endnote-ref-5)
6. Fed. R. Civ. P. 26(a)(2)(B)(ii). [↑](#endnote-ref-6)
7. Fed. R. Civ. P 26(a)(2)(B) advisory committee’s note (2010). [↑](#endnote-ref-7)
8. *See* Fed. R. Civ. P. 26(b) (1992) (amended 1993). [↑](#endnote-ref-8)
9. Krisa v. Equitable Life Assur. Soc., 196 F.R.D. 254, 261 (M.D. Pa. 2000). [↑](#endnote-ref-9)
10. *Id*. at 258. [↑](#endnote-ref-10)
11. *See* *id*. (citing B.C.F. Oil Refining Co. v. Consolidated Edison Co., 171 F.R.D. 57. 64 (full disclosure is mandated regardless of whether the material constitutes work product); Karn v. Ingersoll-Rand Co., 168 F.R.D. 633, 639-40 (N.D. Ind. 1996) (same); Musselman v. Phillips, 176 F.R.D. 194 (D.Md. 1997) (same). [↑](#endnote-ref-11)
12. W.R. Grace & Co. v. Zotos Int’l, Inc., 2000 WL 1843258 at \*3 (W.D.N.Y. Nov. 2, 2000) (citations omitted). [↑](#endnote-ref-12)
13. *See, e.g.*, Haworth Inc. v. Herman Miller Inc*.*, 162 F.R.D. 289,294 (W.D. Mich. 1995). [↑](#endnote-ref-13)
14. *Krisa*, 196 F.R.D. at 260-61 (stating “disclosure of work product to a testifying expert does not abrogate the protection accorded such information” and that nothing in the rules or commentary authorized the abrogation of the core work product privilege.) [↑](#endnote-ref-14)
15. *Krisa*, 196 F.R.D. at 259 (citing Bogosian v. Gulf Oil Corp., 738 F.2d 587, 594 (3d Cir. 1984); Sporcl v. Peil, 759 F.2d 312 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985); Rhone-Poulenc Rorer Inc. v. Home Indemnify Co., 32 F.3d 851 (3d. Cir. 1994)). [↑](#endnote-ref-15)
16. 738 F.2d 587 (3d. Cir. 1984) [↑](#endnote-ref-16)
17. *Bogosian*,738 F.3d at 595. [↑](#endnote-ref-17)
18. *See Rhone-Poulenc Rorer*, 32 F.3d at 866 (“[E]fforts to obtain disclosure of opinion work product should be evaluated with particular care.”) [↑](#endnote-ref-18)
19. *See, e.g.,* Elm Grove Coal Co. v. Director, Office of Workers’ Compensation .Programs, 480 F.3d 278, 302 (4th Cir. 2007) (“We are unpersuaded by this line of decisions and…believe that the vastly superior view is, consistent with the 1993 amendments to Rule 26, the such attorney-expert communications are not entitled to protection under the work product doctrine.”). [↑](#endnote-ref-19)
20. *See* Dyson Technology Ltd v. Maytag Corp., 241 F.R.D. 247 (D. Del. 2007). [↑](#endnote-ref-20)
21. In re Cendant Corp. Sec. Litigation, 343 F.3d 658, 664-668 (3d Cir. 2003) (relying on *Bogosian*). [↑](#endnote-ref-21)
22. Quinn Constr., Inc. v. Skanska USA Bldg., Inc., 263 F.R.D. 190 (E.D.P.A. 2009). [↑](#endnote-ref-22)
23. Fed. R. Civ. P. 26 advisory committee’s note (2010). [↑](#endnote-ref-23)
24. *Id.* [↑](#endnote-ref-24)
25. *Id.* [↑](#endnote-ref-25)
26. Fed. R. Civ. P. 26(a)(2)(B) advisory committee’s note (2010). [↑](#endnote-ref-26)
27. *Id.* [↑](#endnote-ref-27)
28. *Id.* [↑](#endnote-ref-28)
29. Fed. R. Civ. P. 26 advisory committee’s note (2010). [↑](#endnote-ref-29)
30. *Id.* [↑](#endnote-ref-30)
31. Regardless of the level of detail included in the work papers, one could consider including a note in the expert report itself that the work-papers are an integral part of the report. This specific notation puts the opposing side on notice that the work papers and analyses therein are also a significant part of the expert’s opinions and conclusions. [↑](#endnote-ref-31)
32. Fed. R. Evid. 702.Testimony by Experts:

    If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (As amended April 17, 2000, effective December 1, 2000.) [↑](#endnote-ref-32)
33. Boccacini, Marcus T., M.A. What Do We Really Know about Witness Preparation?, *Behavioral Sciences and the Law*, Behav. Sci. Law 20: 161-189 (2002). [↑](#endnote-ref-33)
