Admissibility of Claims Handling and Attorney's Fees Expert Witnesses

American College of Coverage Counsel
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RECOVERING ATTORNEY'S FEES

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State Bar of Texas
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ADVANCED INSURANCE LAW
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San Antonio

CHAPTER 1

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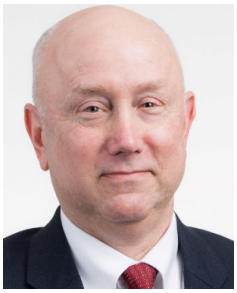

Houston
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Jim is a member of the Insurance Recovery and Shipping groups in Reed Smith's Houston office. He has more than 35 years of experience handling multimillion-dollar insurance coverage disputes through litigation or arbitration, many involving commercial property and business interruption losses, claims for D&O, professional liability, commercial general liability, builder's risk, and pollution coverage, including the energy, manufacturing, construction, and chemical sectors. Jim also handles complex commercial litigation in the shipping industry, including charter party disputes, damage to international shipments of cargo, vessel arrests and claims involving maritime liens. He has extensive experience prosecuting and defending maritime arrest and attachment claims under U.S. Admiralty Rules B, C and D.

Jim is a past chair of the Insurance Law Section of the State Bar of Texas and a current co-chair of the American Bar Association's Insurance Coverage Litigation Committee. He was elected to membership in the American College of Coverage Counsel, a privilege bestowed on less than 500 attorneys nationwide. Jim has also been selected by his peers every year since 2006 for inclusion in the *Texas Super Lawyers* rankings in the area of insurance coverage, and recognized for the 15th consecutive year as one of the nation's top insurance coverage lawyers by *Chambers USA*. In 2020, *Chambers USA* awarded him a top ranking of "Band 1" for Insurance in Texas. He was also selected by *Best Lawyers in America*© as its 2019 Houston "Lawyer of the Year" for his work in Insurance Law.

Jim has previously served as co-chair of the American Bar Association's Insurance Coverage Litigation Committee's Annual Conference, as well as the ABA's Emerging Insurance Coverage Issues and Products Liability Insurance Coverage subcommittees. He also served as the course director for the 2014 State Bar of Texas Advanced Insurance Law Course. He is a former chair of the Houston Bar Association's Historical and Professionalism committees, and was presented with President's Awards in 2010 and 2013 in recognition of his service on those committees. Jim also received the prestigious Jim D. Bowmer Professionalism Award from the College of the State Bar of Texas in 2012.

Jim served as a contributing editor for the *Lexis/Nexis Texas Annotated Insurance Code* from 2006 to 2014. He has co-authored a chapter on handling complex insurance coverage matters in *Inside The Minds: Legal Strategies For The Insurance Industry*, published by Aspatore Books. Jim has also authored insurance coverage articles for the *Journal of Texas Insurance Law*, the *University of Houston Int'l Law Journal*, and the *Michigan Bar Journal*.

Education

Tulane Law School, 1984, J.D., cum laude

Wabash College, 1981, B.A.

Court Admissions

U.S. Supreme Court

U.S. Court of Appeals - Fifth Circuit

U.S. District Court - Eastern District of Texas

U.S. District Court - Northern District of Texas

U.S. District Court - Southern District of Texas

U.S. District Court - Western District of Texas

Professional Admissions

Texas

Representative Matters

- Testified as an independent expert witness on Texas insurance and indemnity law issues before the Court of First Instance in Bilbao, Spain. The dispute involved an all-risks insurance policy and damages arising from the rupture of an underwater tether chain securing the piping system for oil production from the Outer Continental Shelf of the Gulf of Mexico. The alleged damages are in excess of $400 million.

- Represented Lennar Corporation in an insurance coverage dispute arising from the repair and replacement of defective synthetic stucco on hundreds of Houston-area homes. The decision by the Texas Supreme Court in favor of Lennar was listed in a review of national cases as one of the 10 most significant insurance coverage decisions in the country for 2013. *Lennar Corporation, et al. v. Markel American Insurance Company*, 413 S.W.3d 750 (Tex. Aug. 23, 2013).
- Assisted in negotiating and drafting one of the largest ever specific litigation risk insurance policy for a leading offshore drilling contractor, which provided limits of $640 million to insure our client's arbitration award.
- Represented the owner of one of the largest utility scale solar fields in Texas in its $100+ million property damage claim against its builder's risk insurers in Pecos County, Texas, and against its EPC contractor in federal court in Austin, Texas. The matter was successfully settled.
- Secured more than $100 million in insurance coverage for North America's largest natural gas utility arising from property damage at a natural gas pipeline construction project.
- Secured full recovery for one of the leading providers of plumbing and air-conditioning/heating services in the United States in a dispute with its insurer over contingent business interruption losses arising from Hurricane Harvey, the most significant rainfall event in United States history (Texas), and Hurricane Irma, the strongest storm on record to exist in the open Atlantic region (Florida).
- Representing one of the leading owners and managers of hospitals in the U.S. in connection with business interruption losses arising from the Coronavirus pandemic.
- Represented DISH Network in a dispute concerning insurance coverage of a legal malpractice judgment and the insurer's *Stowers* liability. Texas jury awarded more than $34 million to the client, which was upheld on appeal. *OneBeacon Insurance Company v. T. Wade Welch & Associates*, *et al.*, No. H–11–3061 (S.D. Tex.) (2014), *aff'd*, 841 F.3d 669 (5th Cir. 2016).
- Served as insurance coverage counsel to a master limited partnership in the midstream energy sector following a $172 million excess of policy limits verdict.
- Represented a leading real estate valuation provider in insurance coverage litigation under a professional liability insurance policy arising from a multi-million-dollar trade secret lawsuit. The matter was successfully settled.
- Representing the largest manufacturer of exterior building products in North America in coverage litigation arising from an alleged $600 million shareholder derivative action.
- Represented the owner and operator of the largest refinery in North America, and the fifth largest in the world, in connection with insurance coverage and indemnity disputes arising from a severe burn/death case.

Honors and Awards

- Fellow, American College of Coverage Counsel (since 2016)
- Selected by *Best Lawyers in America* as its 2019 Houston Insurance "Lawyer of the Year"
- Band 1, *Chambers USA* ranked insurance coverage lawyer (2016-2022) (ranked in Chambers since 2005)
- Selected to the *Texas Super Lawyers* list for Insurance Coverage (2006 – 2022)
- *Who's Who Legal: Insurance & Reinsurance* (2021)
- *Guide to the World's Leading Insurance & Reinsurance Lawyers* (2007 - 2015)
- *AV® Preeminent*™ 5.0 out of 5 Peer Review Rated, *Martindale-Hubbell®* PEER REVIEW RATINGS™ (1995 - 2022)
- *Texas Lawyer* Insurance Section of the Year (2014)
- Garland Walker American Inn of Court Outstanding Service Award (2015)
- National Program Awards, American Inns of Court (2004, 2008, 2011, 2012, 2014, 2015)
- President's Award recognizing outstanding service as Chair of Houston Bar Association's Historical Committee (2013)
- Jim D. Bowmer Professionalism Award from the College of the State Bar of Texas (2012) (highest professionalism award from the Texas State Bar)
- President's Award recognizing outstanding service as Chair of Houston Bar Association's Professionalism Committee (2010)

