American Bar Association
Forum on the Construction Industry

Preparation of the Damages Expert for Trial

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Presented at the 2013 Midwinter Meeting

Making Dollars & Sense of Construction Damages

January 31 & February 1, 2013
Waldorf Astoria Naples Hotel, Naples, Florida

I. INTRODUCTION – Or, Just like Opening and Closing Statements at Trial, This is the First Time We are Telling You What We Want You to Hear

"Success is more a function of consistent common sense than it is of genius."[2]

"People who make sense are powerful persuaders."[3]

Preparation for testimony by the expert witness begins during the selection process. Selecting a consultant best suited for the forum and subject matter avoids the "square peg, round hole" conundrum.[4] Prior to interviewing potential consultants, proper preparation by counsel requires that consideration be given to the many factors that will influence the desired ultimate outcome. Preparation continues through out the development and refinement of the "theme of the case." Preparation requires frequent communication between the trial attorney (really THE trial attorney and not just someone on the trial team) and the consultant (really THE testifier and not just someone employed by the consultant). Preparation for giving testimony necessitates a clear understanding of the role of the attorney and the consultant as well as the facts on which the claim or defense is premised about which the consultant is to testify.

For example, in preparing for testimony consideration should be given to:

- Who are we?
- Who are the other guys?
- Why are we here?
- Who is the audience?
- What is the theme of the case?
- How does the expert's testimony comport with the case theme?
- What is the desired result to be achieved by the expert's presentation?
- How does the expert's presentation move toward the overall goal of the case?

- Is there a report required or not?
- What is the level of detail and support required for testimony?

II. FIRST SOME BASICS

An attorney may violate his ethical obligations by failing to properly prepare an expert witness to testify.[5] Selection of an expert that has no chance of meeting the "gate keeper" function of the involved jurisdiction may also lead to unpleasant issues with your client or embarrassment at trial.[6] Or, maybe not.[7]

Assisting the consultant in preparation for testimony is "an expected and essential part of deposition practice."[8] Witness preparation "is the mark of a good trial lawyer and is to be commended because it promotes a more efficient administration of justice and saves court time."[9]

Appropriate goals for witness preparation are the education of both the witness and the attorney, as well as modification of testimony delivery. Permissible and expected preparation includes:

- Thoroughly exploring the expert's knowledge of the relevant facts;
- Testing and challenging the expert's opinions;
- Reviewing the questions likely to be asked;
- Preparing the witness for probable lines of hostile cross-examination;
- Reviewing the expert's report and prior testimony to refresh the witness's recollection;
- Reviewing with the witness the factual context into which the witness's testimony will fit;
- Reviewing documents or other items that may be introduced as exhibits;
- Explaining the deposition process; and

- Confirming that the expert is properly prepared and has reviewed all necessary material.[10]

But an attorney's preparation of witnesses, fact or opinion, should not go so far as to "coach" the witnesses into altering their testimony. "An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way."[11] In *Ibarra v. Baker*, the Fifth Circuit affirmed a finding that two county attorneys committed misconduct by using a consultant to coach fact witnesses to provide testimony to support novel defense theories. In particular, the defense expert developed a "high crime area" theory to help defendants avoid section 1983 liability. The evidence showed that the expert flew to Houston to meet with a police officer prior to his deposition and improperly coached the officer to use the phrase "high crime area" during his deposition.

Even during depositions, attorneys should be cautious that their conduct does not cross the line into coaching. In *Plaisted v. Geisinger Medical Center,* the court held that "defense counsel acted improperly under the guidelines for attorney conduct at depositions set forth in [prior opinions of this Court] and in Rule 30 when, during four separate depositions, she made repeated [coaching] objections, instructed witnesses not to answer certain questions, and left the deposition room while a question was pending."[12] As a result, the court allowed plaintiff's counsel to re-depose each witness in certain areas and allowed plaintiff's counsel to pose questions to the witness regarding any discussion that may have taken place during the two breaks defense counsel improperly took during his deposition.

Similarly, in *AmerisourceBergen Drug Corp v. CuraScript, Inc.*, the appellate court upheld an order granting a motion to compel the reopening of a deposition to

respond to questions regarding the witnesses' private conversations with counsel after the start of but prior to completion of the deposition.[13] In reaching its conclusion, the court explained that witness coaching can significantly interfere with the deposing attorney's access to truthful testimony from the witness and may violate Professional Rule of Conduct 3.4, Fairness to Opposing Party and Counsel. Rule 3.4 states that a "lawyer shall not obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assert another person to do any such act."