34. *Id*. at 163. [↑](#endnote-ref-34)
35. *Id*. at 164. [↑](#endnote-ref-35)
36. *Id*. [↑](#endnote-ref-36)
37. *Id.* at 165 (citations omitted). [↑](#endnote-ref-37)
38. *Id.* [↑](#endnote-ref-38)
39. *Id.* at 166. [↑](#endnote-ref-39)
40. 509 U.S. 579 (1993) [↑](#endnote-ref-40)
41. 526 U.S. 137 (1999) [↑](#endnote-ref-41)
42. *Daubert*, 509 U.S. at 589; *see Kumho*, 526 U.S. at 147. [↑](#endnote-ref-42)
43. Fed. R. Evid. 702 [↑](#endnote-ref-43)
44. *See* *Kumho Tire Co.*, 526 U.S. at 140. [↑](#endnote-ref-44)
45. *See* In re Unisys Sav. Plan Litig*.*, 173 F.3d 145, 155 (3d Cir. 1999), *cert. denied*. [↑](#endnote-ref-45)
46. *See* Hines v. Consol. Rail Corp., 926 F.3d 262, 272 (3d. Cir. 1991). [↑](#endnote-ref-46)
47. *See* *Daubert*, 590 U.S. at 592; *In re Unisys* ., 173 F.3d at 155. [↑](#endnote-ref-47)
48. *Daubert,* 590 U.S. at 592-93. [↑](#endnote-ref-48)
49. *See* *In re Unisys*, 173 F.3d at 155-56. [↑](#endnote-ref-49)
50. *Kumho* *Tire Co*., 526 U.S. at 151; *see also* Braun v. Lorillard, Inc., 84 F.3d 230, 235 (7th Cir.) (scientists who testify for a fee to propositions not arrived at through their rigorous methodology in doing their regular professional work represent the abuses *Daubert* *s*eeks to remedy), *cert. denied*, 519 U.S. 992 (1996); Claar v. Burlington N. R.R. Co*.*, 29 F.3d 499, 503 (9th Cir. 1994) (“[S]cientists whose conviction about the ultimate conclusion of their research is so firm that they are willing to aver under oath that it is correct prior to performing the necessary validating tests could properly be viewed as lacking the objectivity that is the hallmark of the scientific method.”). [↑](#endnote-ref-50)
51. *See* In re Paoli R.R. Yard PCB Litig, 35 F.3d 717, 742 (3d Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995) [↑](#endnote-ref-51)
52. *Id.* (quoting *Daubert)*. [↑](#endnote-ref-52)
53. *Daubert*, 590 U.S. at 593 (citation omitted). [↑](#endnote-ref-53)
54. *See, e.g.*, *United States v. Downing*, 753 F.2d 1124 (3d Cir. 1985). [↑](#endnote-ref-54)
55. *Paoli*, 35 F.3d at 742 n.8; *see* United States v. Downing, 753 F.2d 1124, 1238-39; Rutigliano v. Valley Business Forms*,* 929 F. Supp. 779, 784. [↑](#endnote-ref-55)
56. See *Kumho* *Tire Co*., 526 U.S. at 149. [↑](#endnote-ref-56)
57. *Paoli*, 35 F.3d at 744 (citation omitted). [↑](#endnote-ref-57)
58. *Id.* at 745 (emphasis added); *see* *Rutigliano*, 929 F. Supp. at 784. [↑](#endnote-ref-58)
59. *See* *Paoli*, 35 F.3d at 743 (quoting *Downing*, 753 F.2d at 1237). [↑](#endnote-ref-59)
60. *See Daubert*, 509 U.S. at 591. [↑](#endnote-ref-60)
61. *Paoli*, 35 F.3d at 743. [↑](#endnote-ref-61)
62. *See* *id*. [↑](#endnote-ref-62)
63. *See Daubert*, 509 U.S. at 591. [↑](#endnote-ref-63)
64. *See* *id.* [↑](#endnote-ref-64)
65. General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). [↑](#endnote-ref-65)
66. Depending on the jurisdiction, the opposing expert may not file an expert report, but an affidavit or a declaration. Regardless of the type of expert submission, it is advisable to timely keep your expert abreast of all information submitted by or relating to the opposing expert. [↑](#endnote-ref-66)
67. *See Daubert* , 509 U.S. at 579. [↑](#endnote-ref-67)
68. Another way the expert can assist counsel is by preparing discovery requests for the opposing expert, including written interrogatories and document requests. [↑](#endnote-ref-68)
69. On a side note, is it important to specifically reference the trial exhibits on the relevant demonstrative, when appropriate. [↑](#endnote-ref-69)