Publications

- 13 September 2017 "Business Income / Contingent Business Income After a Disaster", Reed Smith Client Briefings, Co-Authors: Stephen L. Moll, John N. Ellison, John D. Shugrue, David M. Halbreich, Kevin B. Dreher, Richard P. Lewis
- 29 August 2017 "Hurricane Harvey: Policyholders Need to Act Promptly to Preserve Rights to Insurance", Reed Smith Client Alerts, Co-Authors: Stephen L. Moll, John D. Shugrue, Kevin B. Dreher, John N. Ellison, Douglas R. Widin, Richard P. Lewis, Paul E. Breene, David M. Halbreich, Courtney C. T. Horrigan
- 23 May 2017 "Legislature Restricts Rights of Insurance Policyholders", Austin American-Statesman, Co-Author: Luke E. Debevec
- Summer 2016 "Everything You Need To Know About Professional Liability Insurance You Already Learned from Dr. Seuss (And Other Children's Stories)", State Bar Litigation Section Report, The Advocate, Vol. 75, Co-Author: Emily E. Garrison
- October 2011 "Part II: Stanford Coverage Litigation—The Final Chapter of a High-Stakes Battle Over Payment of Millions of Dollars in Attorneys' Fees", ABA Coverage Magazine
- 27 July 2009 "Court Rejects Third-Party Notice", Texas Lawyer, Co-Author: Stephen L. Moll
- 30 June 2009 "Construction Defect Claims", 88 Michigan Bar Journal
- 1 January 2009 "Insurance Coverage for Construction Defect Claims: A Survey of Significant Texas Case Law & National Trends", Lorman Education Services
- September/October 2007 "Contract Language Trumps Equity in Insurance Case", Legal Trends, 45:2, The Houston Lawyer
- 4 June 2006 "The Successful Policyholder: Insuring a Fruitful Harvest", Texas General Counsel Forum Report, Texas Lawyer, Co-Author: Stephen L. Moll
- 14 November 2015 "The Customer's Perspective: Making the Most of Insurance Coverage", Aspatore Books
- 2005 "Legal Strategies for Policyholders, Understanding the Law Behind the Insurance Business", Aspatore Books, Co-Author: Stephen L. Moll
- 2004 "Maximizing Insurance Coverage for Pre-Suit Settlements of Construction Defect Claims", 5 Journal of Texas Insurance Law 2, Special Construction Coverage Issue
- 1997 "Recovery of Economic Damages for Delayed Offshore Production", 28 J. Maritime Law & Commerce; (cited in Agip Petroleum Co. v. Gulf Island Fabrication, Inc., 17 F. Supp. 2d 660, 661 (S.D. Tex. Aug. 25, 1998) (NO. CIV. A. H-94-3382))
- 1994 "Weathering the Storm: International Loss of Hire Policies and the Problem of Unchartered Rigs", 17 Univ. of Houston Int'l L. J. 203

Speaking Engagements

- 1 June 2022 State Bar of Texas 19th Annual Advanced Insurance Law Course, San Antonio, Texas
  "What Judges Want Young Lawyers To Know"
- 12 May 2022 American College of Coverage Counsel 10th Annual Meeting, Chicago, Illinois
  "When Can the Policyholder Pick its Own Lawyer and How Much Does the nsurer Have to Pay?"
- 2 March 2022 ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, Tucson, Arizona
  "To Certify or Not to Certify: Tips for Federal Appeals of Novel Insurance Coverage Issues"
- 22-24 September 2021 American College of Coverage Counsel 9th Annual Meeting, Chicago, Illinois
  "Recent Developments in Excess Judgment Liability"
- 25 August 2021 American College of Coverage Counsel (Virtual), "Federal Removal and Remand Issues in Coverage Cases"
- 4 March 2021 ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar (Virtual)
  "Removal, Remand & More: Rules and New Developments in Forum Battles for Coverage Disputes"
- 4 February 2021 Aon's Global Transaction Solutions Symposium (Virtual)
  "An Introduction to Litigation and Contingent Risk Insurance"
- 4 June 2020 State Bar of Texas 17th Annual Advanced Insurance Law Course (Virtual)
  "*Stowers*—Trouble with Towers"

- 5 June 2019 State Bar of Texas 16th Annual Advanced Insurance Law Course, San Antonio, Texas
  “How to Write and Respond to a *Stowers* Letter”
- 29 March 2019 Insurance Law Section of the State Bar of Texas, Houston, Texas
  “How To Try an Insurance Coverage Case”
- 28 February 2019 ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, Tucson, Arizona
  “What Every Coverage Lawyer Should Know About Preserving Error at Trial and on Appeal"
- 25 February 2019 The American Law Institute and the United States District Courts for the Southern District, Houston, Texas “The Restatement of the Law of Liability Insurance”
- 1 March 2018 ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, Tucson, Arizona
  “Trends and Cutting-Edge Strategies for Pleading, Prosecuting and Defending Rescission Claims"
- 28 February 2018 Let's Call the Whole Thing Off": Pleading, Prosecuting and Defending Rescission Claims, Tucson, Arizona
- 25 October 2017 State Bar of Texas 40th Annual Advanced Civil Trial Course, Houston, Texas
  “Minding Insurance Coverage in Civil Trial”
- 8 June 2017 State Bar of Texas 14th Annual Advanced Insurance Law Course, San Antonio, Texas
  “Strategies Employed by Insurers and Policyholders to Secure and Protect the Most Advantageous Forum for their Coverage Disputes”
- 3 March 2017 ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, Tucson, Arizona
  "The Art of the Appeal: Making Your Insurance Case Clear, Concise, and Persuasive”
- 10-11 November 2016 21st Annual Insurance Law Institute - The University of Texas School of Law, "*Insured's Right to Independent Counsel: Navigating Texas Case Law Since Davalos Decision*"
- 10 June 2016 State Bar of Texas 13th Annual Advanced Insurance Law Course, San Antonio, Texas, "*Eight (Corners) Is Enough: Recent Trends in Duty to Defend Litigation in Texas State and Federal Courts*"
- 31 May 2016 Perrin Conferences LLC, "*Construction Defects May Be Accidents, But A Company’s Response Is Not*"
- 4 March 2016 ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, Tucson, Arizona, "*Battling for the Forum: Strategies Employed by Insurers and Policyholders to Secure and Protect the Most Advantageous Forum for Their Coverage Disputes*"
- 26 February 2016 State Bar of Texas Insurance Law Section South Texas Insurance Law Seminar, McAllen, Texas, "*Ethical Issues for Lawyers in Insurance Disputes*"
- 21 January 2016 Federal Bar Association, Southern District of Texas Chapter, Houston, Texas, "*Insurance Litigation in the Federal Courts: Updates and Practical Suggestions*"
- 12-13 November 2015 20th Annual Insurance Law Institute, Dallas, Texas, "*What is and What is not an Effective Stowers Demand*"
- 1 March 2015 ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, Tuscon, Arizona, "*Product Recall Insurance: It’s Not Just for Food Contamination Anymore*"
- November 2014 University of Texas School of Law 19th Annual Insurance Law Institute, Dallas, Texas, "*How to Pick Your Battlefield: Strategies Employed by Insurers and Policyholders to Secure and Protect the Most Advantageous Forum*"
- June 2014 State Bar of Texas Annual Meeting, Insurance Law Section CLE, Austin, Texas, "*What's in the Pipeline: Important Issues Pending Before the Texas Supreme Court and Fifth Circuit*"
- 24 April 2014 State Bar of Texas 11th Annual Advanced Insurance Law Course, Houston, Texas, "*Course Director*"
- 1 February 2014 South Texas College of Law 18th Annual Texas Insurance Law Symposium, Houston, Texas, "*Texas Supreme Court Update and 2014 Projections: Lennar, Ewing, Deepwater Horizon, Warren, and more*"
- 1 December 2013 Lorman Education Services Live National Webinar, "*Common Pitfalls of Certificates of Insurance*"

- 1 November 2013 University of Texas School of Law 18th Annual Insurance Law Institute, Houston, Texas, "*Lessons Learned from Lennar Homes*"
- 1 September 2013 Houston Risk Management Society Meeting, Houston, Texas, "*The 10 Most Important Things to Know About Your D & O Coverage*"
- 1 April 2013 State Bar of Texas Advanced Insurance Law Course, Dallas, Texas, "*Room For Disagreement? The Insureds' and Carriers' Positions on Cutting Edge Issues Regarding the Duty to Defend*"
- 1 February 2013 South Texas College of Law 17th Annual Texas Insurance Law Symposium, Houston, Texas, "*The Duty to Defend in Texas: Developments & Commentary*"
- 1 October 2012 University of Texas School of Law 17th Annual Insurance Law Institute, "*The 8 Corners Rule Under Attack: The 'New' Rules for the Duty to Defend*"
- 1 March 2012 ABA Section of Litigation 2012: Insurance Coverage Litigation Committee – CLE Seminar, "*Please Excuse the Delay: The Consequences of Untimely Notice, Slow Investigation, and the Failure to Communicate*"
- 1 January 2012 South Texas College of Law 16th Annual Texas Insurance Law Symposium, "*What We Have Here is a Failure to Communicate: Untimely Notice of a Claim, Settlements Without the Insurer's Consent, and Making Sense of the Prejudice Rule*"
- 1 November 2011 The University of Texas School of Law 2011 Insurance Law Institute, "*Are the Courts Getting It Right? Making Sense of the Prejudice Rule for Untimely Notice and Settlements Without Consent*"
- 1 April 2011 State Bar of Texas Advanced Insurance Law Course, "*Putting the 'Coverage Case' Cart Before the 'Liability Case' Horse*"
- 1 March 2011 ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, "*Pay Me Now! Coverage Disputes Over Legal Fees*"
- 1 February 2011 National Constitution Center Live National Audio Conference, "*Construction Defect Claims in 2011: Keys to Maximum Coverage*"
- 1 January 2011 South Texas College of Law 15th Annual Texas Insurance Law Symposium, "*Deconstructing Stanford: Practical Solutions to Recovering Defense Costs Under Claims-Made Policies*"