In addition, Rule 3.4 states that "a lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case." Witness coaching may also violate Rule of Professional Conduct 3.3, Candor Toward a Tribunal.

III. MORE BASICS PROVIDED BY THE OMNIPOTENT RULE 26 AS AMENDED IN 2010 AND SUBSEQUENT INTERPRETATIONS

"Everyone gets so much information all day long that they lose their common sense."[14]

In 2010 the Supreme Court adopted amendments to the Federal Rules of Civil Procedure. The 2010 amendments took effect on December 1, 2010 and govern all new proceedings and all pending proceedings, insofar as just and practicable. The amendments are important to counsel's role in assisting the expert to prepare for testimony.

The 2010 Amendments, *inter alia*, modified Rule 26 to address concerns about expert discovery. In short, the amendments narrowed the scope of an expert's written

report, required certain expert disclosures where no written report is mandated; and expressly protected as work product draft reports and communications between the expert and the party's attorney unless the communications relate to specified topics.[15]

Specifically, Rule 26(a)(2)(B)(ii) was amended to require disclosure of "facts or data" rather than "data or other information." The phrase "facts or data" should be interpreted broadly to require disclosure of any material considered by the expert from whatever source that contains factual ingredients.

Rule 26(b)(4)(B) was added to provide work product protection to drafts of a testifying expert's disclosures. Rule 26(b)(4)(C) was included to provide work product protection to all communications between a party's attorney and testifying retained expert witnesses with the following three exceptions: 1) communications that relate to compensation for the expert's study or testimony; 2) communications that identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or 3) communications that identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

The party seeking to invoke the work product doctrine bears the burden of establishing all the requisite elements, and any doubts regarding its application must be resolved against the party asserting the protection.[16]

Facts or Data:

Amended Rule 26(a)(2)(B) now requires a retained expert witness to prepare a written report containing "the facts or data" that the witness considered in forming all opinions. The phrase "facts or data" is intended to be narrower than the "data and other information" formulation used in the 1993 version and is meant to exclude theories or

mental impressions of counsel. However, the 2010 amendments did not alter the definition of "consider." Thus, required disclosures under Rule 26(a)(2)(B) still include any information furnished to a testifying expert that such an expert "generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions even if such information is ultimately rejected."[17]

Draft Expert Reports:

Draft expert reports that are protected by the work product privilege should be identified on a privilege log. Whether certain items on a privilege log constitute a "draft report" may be a contested issue. In *Republic of Ecuador v. Bjorkman,* the court held that draft worksheets created by the expert or his assistants for use in his expert reports constituted work product under the Federal Rules and were not subject to disclosure, but draft worksheets prepared by non-attorney employees at the company which retained the expert were not expert draft reports and therefore were required to be produced.

The court explained that to qualify as work product, draft reports must be authored or co-authored by reporting experts in the underlying litigation and must be drafts of reports ultimately submitted in the litigation. The court found that certain documents contained on the Respondent's privilege log as "draft reports" were in fact notes or memoranda. The court upheld the work product protection as applied to the memoranda prepared by the party's attorney, but did not extend protection to the expert's own development of opinions to be presented that was found in notes, task lists, outlines, memoranda, presentations and draft letters authored by the expert, his employer, non-attorney employees of the company which hired him, and other testifying experts from

related litigation, as they were not draft reports nor were they communications between the expert and counsel."[18]

Expert Notes:

Whether an expert's notes are discoverable will likely require a case by case analysis. In *Dongguk University v. Yale University*, the Connecticut District Court concluded that as a general matter an expert's notes are not protected by Rule 26(b)(4)(B) or (C), because they are neither drafts of an expert report nor communications between the party's attorney and the expert witness. For example, an expert's testing of material involved in litigation and any notes of such testing would not be exempted from discovery. However, under Rule 26(b)(3)(B) the court must protect against disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories. Therefore, the court conducted an *in camera* review of the expert's notes and found that the notes did not contain any mental impressions, conclusions, opinions, or legal theories of the party's attorney nor did they memorialize a conversation with counsel. Thus, the expert was ordered to produce the notes.[19]

In *Etherton v. Owners Ins. Co*., the Colorado District Court addressed whether an expert's disclosures were inadequate because they did not include "five pages of mathematical calculations" or notes created by the expert during the process of developing his report. In concluding that the expert's mathematical calculations were not required to be included with his Rule 26 report, the Court noted that the calculations were "working notes" that need not automatically be produced. In reaching this conclusion, the court relied, in part, on Rule 26(b)(4)(B)'s protection of draft reports "regardless of the form in which the draft is recorded."[20]