Civic Involvement

- 2013 - present - Deacon, West University Baptist Church
- 2014 - 2015 - Board Member, Casa El Buen Samaritano

Professional and Community Affiliations

- Member, State Bar of Texas
  - Chair, Insurance Law Section (2015 – 2016)
  - Director, Advanced Insurance Law Course (2014)
  - Member, College of the State Bar of Texas
  - Member, American Bar Association
  - Co-Chair, Insurance Coverage Litigation Committee's 26th Annual Conference (2014)
  - Co-Chair, Emerging Insurance Coverage Issues Subcommittee (2009 – 2014)
  - Co-Chair, Products Liability Insurance Coverage Subcommittee (1999 – 2009)
  - Member, Houston Bar Association
  - Former Co- Chair, Historical Committee
  - Former Co-Chair, Professionalism Committee

- Counselor/Vice President, Garland Walker Chapter of the American Inns of Court (Board member since 2000)
- Nominating Committee, Texas Bar Foundation (2014 – present)
- Member, Board of Contributing Editors, Lexis/Nexis Texas Annotated Insurance Code (2006 – 2014)
- Founding Member, Houston Society of Policyholder Insurance Coverage Lawyers
- Associate Member, Risk & Insurance Management Society
- Faculty, Tulane Law School, Civil – Pre-Trial Litigation Intersession Boot Camp, 2016
- Faculty, University of Texas Insurance Law Institute
- Faculty & Former Course Director, State Bar of Texas Advanced Insurance Law Course
- Former Faculty, South Texas College of Law Insurance Law Symposium
- Proctor, Maritime Law Association of the United States (1986 – present)
- Former Faculty, The University of Texas Admiralty and Maritime Conference
- Managing Editor, *The Maritime Lawyer* (1983 – 1984) (now known as *Tulane Maritime Law Journal*)

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RECOVERING ATTORNEY'S FEES

Some of the first questions lawyers are often asked by clients are "How much will this cost if we go to court?" and "If we end up in court, will we have to pay all of your fees?" With clients as concerned with cost reduction as ever, being able to accurately set the client's expectations regarding attorney's fees is critical to providing quality legal advice and obtaining the best outcome. Fortunately, Texas law generally allows for the recovery of attorney's fees in breach of contract cases,[1] which applies to breach of contract actions concerning insurance policies[2] unless an exception exists or fees are otherwise recoverable.[3] Further, the Texas Insurance Code specifically allows for the recovery of attorney's fees.[4] This paper will discuss the fundamentals for when and how parties can recover attorney's fees, as well as other legal issues and recent legal developments to consider in this area.

I. RECOVERING ATTORNEY'S FEES UNDER TEXAS LAW

When can a party recover attorney's fees? Under Texas law, to secure an award of attorney's fees from an opponent, "the prevailing party must prove: (1) the recovery of attorney's fees is legally authorized, and (2) the requested attorney's fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process."[5]

For those who practice in federal court, note that an award of attorney's fees "is governed by the same law that serves as the rule of decision for the substantive issues in the case."[6] "State law controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision."[7] But also note that the procedural rules are different. In federal court, Rule 54(d)(2)(A) controls, which provides that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages."[8] Absent a stipulation to the contrary, Texas state court practitioners present their request for attorney's fees to the fact finder.[9]

A. When is Recovering Attorney's Fees Authorized?

In Texas, "a prevailing party has no inherent right to recover attorney's fees from the non-prevailing party unless there is specific statutory or contractual authority allowing it."[10]

1. Insurance Policies and Attorney's Fees

Under Texas law, insurance policies are construed "according to the same rules of construction that apply to contracts generally."[11] Texas courts treat an agreement between two parties regarding attorney's fees quite liberally. As the Texas Supreme Court has stated: "Parties are generally free to contract for attorney's fees as they see fit."[12] Courts give effect to "the parties' true intent as expressed in the contract."[13] Therefore, parties may limit (or expand) the standard under which attorney's fees are recoverable by written agreement.[14] Typical requirements for awarding attorney's fees, such

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[1] TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (2021).

[2] *Ostrovitz & Gwinn, LLC v. First Specialty Ins. Co.*, 393 S.W.3d 379, 387 (Tex. App.—Dallas 2012, no pet.) ("Insurance policies are contracts, so the rights and duties they create and the rules governing their interpretation are those generally pertaining to contracts.") (citing *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008).

[3] See footnotes 19 and 20, and related discussion in Part I(a)(ii)(1) below.

[4] TEX. INS. CODE ANN. §§ 541.152, 541.153, 542.060 (2021).

[5] *Rohrmoos Venture v. UTSW DVA Healthcare, L.L.P.*, 578 S.W.3d 469, 487 (Tex. 2019).

[6] *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002) (citing *Kona Tech. Corp. v. S. Pac. Transp. Co.*, 225 F.3d 595, 614 (5th Cir. 2000)).

[7] *Transverse, LLC v. Iowa Wireless Servs., LLC*, No. A-10-CV-517-LY, 2019 U.S. Dist. LEXIS 121412, at *26 (W.D. Tex. 2019) (citing *Mathis v. Exxon Corp., supra*).

[8] Fed. R. Civ. P. 54(d)(2)(A).

[9] *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000) (indicating that "[i]n general, the reasonableness of statutory attorney's fees is a jury question"); *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901, 907 (Tex. 1966) (disapproving court of appeals opinions holding that "the reasonableness of attorney fees is not a jury question but is a matter entrusted to the trial judge's discretion; and further, that the trial judge may adjudicate reasonableness on judicial knowledge and without the benefit of evidence.").

[10] *Rohrmoos Venture*, 578 S.W.3d at 487.

[11] *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008).

[12] *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 231 (Tex. 2014) (citing *Intercontinental Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009)).

[13] *Carto Props., LLC v. Briar Cap., L.P.*, No. 01-15-01114-CV, 2018 Tex. App. LEXIS 1186, at *29 (Tex. App.—Houston [1st Dist.] 2018, pet. denied); *See Rohrmoos Venture*, 578 S.W.3d at 490 (*citing and quoting URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018)).

[14] *See JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 491 (Tex. 2019) ("Any award of fees is limited by the wording of the statute or contract that creates an exception to the American Rule."); *see also Intercontinental Group P'ship*,

as statutes that contain a requirement for a party to "prevail" to be entitled to attorney's fees,[15] may not apply.

2. Texas Statutes Authorizing the Recovery of Attorney's Fees in Insurance Cases

Multiple Texas statutes may be used to collect attorney's fees in insurance cases, including: Chapter 38 of the Texas Civil Practice and Remedies Code,[16] Chapter 541 of the Texas Insurance Code,[17] and Chapter 542 of the Texas Insurance Code.[18] Each are discussed briefly below.

II. SECTION 38.001 OF THE TEXAS CIVIL PRACTICE & REMEDIES CODE

Section 38.001 of the Texas Civil Practice and Remedies Code permits the recovery of "reasonable[19] attorney's fees" for claims on a written or oral contract.[20] Section 38.001 applies to breach of contract actions concerning insurance policies.[21] Note that Section 38.006 expressly excludes insurance contracts that are subject to four specific statutory schemes in the Texas Insurance Code: Title 11, Chapter 541, and Subchapters A and B of Chapter 542.[22]

To recover fees under Section 38.001, a party must: (1) "be represented by an attorney,"[23] (2) present its claim to the opposing party, which later remains unpaid for thirty days,[24] (3) "prevail on a cause of action for which attorney's fees are recoverable, and [(4)] recover damages."[25]

The second requirement is known as "presentment." The term presentment "mean[s] simply a demand or request for payment or performance."[26] "The purpose of presentment is to allow the opposing party a reasonable opportunity to pay a claim without incurring an obligation for attorney's fees."[27] "No particular form of presentment is required."[28] However, neither filing suit nor alleging a demand in the pleadings, by themselves, constitute presentment.[29]

The final requirements are that the claimant must "prevail" in the underlying suit and recover damages. Here, there is a distinction between what it means to "prevail" under Section 38.001 versus elsewise, when Section 38.001 does not apply. Texas law is clear that to "prevail" under Section 38.001 a party must be awarded damages, as explained above. Notably, Texas law does not require that a party recover all damages sought, or even that a party "substantially" prevail to recover reasonable attorney's fees.[30] What is not clear, is whether nominal damages are sufficient to support an award of attorney's fees under Section 38.001, as the Texas Supreme Court has not directly addressed this issue.[31] However, a Southern District of Texas judge recently noted in a 2019 opinion that "Texas courts of

295 S.W.3d at 653 ("Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's….").

[15] *JCB, Inc.*, 597 S.W.3d at 491 (mentioning statutes requiring that a plaintiff prevail).