In *D.G. ex rel. G. v. Henry,* the court addressed whether notes, in which an expert's assistant compiled and summarized information contained in individual case files, were required to be produced. Ultimately, the court required production of the summaries because they were not draft reports. The court further explained that the summaries contained facts from the case files that the expert had relied on in forming his opinions, therefore the summaries were within the scope of "facts or data" under the amended rule.[21]

Communications between Experts:

In *National WesternLife Insurance v. Western National Life Insurance,* the court held that a retained testifying expert's communications with a consulting expert were discoverable only to the extent that the communications contained facts or data that were relied upon by the testifying expert to form his opinions. The court further found that the plaintiff had not shown any entitlement to discovery from the nontestifying expert under Rule 26(b)(4)(D) because "facts known or opinions held" by a nontestifying expert are not discoverable unless the party seeking the discovery shows "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."[22]

Communications between Counsel and Experts:

The amended Rule 26 now explicitly protects communications between a party's attorney and reporting experts. However, the 2010 Amendments did not create work product protection for communications between attorneys and non-reporting expert witnesses, instead leaving in place existing protections for such communications.

In *Pacificorp v. Northwest Pipeline GP*, the court considered a motion to compel at least 76 communications authored by, received by, or copied to the party's non-retained experts on topics about which they intend to testify. Many of the communications involved the party's in-house and outside counsel. The court applied the flexible rule used in *United States v. Sierra Pacific Indus.*, which "distinguishes between non-reporting experts who more resembled reporting experts (e.g. employees who intermittently testified as experts) and the so-called "hybrid fact and expert opinion witnesses" who should be treated unlike reporting experts.[23]

The court found that four of the non-reporting experts were hybrid fact and expert witnesses because they had percipient knowledge of disputed facts in the litigation and their expert disclosures indicated that they may provide both expert and lay testimony. As such, the court held that their designations as non-reporting experts resulted in the waiver of all applicable privileges and protections for items they considered that relate to the subject of their expert opinions and granted the motion to compel. *Id*

In *Graco Inc. v. PMC Global Inc,* the court concluded that the defendant was entitled to all relevant discovery regarding the facts or data considered, reviewed or relied upon for the development, foundation or basis of the employee opinion witnesses' opinions, but not to any communications between them and the plaintiff's counsel because those communications are protected by the attorney-client privilege.[24]

One Expert Serving Two Roles:

The Advisory Committee Notes recognize that a non-retained expert witness, such as a physician or other health care professional and employees of a party who do not

regularly provide expert testimony may testify both as a fact witness and also provide expert testimony.[25]

Rule 26(b)(4)(D) establishes a high barrier to discovering opinions of a non-testifying consultant. In *Sara Lee Corp. v. Kraft Foods Inc.,* Defendants' expert served two roles in the same case—that of a testifying expert on one issue and that of a non-testifying consultant on a separate issue. The court determined that the materials in question were generated uniquely in the expert's capacity as a consultant and were not discoverable unless plaintiff could show exceptional circumstances under which it was impracticable to obtain the facts or opinions on the same subject by other means. Further, because the requested materials were merely suggestions on how defendants might conduct a study, they were not "facts or data" or assumptions provided by counsel and therefore were protected under Rule 26(b)(4)(C).[26]

IV. TRIAL ATTORNEY AND CONSULTANT HAVE DISTINCT ROLES

"Common sense often makes good law."[27]

The Attorney's role and responsibilities include:

- Understand the role of the consultant.
- Assure consultant understands and agrees with role and expectations.
- Make sure expert is aware of and meets the "gate keeper" criteria.
- Discuss Rule 26 protections of work product and obligation to preserve even if Rule 26 does not require disclosure.
- Deliver facts, data in manner that they can be easily produced as required.
- Communicate/discuss disputed facts and opposing legal theories.
- Communicate/develop the theme of the case as necessary for testimony in manner that is protected as work product.

- Define the topics on which opinion testimony is expected.
- Anticipate cross examination topics and tactics.
- Call to attention of expert any peculiarities of jurisdiction and/or trier of fact.

The Consultant's role and responsibilities include:

- Understand the role of trial counsel.
- Assure there is agreement as to role and expectations.
- Carefully review and critically evaluate the "facts" as presented.
- Identify what may be missing or required for full development of opinions.
- Segregate facts and data from work product discussions.
- Develop and fully vet with counsel the opinions about which testimony is expected.
- Make sure the attorney is aware of basis for opinions and relied upon facts.
- Make sure the attorney has working understanding of opinions.
- Identify prior testimony or reports on similar relevant issues or involving related parties.
- Pay attention to billing statements to avoid inadvertent disclosure of work product.