[16] TEX. CIV. PRAC. & REM. CODE ANN. § 38.001–.006 (2021).

[17] TEX. INS. CODE ANN. § 541.151 (2021).

[18] *Id.* § 542.060 (2021).

[19] The distinction between "reasonable" and "reasonable and necessary" in statutes concerning attorney's fees is immaterial. *Iola Barker v. Hurst*, No. 01-19-00529-CV, 2021 Tex. App. LEXIS 4717, at *11, n. 9 (Tex. App.—Houston [1st Dist.] June 15, 2021, no pet. h.) ("The Texas Supreme Court has noted that although the legislature sometimes employs the terms "reasonable and necessary" and sometimes just the term "reasonable," the distinction between the provisions is immaterial.") (citing *Rohrmoos Venture, supra*).

[20] TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (2021).

[21] *See Grapevine Excavation, Inc. v. Md. Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000) ("We conclude that we should follow established and longstanding Texas authority that interprets section 38.006 to allow recovery of attorney's fees in a successful breach-of-contract action against an insurer unless attorney's fees are otherwise available."); *accord Allstate Ins. Co. v. Irwin*, No. 19-0885, 2021 Tex. LEXIS 415, at *18 (May 21, 2021) (parenthetically quoting *Grapevine* for this proposition).

[22] *Id.* at § 38.006(1)-(4).

[23] TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(1).

[24] TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(2)-(3).

[25] *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) (citing *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995)).

[26] *Gibson v. Cuellar*, 440 S.W.3d 150, 157 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

[27] *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006) (quoting *Ellis v. Waldrop*, 656 S.W.2d 902, 905, 26 Tex. Sup. Ct. J. 541 (Tex. 1983)).

[28] *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981) (citing *Huff v. Fid. Union Life Ins. Co.*, 312 S.W.2d 493, 500 (Tex. 1958)).

[29] *Helping Hands Home Care, Inc. v. Home Health of Tarrant Cty., Inc.*, 393 S.W.3d 492, 516 (Tex. App.—Dallas 2013, pet. denied); *Puga v. N.Y. Marine & Gen. Ins. Co.*, No. 2:19-CV-381, 2021 U.S. Dist. LEXIS 118798, at *6–7 (S.D. Tex. 2021) (denied a motion for attorney's fees because the plaintiff failed to make a demand against the insurer, filing suit instead).

[30] *See Penhollow Custom Homes, LLC v. Kim*, 320 S.W.3d 366, 375 (Tex. App. —El Paso 2010, no pet.).

[31] *MBM Fin. Corp. v. Woodlands Operating Co.*, L.P., 292 S.W.3d 660, 666 (Tex. 2009) ("While *some* damages are necessary to recover fees under this statute, this Court has

appeals have consistently denied attorney's fees when the damages award is nominal."[32]

Outside the context of Section 38.001, the Texas Supreme Court explained that to "prevail" a party must only obtain "actual and meaningful relief, something that materially alters the legal relationship of the parties."[33] In that scenario, a *plaintiff* prevails if it can "prove compensable injury and secure an enforceable judgment in the form of damages or equitable relief."[34] Conversely, as the Texas Supreme Court later held in *Rohrmoos*, a *defendant* prevails "by successfully defending against a claim and securing a take-nothing judgment on the main issue or issues of the case."[35]

III. SECTIONS 541.152 AND 542.060 OF THE TEXAS INSURANCE CODE

Section 541.151 of the Texas Insurance Code grants a private right of action for persons suffering damages as a result of a deceptive insurance act or practice,[36] for which a prevailing plaintiff may recover attorney's fees under Section 541.152.[37]

Defendant insurers may also have a right to recover attorney's fees under Chapter 541. Under section 541.152[38], a defendant "must establish that the plaintiff's claims were "(1) groundless and brought in bad faith, or (2) groundless and brought for the purpose of harassment[.]"[39] "Whether an action is groundless, brought in bad faith, or brought for the purpose of harassment is a question to be determined by the trial court."[40] "Groundless" in Section 141.153 has the same meaning as it does under Texas Rule of Civil Procedure 13.[41] In light of this, an action is "'groundless' if it 'has no basis in law or fact, and is not warranted by any good faith argument for extension, modification, or reversal of existing law.'"[42] "A suit is brought in 'bad faith' if it is motivated by malicious or discriminatory purpose."[43]

Section 542.060 allows the recovery of "reasonable and necessary attorney's fees" against liable insurers who have not complied with the Insurance Code's subchapter regarding prompt payment of claims.[44] Chapter 542 contains multiple deadlines, the violation of which trigger Section 542.060's liability provisions.[45]

A. When are Fees Reasonable and Necessary? Considering *Rohrmoos Venture v. UTSW DVA Healthcare, LLP* and Later Cases

The Texas Supreme Court clarified the proper method for proving that fees are reasonable and necessary in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*.[46] The method consists of two steps: the "base calculation," which determines a fee amount that is presumptively reasonable, and the adjustment of the base calculation (up or down) based on specific evidence in favor of the adjustment.[47] To briefly further explain the two steps: first, the "base calculation" is a multiplication of the "reasonable hours spent by counsel in the case" by the "reasonable hourly rate,"[48] with the "fee claimaint bear[ing] the burden of providing sufficient evidence on both counts."[49] Note that "sufficient evidence" is at a minimum, "evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were

never said whether *nominal* damages are enough") (emphasis in original).

[32] *The Lomix Ltd. P'ship v. Compass Bank*, No. 1:15-CV-00050, 2019 U.S. Dist. LEXIS 229387, at *13 (S.D. Tex. 2019) (citing multiple cases).

[33] *Intercontinental Grp. Partnership v. K.B. Home Lone Star L.P.*, 295 S.W.3d 650, 652 (Tex. 2009) (citing *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)).

[34] *Id.*

[35] *Rohrmoos Venture*, 578 S.W.3d at 486.

[36] TEX. INS. CODE ANN. § 541.151 (2021).

[37] TEX. INS. CODE ANN. § 541.152(a)(1).

[38] See *id.* ("(a) A plaintiff who prevails in an action under this subchapter may obtain: (1) the amount of actual damages, plus court costs and reasonable and necessary attorney's fees[.]"

[39] *Arizpe v. Principal Life Ins. Co.*, 2019 U.S. Dist. LEXIS 151971, at *5 (N.D. Tex. Sept. 6, 2019); TEX. INS. CODE ANN. § 541.153 (2021).

[40] *Id.* at *5-6 (quoting Knoderer v. State Farm Lloyds, 515 S.W.3d 21, 45 (Tex. App.—Texarkana 2017, pet. denied)) (internal quotation marks omitted).

[41] *Envtl. Packaging Techs., Ltd. v. Arch Ins. Co.*, No. 4:18-CV-00240, 2020 U.S. Dist. LEXIS 123263, at *35 (S.D. Tex. 2020) (quoting *Metro Hosp. Partners, Ltd. v. Lexington Ins. Co.*, 84 F. Supp. 3d 553, 574-75 (S.D. Tex. 2015)).

[42] *Id.* at *35-36 (quoting *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989) (citing Texas Rule of Civil Procedure 13)).

[43] *Riddick v. Quail Harbor Condo. Ass'n, Inc.*, 7 S.W.3d 663, 677 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing *Central Texas Hardware, Inc. v. First City, Texas-Bryan, N.A.*, 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied)).

[44] TEX. INS. CODE ANN. § 542.060.

[45] *John Hancock Life Ins. Co. v. Estate of Wheatley*, No. 4:18-cv-2869, 2020 U.S. Dist. LEXIS 173422, at *4-5 (S.D. Tex. 2020).

[46] *See Rohrmoos Venture*, 578 S.W.3d at 499.

[47] *Id.* at 497-501.

[48] *Id.* at 498.

[49] *Id.*

performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services."[50] This "calculation usually includes" multiple factors from the *Arthur Andersen* case,[51] a case previously relied upon by Texas courts as a separate method for awarding attorney's fees.[52] Second, the "enhancement or reduction of the base lodestar figure" is based on the presentation of "specific evidence" either (1) "showing that a higher amount is necessary to achieve a reasonable fee award" or, in the case of a requested reduction, to (2) "to overcome the presumptive reasonableness of the base lodestar figure."[53] Importantly, *Arthur Andersen* factors included in the base calculation cannot be used in the enhancement or reduction of the base calculation (step two).[54]

Multiple Texas cases have recently grappled with the *Rohrmoos* opinion. Some recent opinions are highlighted briefly below.

1. Sufficiency of the Evidence Generally

- *Iola Barker v. Hurst*, No. 01-19-00529-CV, 2021 Tex. App. LEXIS 4717 (Tex. App.—Houston [1st] June 15, 2021, no pet. h.): The Court reversed and remanded for a redetermination on attorney's fees "because [the trial court's award] bears no relationship to the uncontroverted evidence of attorney's fees incurred."[55]The trial court award of statutorily authorized attorney's fees constituted only 17 percent of what was requested, but the fee claimants satisfied *Rohrmoos'* requirements so that the base lodestar calculation was a presumptively reasonable amount, which was not overcome by conclusory affidavits presented by the opposing party.[56]
- *Cintas-R.U.S., L.P. v. Dave's Tubing Testing & Hot Oil Serv.*, No. 11-19-00145-CV, 2021 WL 2371640 (Tex. App.—Eastland 2021, no pet. h.): The trial court's judgment in this case awarded about twenty-five percent of the damages requested but was decided before *Rohrmoos*. The Court of Appeals noted this but affirmed nonetheless, applying *Rohrmoos*. The Court noted that even though the testimony of the fee claimant's trial attorney supporting the requested fees was uncontroverted, it was not entitled to those fees as a matter of law. First, the testimony did not satisfy the *Rohrmoos* standard because it "did not address the particular tasks that were performed or the amount of time needed to perform those tasks."[57] Second, after quoting the Texas Supreme Court's opinion in *Smith v. Patrick W. Y. Tam Trust*[58] (which quotes *Arthur Andersen*, cited above), the Court stated "the fact that the trial court only awarded roughly twenty-five percent of the damages sought provides some basis for the trial court's award of twenty-five percent of the attorney's fees sought by [the fee claimant]."[59]
- *Shumate v. Berry Contracting, L.P.* No. 13-19-00382-CV, 2021 Tex. App. LEXIS 5648 (Tex. App.—Corpus Christi July 15, 2021) (*mots. for ext. of time to file mot. for reh'g and en banc consideration granted*): Citing *Rohrmoos* and upholding an award of attorney's fees when sufficient evidence was presented in the form of (1) testimony "span[ning] ten pages of the reporter's record" and (2) "exhibits containing detailed time and billing records which itemize the legal work that was performed, the time spent on each task, and the applicable hourly rate."[60]
- *Gerges v. Gerges*, 601 S.W.3d 46, 66–67 (Tex. App.—El Paso 2020, no pet.): Affirmed the trial court's award of attorney's fees of $10,000 for a rate of $250 per hour. Applying *Rohrmoos*, the Court held there was sufficient evidence to support

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[50] *Id.*

[51] *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997); The *Rohrmoos* court stated:

[T]he base lodestar calculation usually includes at least the following considerations from *Arthur Andersen*: the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal service properly, the fee customarily charged in the locality for similar legal services, the amount involved, the experience, reputation, and ability of the lawyer or lawyers performing the services, whether the fee is fixed or contingent on results obtained, the uncertainty of collection before the legal services have been rendered, and results obtained.

Rohrmoos Venture, 578 S.W.3d at 500 (internal quotation marks omitted).

[52] *Rohrmoos Venture*, 578 S.W.3d at 490.

[53] *Id.* at 501.

[54] *Id.*

[55] *Iola Barker v. Hurst*, 2021 Tex. App. LEXIS 4717 at *34 (Tex. App.—Houston [1st] June 15, 2021, no pet. h.).

[56] *Id.* at *26-36.

[57] *Cintas-R.U.S., L.P. v. Dave's Tubing Testing & Hot Oil Serv.*, No. 11-19-00145-CV, 2021 WL 2371640 at *19 (Tex. App.—Eastland 2021, no pet.).

[58] 296 S.W.3d 545, 548 (Tex. 2009).

[59] *Cintas-R.U.S., L.P.*, 2021 WL 2371640 at *19.

[60] *Id.* at *34.

the award given the fee claimant's attorney's testimony and supporting billing records.[61]

- *Mortensen v. Villegas*, No. 08-19-00080-CV, 2021 Tex. App. LEXIS 747 (Tex. App.—El Paso Feb. 1, 2021, no pet.): Citing *Gerges*, above, the Court reversed an award of attorney's fees where fee invoices, standing alone (without supporting affidavits or testimony by the fee claimant's attorney), did not provide sufficient evidence of all of the *Rohrmoos* factors—specifically, the affidavits did not "establish the reasonableness of the time spent on legal services and the reasonableness of the rates charged."[62]
- *Ferrant v. Lewis Brisbois Bisgaard & Smith, LLP.*, 2021 Tex. App. LEXIS 5595, at *16 (Tex. App.—Dallas July 14, 2021, no pet. h.): Reversing a fee award and remanding, when no "billing statements or other documentation" were presented to support the fee claimant's representative's testimony in support of the fee claimant's requested attorney's fees.[63] Further, the representative "presented no testimony or documentary evidence of the specific tasks performed by [the fee claimant's] attorneys and staff or the amount of time spent on specific tasks."[64] Citing *Rohrmoos*, the Court held this was "legally insufficient evidence to support the fees award."[65]
- *Tex. Windstorm Ins. Ass'n v. James*, No. 13-17-00401-CV, 2020 Tex. App. LEXIS 6719, at *62 (Tex. App.—Corpus Christi Aug. 20, 2020, pet. filed): The court upheld an award of attorney's fees after a jury trial found violations of an insurance policy and Chapter 541 of the Texas Insurance Code. Interestingly, though the Court cited *Rohrmoos* before proceeding to discuss the sufficiency of the evidence to support the fee award, it only cited it for the general proposition that the fee claimant party must prove the fees they seek are reasonable necessary.[66] The Court continued to analyze the sufficiency of the evidence, but only considered the *Arthur Andersen* factors—giving no mention the *Rohrmoos* lodestar method whatsoever.[67] *Rohrmoos* was explicit that the lodestar method was *the* method to apply "to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed."[68]

2. Contingent Attorney's Fees

The Texas Supreme Court recently addressed the application of *Rohrmoos* to the standard for awarding contingent appellate attorney's fees in *Yowell v. Granite Operating Co.*[69] In that case, the court declined to require the use of the lodestar analysis as explained in *Rohrmoos* because contingent attorney's fees are not a "situation[] in which an objective calculation of reasonable hours worked … can be employed."[70] The Court further stated that a party must still "provide opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services."[71] The Court upheld the award of contingent attorneys fees after its own review of the record.[72] In *Shumate v. Berry Contracting, L.P.*, discussed above, the Thirteenth District Court of appeals similarly upheld an award of contingent attorney's fees, citing *Yowell*, after its own review of the record.[73]

3. Adjustment of the Base Lodestar Calculation

Upward adjustment: *Kovar v. Seay*, No. 10-19-00273-CV, 2020 Tex. App. LEXIS 10173 (Tex. App.—Waco Dec. 22, 2020, pet. denied): Affirming a jury award for $80,000 in attorney's fees when the base lodestar calculation was $72,000, stating "[the fee claimant's attorney's] testimony touches on several of the Arthur Andersen factors, and given the difficulty of this case, there is justification for adjusting up from the base lodestar figure of $72,000 (360 hours x $200 per

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[61] *Gerges v. Gerges*, 601 S.W.3d 46, 65–67 (Tex. App.—El Paso 2020, no pet.).

[62] *Mortensen v. Villegas*, No. 08-19-00080-CV, 2021 Tex. App. LEXIS 747, at *24-25 (Tex. App.—El Paso Feb. 1, 2021, no pet.).

[63] *Ferrant v. Lewis Brisbois Bisgaard & Smith, LLP*, 2021 Tex. App. LEXIS 5595, at *15-16 (Tex. App.—Dallas July 14, 2021, no pet. h.).