V. FROM THE PERSPECTIVE OF A SEASONED CONSULTANT, A CHECK LIST OF DO'S AND DON'T'S FOR PREPARING THE EXPERT DAMAGES WITNESS

1) Don't wait until the last minute to prepare the witness. If something comes up during the prep session and/or you feel that the expert is not ready, leave some time to remedy the situation.

2) Meet with the expert again at least an hour before the scheduled testimony time. Leave plenty of time for any last minute delay or traffic issues, etc.

3) If your expert is flying in from out of town, make sure they come in the night before to avoid any flight issues.

4) Make sure that you remind your expert to read his or her deposition transcript. Many experts, even the most seasoned, do not do that right before they testify, and a small difference in how a question is answered between deposition and trial can appear to be (and might actually be) problematic.

5) Specifically ask the expert what areas he or she feels most vulnerable on, so they can be discussed and you can offer potential approaches for dealing with those issues.

6) Go over the limits of what you want the expert to talk about regarding communications with you or other lawyers in your firm.

7) Make it clear whether or not drafts of reports, e-mail communications, notes, etc. are considered discoverable in your particular jurisdiction and within the parameters of whatever arrangement you have with opposing counsel.

8) Make sure that the expert understands that anything he takes to the stand (if it is necessary or helpful to them) is discoverable by opposing counsel, and the other side's lawyer can ask to see it.

9) Coach the witness as to the best approach for directing answers when questions are asked. Although you want eye contact with the judge and/or jury, it should be natural. On cross, it is sometimes much more effective to face the opposing counsel, and only turn direct attention to the judge or jury if a detailed explanation of a point is being offered.

10) Read the deposition transcript for the expert and see if you can develop what you see as themes for the cross examination that will be coming and see how your expert will respond.

11) By now, any prior testimony that is possibly in conflict with the current position being taken by the expert has already been fleshed out. Go over these again with your expert to make sure that the responses and manner in which your expert is going to distinguish prior testimony sound legitimate and are not overly defensive on a particular position (especially if viewed as a relatively minor point).

12) Consider dealing with any potentially troublesome prior testimony on direct rather than defensively on cross.

13) Discuss fees on the engagement and consider dealing with those issues on direct.

14) Go over publications and probe the expert for any comments he or she might have made that could potentially be viewed as in conflict with positions on the current case.

15) Make sure that the expert is prepared to deal with the issue of assistance from other staff members, stressing that:

A) Your expert is ultimately responsible for all conclusions and opinions;
B) Assistants worked under his or her direction;
C) Draft of report was directed/outlined by expert (if not all originally drafted);
D) Your expert should be aware of the qualifications and background of the people working under his or her direction;

16) Ask your expert what the standards are that are applicable to the work involved (e.g., Statement on Standards for Consulting Services (SSCS), published by the AICPA).

17) If the SSCS are applicable, make sure that your expert is well versed in terms of distinguishing these standards from those applicable to an "Audit" under Generally Accepted Auditing Standards.

18) If the dispute relates to a particular contract, make sure your expert has read the contract provisions that are applicable, and that you have informed your expert as to the legal interpretation of key clauses. Stress with the expert that they are not giving a legal opinion relating to the contract or its interpretation.

19) Go over with the expert the names, titles and dates of any conversations or meeting he or she had with client representatives.

20) If your damages expert is relying on any other expert or fact witnesses, make sure you inform them of any current issues or changes in those opinions and go over your expert's understanding of the underlying factual or other expert assumptions.

21) Have your expert carefully review all damages calculations and inform you of any corrections or errors in the numbers. If any, deal with them on direct rather than 'hoping they don't come up'.

[1] The author acknowledges the contributions of attorney Rebecca A. Ross of Polsinelli Shughart PC in Denver, Colorado in the preparation of this article.

[2] brainyquote Common Sense Quotes, http://www.brainyquote.com/quotes/quotes/a/anwang112586.html, last visited November 30, 2012.

[3] *The World of McElhaney*, ABA Journal, October 2012, at 37.

[4] The Free Dictionary, http://idioms.thefreedictionary.com/square+peg+in+a+round+hole, last visited November 30, 2012.

[5] *In the Matter of Disciplinary Proceedings Against Warmington*, 568 N.W.2d 641 (Wis. 1997)(attorney's failure to supervise the preparation of an expert witness to testify, among other things, constituted the failure to provide competent representation in violation of SCR 20:1.1).