[64] *Id.* at *16.

[65] *Id.*

[66] *Tex. Windstorm Ins. Ass'n v. James*, No. 13-17-00401-CV, 2020 Tex. App. LEXIS 6719, at *58 (Tex. App.—Corpus Christi Aug. 20, 2020, pet. filed) (citing *Rohrmoos, supra* at 502: "When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney's fees.").

[67] *Id.* at *58-62.

[68] *Rohrmoos Venture*, 578 S.W.3d at 498.

[69] 620 S.W.3d 335, 354–55 (Tex. 2020).

[70] *Yowell*, 620 S.W.3d at 355 (quoting *Rohrmoos Venture,* 578 S.W.3d at 498) (internal quotation marks omitted).

[71] *Id*.

[72] *Id.* at 356.

[73] *Shumate,* 2021 Tex. App. LEXIS 5648, at *35.

hour)."[74] The Court noted that the fee claimant's attorney had testified "that this had been a very long and very difficult case with time periods spanning from 2008 through 2016" on which "he spent more than 360 hours."[75]

Downward adjustment: *Barrera, Sanchez & Assocs., P.C. v. Rodriguez*, 2020 Tex. App. LEXIS 9624, at *12–14 (Tex. App.—Corpus Christi Dec. 10, 2020, no pet h.): Affirmed the trial court's award, after a bench trial, of attorney's fees for $1,500, reduced from $5,000 upon a motion for reconsideration, despite a $20,000 request. Applying *Rohrmoos*, the court concluded the fee claimant's attorney's testimony presented "evidence of the first the first and second factors: the particular services he performed as [the fee claimant party's] attorney, and who performed those services."[76] However, the court found "[t]he record … is devoid of evidence regarding the third through fifth [of the *Rohrmoos*] factors: when the services were performed, the reasonable amount of time required to perform those services, and [the fee claimant's attorney's] hourly rate."[77] The Court also did not find any billing records in the record to support the fee claimant attorney's $20,000 request.[78]

IV. OTHER TOPICS TO CONSIDER

A. The Requirement to Segregate Fees Under *Tony Gullo Motors I, L.P. v. Chapa*

The Texas Supreme Court's decision in *Tony Gullo Motors I, L.P. v. Chapa*[79]mandates fee segregation "if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees."[80] Further, "it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated."[81] Here are a few recent opinions applying the segregation requirement:

- *Tex. Windstorm Ins. Ass'n v. James*, No. 13-17-00401-CV, 2020 Tex. App. LEXIS 6719 (Tex. App.—Corpus Christi Aug. 20, 2020, pet. filed): Proper segregation occurred when the expert witness on attorney's fees testified "that 5 percent is more than enough to remove from this fee to account for the common law cause of action."[82] The claims in the case included statutory and common law claims.[83]
- *Ashburn v. Myers*, No. 02-20-00183-CV, 2021 Tex. App. LEXIS 2555, at *19 (Tex. App.—Fort Worth Apr. 1, 2021, no pet. h.): Segregation did not occur (and therefore the case was remanded) when the evidence supporting the award of attorney's fees failed to distinguish between recoverable (related to a claim relating to Texas Rule of Civil Procedure 677) and unrecoverable actions (relating to a motion for sanctions).[84] Notably (1) the evidence included an invoice that "contain[ed] no breakdown, or indeed any indication, that the fee billed was only for research and drafting that did not include the sanctions issue[,]"[85] and (2) testimony to the Court as to the hours spent on the matter left open the possibility that segregation did not occur.[86]
- *Sustainable Tex. Oyster Res. Mgmt., L.L.C. v. Hannah Reef, Inc.*, 623 S.W.3d 851 (Tex. App.—Houston [1st Dist.] 2020, pet. filed): It was improper not to segregate fees (and therefore the fee award was reversed and the case remanded) when "[d]iscrete legal services were expended to advance claims for which fees were not recoverable."[87] In this case, the Court specifically cited the facts that (1) the party seeking attorney's fees pled multiple non-recoverable causes of action, and (2) there were ten different petitions filed by the party seeking attorney's fees.[88] The Court cited multiple cases (including *Tony Gullo*) when stating: "Courts have determined that evidence of fee segregation is required concerning

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[74] *Kovar v. Seay*, No. 10-19-00273-CV, 2020 Tex. App. LEXIS 10173, at *21 (Tex. App.—Waco Dec. 22, 2020, pet. denied).

[75] *Id.* at *20.

[76] *Barrera, Sanchez & Assocs., P.C. v. Rodriguez*, 2020 Tex. App. LEXIS 9624, at *12 (Tex. App.—Corpus Christi Dec. 10, 2020, no pet. h.).

[77] *Id.*

[78] *Id.* at *3.

[79] *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).

[80] *Id.* at 313.

[81] *Id.* at 313-14.

[82] *Tex. Windstorm Ins. Ass'n*, 2020 Tex. App. LEXIS 6719 at *64.

[83] *Id.*

[84] *Ashburn v. Myers*, No. 02-20-00183-CV, 2021 Tex. App. LEXIS 2555, at *19-24 (Tex. App.—Fort Worth Apr. 1, 2021, no pet. h.).

[85] *Id.* at 23.

[86] *See id.*

[87] *Sustainable Tex. Oyster Res. Mgmt., L.L.C. v. Hannah Reef, Inc.*, 2020 Tex. App. LEXIS 10139, at *53, 623 S.W.3d 851 (Tex. App.—Houston [1st Dist.] 2020, pet. filed).

[88] *Id.*

the drafting of a petition when the petition pleads causes of action for which attorney's fees are both recoverable and unrecoverable, and portions of the petition relate solely to the causes of action for which fees are unrecoverable."[89]

B. Does an Insurer Waive its Right to Contest the Reasonableness of Defense Costs if it Wrongfully Denies its Duty to Defend?

In *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*,[90] the Texas Supreme Court held that "[an insurer's] denial of coverage bar[s] it from challenging the reasonableness of [the policyholder's] settlement."[91] The court recognized that after an insurer disclaims coverage, the policyholder is incentivized to appropriately manage its costs "in case it became solely responsible for payment."[92]

Although *Evanston* addressed settlements, not attorney's fees, United States District Judge Jane Boyle of the Northern District of Texas bridged that gap in *Shore Chan Bragalone Depumpo LLP v. Greenwich Ins. Co.*[93] Judge Boyle relied on *Evanston* to predict that "the Texas Supreme Court would extend this holding and decide that an insurer who abdicates its duty to defend is also barred from directly challenging the reasonableness and necessity of the insured's attorney's fees."[94] The court explained that "this is especially so because an insurer gives up the right to control the defense once it abandons its insured[.]"[95] Accordingly, the *Shore Chan* court held that an insurer that wrongfully denies its defense obligation will be limited to challenging the sufficiency of the policyholder's evidence in establishing the actual amounts it incurred.[96]

Notably, *Shore Chan* relied[97] on the Seventh Circuit decision in *Taco Bell Corp. v. Cont. Cas. Co.,* which predated *Evanston* but forecast it's reasoning.[98] According to the *Taco Bell* court, once an insurer denies its duty to defend, the resulting uncertainty about reimbursement incentivizes the insured "to minimize its legal expenses (for it might not be able to shift them); and where there are market incentives to economize, there is no occasion for a painstaking judicial review."[99] Therefore, an insurer cannot contest the reasonableness of its insured's defense costs after the insurer wrongfully denies its duty to defend: "the duty to defend would be significantly undermined if an insurance company could, by the facile expedient of hiring an audit firm to pick apart a law firm's billing, obtain an evidentiary hearing on how much of the insured's defense costs it had to reimburse."[100]

The *Shore Chan* court also cited *Nutmeg Ins. Co. v. Employers Ins. Co. of Wausau*.[101] In *Nutmeg*, the court observed that "[a]n insurer loses its right to control an insured's defense by initially breaching the duty to defend."[102] The *Nutmeg* court then granted summary judgment for the policyholder in "the actual amount that was paid to defend the [underlying] action."[103]

In 2019, United States Magistrate Judge Andrew Edison of the Southern District of Texas followed *Shore Chan* in *Columbia Lloyds Ins. Co. v. Liberty Ins. Underwriters, Inc*.[104] The court quoted from the Fifth Circuit's 2018 opinion in *Lyda Swinerton Builders, Inc. v. Okla. Sur. Co.*:[105] "[i]t is well settled that once an insurer has breached its duty to defend, the insured is free to proceed as he sees fit; he may engage his own counsel and either settle or litigate, at his option."[106] The court then reasoned, "[w]hen this occurs, the breaching insurer 'is in no position to object to defense-related expenditures that are supported by the record and that are not patently unreasonable.'"[107] Quoting from *Shore Chan*, the court stated "a breaching insurer 'may not directly challenge the reasonableness and necessity of an insured's attorney's fees'; however, they 'may

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[89] *Id.* at 54.

[90] *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 674 (Tex. 2008).

[91] *Id.* at 674.

[92] *Evanston*, 256 S.W.3d at 674.

[93] *Shore Chan Bragalone Depumpo LLP v. Greenwich Ins. Co.*, 904 F.Supp.2d 592, 603 (N.D. Tex. 2012).

[94] *Id.* at 603.

[95] *Id.* (quoting *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 (5th Cir. 1983).

[96] *Id.* at 604.

[97] *Id.* at 603.

[98] *See Taco Bell Corp. v. Cont. Cas. Co.*, 388 F.3d 1069 (7th Cir. 2004).

[99] *Id.* at 1076.

[100] *Id.* at 1076-77.

[101] *Nutmeg Ins. Co. v. Employers Ins. Co. of Wausau*, No. 3:04-CV-1762, 2006 WL 453235, at *47 (N.D. Tex. Feb. 24, 2006).

[102] *Id.* (citing *Witt v. Universal Auto. Ins. Co.*, 116 S.W.2d 1094, 1098 (Tex. App.—Waco 1938, writ dism'd.)).

[103] *Id.*

[104] *Columbia Lloyds Ins. Co. v. Liberty Ins. Underwriters, Inc.*, No. 3:17-CV-005, 2019 U.S. Dist. LEXIS 90455, at *7 (S.D. Tex. May 30, 2019).

[105] *Lyda Swinerton Builders, Inc. v. Okla. Sur. Co.*, 903 F.3d 435 (5th Cir. 2018).

[106] *Columbia Lloyds Ins. Co.*, 2019 U.S. Dist. LEXIS 90455, at *7 (quoting *Lyda Swinerton, supra*, at 454).

[107] *Id.* at *7–8 (quoting *Lyda Swinerton*, 903 F.3d at 454).

contest the admissibility or sufficiency of the insured's evidence….'"[108]

The statement in *Lyda Swinerton* that the insurer "is in no position to object to defense-related expenditures that are supported by the record and that *are not patently unreasonable*"[109] would appear to soften *Shore Chan*'s blanket prohibition of a breaching insurer's ability to challenge the reasonableness of defense costs. Nonetheless the court in *Columbia Lloyds* adopted *Shore Chan*'s rule without hesitation. So far, only one court has opted to buck the trend. In *Yowell v. Seneca Specialty Ins. Co.,*[110] the district judge recognized *Shore Chan*'s holding, but stated "[t]he Fifth Circuit, while interpreting Texas law, had previously reached the opposite conclusion."[111] The court cited *American Home Assurance Company v. United Space Alliance, LLC*[112], which pre-dated *Lyda Swinerton*, for the proposition that "attorney's fees that are recoverable as damages for breach of the duty to defend must be reasonable and necessary."[113] Therefore, according to the *Yowell* court, there was no "waive[r] [of the] right to contest the reasonableness and necessity of the defense fees…."[114]

So far, no Texas state court has weighed in on this issue.

[108] *Id.* at *8 (quoting *Shore Chan*, 904 F. Supp. 2d at 604) (internal alterations omitted).

[109] *Lyda Swinerton*, 903 F. 3d at 454 (emphasis added).

[110] 117 F. Supp. 3d 904, 909 (E.D. Tex. 2015).

[111] *Id.* at 909.

[112] 378 F.3d 482 (5th Cir. 2004).

[113] *Yowell*, 117 F. Supp. 3d at 909 (citing *American Home Assurance Company v. United Space Alliance, LLC* 378 F.3d 482, at 490 (5th Cir. 2004). The court also cited *Primrose Operating Co. v. Nat'l Amer. Ins. Co.*, 382 F.3d 546, 559 (5th Cir. 2004).

[114] *Id.*

FROM THE EDITOR

The Real Problem With Testimony As To Legal Conclusions

By Patrick J. Kenny

Most practitioners have encountered in one form or another the so-called "rule prohibiting experts from providing their legal opinions or conclusions." *In re Initial Public Offering Securities Litigation,* 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) (further citation omitted). The "rule" has been described as "axiomatic," *id.*, and reportedly "every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law." *Id.* (further citations omitted). Yet, well established rules often founder in their application to particular facts, and that seems to be true with the "rule" barring expert legal opinions and conclusions. In fact, it appears there are at least three reasons the "rule" proves difficult in application, and recognizing the same would assist litigants and courts in approaching such testimony.

First, precedent is of limited value. Countless reported decisions seem to cite with approval what appears to be expert testimony as to particular legal opinions and conclusions. However, in truth, in many cases the expert testimony in question was admitted without objection "and often without anyone even noticing that the testimony includes legal conclusions[.]" *Pitman Farms v. Kuehl Poultry LLC,* No. 19-CV-3040 (ECT/BRT), 2020 WL 7425234, at *5 (D. Minn. Dec. 18, 2020). In the absence of an objection to the relevant testimony, a court's reference to the evidence is of no consequence in later cases.

Second, the question as to whether an opinion rules afoul the "rule" often simply boils down to how the opinion at issue is presented:

> Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.

Fed. R. Evid. 704, advisory committee's note.

To be sure, in some circumstances there will be no way to present the key aspect of the testimony without seeming to cross the line into impermissible legal conclusion. However, litigants on both sides would do well to recognize that, in many instances the proponent of the testimony in question has substantial control over the ultimate admissibility ruling and thus, in the right circumstances, can rehabilitate otherwise inadmissible legal opinion testimony.

Third, litigants and courts often overlook the fact that the "rule" against experts testifying to legal conclusions dates back long before the current rules of evidence. *See, e.g., Roberts v. Cooper*, 61 U.S. 467, 481, 15 L. Ed. 969 (1857) (describing the "rule" nearly 170 years ago, "the opinions of the Attorney General may form very persuasive arguments to the court, but cannot be read as evidence to the jury of what the law is, or ought to be. It is the province of the court to instruct the jury as to the principles of law affecting the case, and counsel cannot appeal to a jury

to decide legal questions by reading cases to them, or giving in evidence the opinions of public officers").

In fact, the Federal Rules of Evidence include no blanket proscription against legal opinions. *See, e.g.*, Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue"); *Adams v. New England Scaffolding, Inc.*, No. 13-12629-FDS, 2015 WL 9412518, at *5 (D. Mass. Dec. 22, 2015) ("despite occasional judicial pronouncements to the contrary, there is no blanket prohibition on expert testimony concerning the law").

Though the language of the former "rule" against expert legal conclusions still appears in case law, the basis for current rulings on the issue can be traced to the language of Rule 702. That Rule, among other things, permits expert testimony only if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue[.]" Fed. R. Evid. 702(a). Thus, the reason expert legal conclusions are not admissible now – is not by virtue of a "rule" against such testimony – but rather is because such testimony often is not helpful to the trier of fact:

> The essential problem is not that such an opinion is a legal conclusion, or that it concerns an ultimate issue, but that it would not "help" the trier of fact within the meaning of Fed. R. Evid. 702.

Adams, No. 13-12629-FDS, 2015 WL 9412518, at *7.

Practitioners facing testimony that might be considered expert legal opinion would be well-advised to keep all three points in mind when approaching such testimony. Thus, the proponent of the legal opinion testimony should endeavor to introduce the testimony in terms of the factual bases leading to the legal conclusion rather than the conclusion itself. *See, e.g.*, Fed. R. Evid. 704, advisory committee's note (quoting Professor Wigmore's example "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?"). Doing so could avoid the issue entirely.

In addition, litigants should be mindful of dubious utility of precedent on this issue. Many prior decisions seeming to approve of testimony that includes legal conclusions often do not involve a direct challenge to the admissibility of the testimony in question. Moreover, even when the at-issue testimony was the subject of objection, practitioners must remember that the ruling on such objections is a matter of discretion. *See, e.g., Lestage v. Coloplast Corp.*, 982 F.3d 37, 49 (1st Cir. 2020) ("Unless the district court entirely abdicated its gatekeeper role, we review the district court's decision to admit expert testimony for abuse of discretion").