[6] *Brennan v. St. Louis Zoological Park*, 882 S.W.2d 271 (Mo.App.E.D. 1994) ("the fact that [plaintiff's expert-a professional engineer] worked closely with architects for a number of years does not mean he is qualified to testify as to the standard of care required of architects by their own profession."); *see also*, *IMR Corporation v. Hemphill*, 926 S.W.2d 542 (Mo.App. 1996) (finding that a civil engineer was not qualified to testify as to the standard of care required for a general contractor) *But see, e.g. Yantzi v. Norton*, 27 S.w.2d. 427, 431 (Mo.App. 1996) (holding that defendants' expert witnesses who were not professional engineers, were permitted to give expert testimony regarding foundation inspection and evaluation); *Perlmutter v. Flickinger*, 520 P.2d 596, 597-598 (Colo.App. 1974) (permitting a chemical engineer who designed skylights and a contractor who installed skylights to testify regarding an architects' standard of care for designing skylights) *Brushton-Moira Cent. Sch. Dist. v. Alliance Wall Corp*, 600 N.Y.S.2d 511, 512 (1993) (permitting a civil engineer specializing in the design and evaluation of wall systems to give an expert opinion concerning the standard of care applicable to architects designing walls) *National Cash Register Co. v. Haak*, 335 A.2d 407, 411 (Pa.Super. 1975) (permitting a geologist and an engineer specializing in hydraulics to give expert testimony regarding an architect's design of a surface water distribution system).

[7] *Rodrick v. Wal-Mart Store East*, 666 F.3d 1093 (8th Cir. 2012); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953 (10th Cir.2002) (noting that a district court can allow evidence violating Rule 26(a) if the violation was justified or harmless).

[8] Ira L. Libanoff, *Practical and Legal Considerations for Locating and Selecting Expert Witnesses*, 2010 ABA Forum on the Construction Industry Fall Meeting.
Author: Holmes, Nicholas; Libanoff, Ira L; Nielson, Jennifer A
(These papers presented at the Forum's 2010 Fall meeting are excellent, thoughtful discussions of related issues concerning expert witnesses in construction related disputes.)

[9] M.T. Boccaccini, *What do we really know about witness preparation?* 20 Behavioral Sciences and the Law 161,161-189 (2002).

[10] *Id.*

[11] *Ibarra v. Baker*, 338 Fed.Appx. 457, 465 (2009).
[12] *Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 535 (M.D. Pa. 2002).
[13] *AmerisourceBergen Drug Corp v. CuraScript, Inc.*, 83 Pa. D. & C. 4th 362, 364 (Pa.Com.Pl. 2007).
[14] brainyquote Common Sense Quotes, http://www.brainyquote.com/quotes/quotes/g/gertrudest107878.html, last visited November 30, 2012.
[15] *In re 94th and Shea, LLC*, 2011 WL 6396522 (D. Ariz. 2011).
[16] *Republic of Ecuador v. Bjorkman*, 2012 WL 12755 (D. Colo. 2012).
[17] *Fialkowski v. Perry*, 2012 WL 2527020 (E.D. Pa. 2012).
[18] *Republic of Ecuador v. Bjorkman*, 2012 WL 12755 (D. Colo. 2012).
[19] *Dongguk University v. Yale University*, 2011 WL 1935865 (D. Conn. 2011).
[20] *Etherton v. Owners Ins. Co*., 2011 WL 684592 (D. Colo. 2011).
[21] *D.G. ex rel. G. v. Henry*, 2011 WL 1344200 (N.D. Okla. 2011).
[22] *National Western Life Insurance v. Western National Life Insurance*, 2011 WL 840976 (W.D. Tex. 2011).
[23] *Pacificorp v. Northwest Pipeline GP* 2012 WL 2903976 (D. Or. 2012)*; United States v. Sierra Pacific Indus.*, 2011 WL 2119078 (E.D. Cal. 2011).
[24] *Graco Inc. v. PMC Global Inc.*, 2011 WL 666056 (D.N.J. 2011).
[25] *Currie v. Cundiff*, 2012 WL 2120002 (S.D. Ill. 2012).
[26] *Sara Lee Corp. v. Kraft Foods Inc*., 273 F.R.D. 416 (N.D. Ill. 2011).
[27] brainyquote Common Sense Quotes http://www.brainyquote.com/quotes/quotes/w/williamod111873.html, last visited November 30, 2012.