Third, and most important, counsel should bear in mind that the admission of such testimony is governed by Rule 702. Arguments for and against the admission of such evidence ultimately will be judged against, and therefore should focus upon, whether the evidence in question:

> will help the trier of fact to understand the evidence or to determine a fact in issue[.]

Fed. R. Evid. 702(a).

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Use and Abuse of Claims Experts in Bad Faith Litigation

By Michael Huddleston

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Experts in bad faith cases come in a wide variety. This article focuses on the use of "claims" experts in extracontractual cases. These cases of course can involve either (1) first-party claims under personal lines, commercial property, life insurance, and other policies potentially obligating the insurer to pay for loss directly to the insured; or (2) third-party liability claims involving allegations of things such as wrongful refusal to defend and wrongful refusal to settle.

Almost all of the subtopics in these two basic types of cases involve treatment and analysis of both statutory and common law. Simply put, insurer conduct involves the analysis of the law, regulations, and statutes. The adjuster is sometimes a lawyer but most often not. Consequently, the use of experts in these cases presents a fundamental tension in that such testimony can devolve into the expert potentially invading the role of the judge in instructing the jury on the law. The appropriate target would appear to be discussion of the accepted standards and practices in the insurance industry for the treatment and analysis of such issues.

First-Party Cases

In first-party cases, testimony typically focuses on whether the carrier had a reasonable basis for denying coverage or delaying payment of the claim. The basis of denial may be a coverage interpretation. In that instance, the expert can explain how a reasonable carrier would go about dealing with and resolving this type of coverage dispute. For example, the expert can properly explain how a carrier could obtain the legal opinion of objective outside counsel on the particular coverage issue. If the carrier did not seek legal counsel's opinion, then the expert can explain to the jury whether the experience level of the adjuster making the ultimate decision was sufficient and whether the adjuster utilized proper controlling standards, such as standards of contract construction, in reaching a decision. The expert can also identify types of conduct that may reveal a bias or pretext or "post-claim underwriting" in reaching the result.

Institutional bad faith is also an appropriate topic for expert testimony. The expert can assist the jury in determining whether the company had standards, practices, and training in place that reflect an attempt to assist adjusters in reaching sound and fair decisions. Additionally, the expert can identify the appropriate internal and external standards and practices and judge the actual conduct by those standards and practices. For example, an adjuster who uses an expert opinion from one claim to interpret the policy and coverage in another claim is not following either industry or internal standards. Mixing and matching opinions without consideration of the factual differences is a fundamentally flawed approach.

In describing whether a carrier had a reasonable basis for its decision, an expert should be permitted to explain to the jury what a carrier would look to and how it would properly assess applicable case law. As noted, that may involve seeking a coverage opinion from in-house counsel or from outside counsel. Carrier experts will often opine as to whether the case was one of first impression, a very typical safe harbor for carrier decisions. A policyholder expert can point out the flaws in the analysis of the carrier. Often, the claim file material analyzing the coverage is objected to on the basis of privilege, which makes the task more challenging. The expert can explain to the jury how the carrier should have gone about its analysis. Of necessity, these topics require some discussion of how a carrier would treat and apply the law. The point of proper testimony should be to explain how a proper insurance company would evaluate the claim, not what the controlling legal interpretation should actually be. Otherwise, the expert will be in danger of invading the province of the court.

Experts in first-party cases are often asked to explain to the jury how the claims adjustment process works. A jury is not necessarily going to understand the ins and outs of, for example, appraisal. The policyholder expert will consider and discuss what things in the claim file and testimony indicate a pretext or set mindset on the part of the carrier that is indicative of bad faith. The expert can explain how a carrier should appropriately approach a claims decision, including the timing of the process and decision. Juries typically do not know how insurance companies internally operate. An expert can explain the different parts of the company that may be involved with a given claim, such as proper claims supervision, the use of large loss committees, the role of underwriters and/or actuaries, the process of setting reserves, the process of reporting to reinsurance companies, and the involvement and function of in-house legal departments.

Finally, experts can be used in first-party cases to explain to the jury about the proper selection and use of outside experts, such as engineers and roofing experts. Such experts are often used to explain what may or may not evidence a pretextual decision to deny coverage. Expert testimony can also involve analyzing the expert reports used for the claims decision, similar to a *Daubert* challenge, to point out why a reasonable carrier under industry practices would or would not rely upon that report or opinion.

Third-Party Liability Claims

In liability cases, the focus of expert testimony is typically on settlement practices. Again, the expert can be used to critique and/or explain the nature of the conduct revealed by the claim file and related testimony. Additionally, experts often address a number of other areas of testimony that impact extracontractual liability:

1. Assessment of adjuster/supervisor conduct, such as method of investigating, approach to assessing coverage issues, and compliance with internal policies
2. Application of liability standards to the conduct, such as ultimate issue testimony regarding when liability became reasonably clear and/or whether a reasonable carrier would have accepted a given settlement demand

TIP: Although claims experts can assist the trier of fact in understanding insurance industry standards, be sure their testimony is not based on barren legal conclusions.

3. Explanation of whether the demand for settlement from the claimant was one a reasonable carrier would accept, looking to things like whether a proper release was offered, protection from lienholders was provided, etc.
4. Assessment of whether a unilateral settlement by the insured, for example with a covenant not to execute, was subject to any of a variety of attacks, such as whether it was the result of collusion or the result of a fully adversarial trial
5. Discussion of whether coverage positions were timely and properly reserved and explanation of the nature and purpose of reservations
6. Discussion of the rules of contract construction applicable to insurance contracts, as used in insurance adjusting practice
7. Explanation of whether the coverage position was one that was bona fide or reasonably debatable or whether it had a reasonable basis
8. Explanation of the coverage dispute process and how things like declaratory judgments work and how they can be used to resolve coverage disputes

In short, opinions about contract interpretation cannot be a determination of who is right or wrong but instead should be focused on whether the use and application of legal principles were consistent with insurance industry standards and practices.[1]

Lawyers as Claims Experts

The key for the lawyer expert is to have sufficient experience with the insurance industry and the claims process to be able to assess the reasonableness of the insurance company's position on legal principles and the application of facts to those principles. Barren legal conclusions simply will not work.

Ashby. In *State Farm Lloyd's Insurance Co. v. Ashby AAA Automotive Supply Co.*, the court held that "an attorney who has been involved in handling insurance cases may be more qualified to testify as an expert concerning bad-faith claims than a licensed adjuster with limited expertise in the area."[2] The court noted that an opinion on the standard of care regarding a licensed profession must come from one who is in fact licensed in that profession.[3] The court also recognized that adjusting must be done by someone licensed by the state.[4] The court noted that attorneys "are exempted from the license requirement to the extent they perform adjusting activities in the course of their practice of law."[5]

The claimant offered the testimony of two lawyers as adjusting or bad faith experts. One had a mixed practice and had handled coverage cases and evaluated bad faith exposure for carriers on occasion. He had handled some suits involving fires, and he was now offering testimony in an arson case. He had never acted other than as a lawyer and thus had no experience as a claims manager or adjuster and had no experience from the insurer's point of view. The other expert, also a lawyer, offered testimony regarding the interpretation of the insurance policy. The court noted that "[h]e had significant experience in the litigation of fire policies."[6] The court ignored challenges to both experts' testimony invading the province of the jury and improperly involving matters of law.

If the expert is a lawyer, attacks based on whether the testimony invades the province of the court to instruct the jury on the law will more likely be made. The interpretation of a contract and thus the determination of whether a contract is ambiguous are typically questions of law.[7] A so-called insurance expert generally may not testify as to the interpretation or ambiguity of a policy.[8]

Stallion. One decision that appears far off the mark is *Stallion Heavy Haulers, LP v. Lincoln General Insurance Co.*[9] The lawyer expert in that case was the author of this article.

The court framed the respective positions of the parties as follows:

> Lincoln complained that Stallion is not allowed to bring additional counsel into the case under the guise of an expert opinion. Lincoln maintained that designating Huddleston as an expert invades the court's role in determining the law to apply to this case. Lincoln characterized Huddleston's report as addressing questions of law; specifically, the duty to defend and the duty to indemnify.
>
> Stallion conceded that Huddleston's report discusses a great deal of legal authority, but argued that Huddleston's root opinions concern Lincoln's handling of the claim and the reasonableness of Lincoln's actions in accordance with the usual and customary practices of the insurance industry. Stallion characterized Huddleston's opinions as mixed questions of law and fact—opinions that Stallion insisted are permitted under Texas insurance law.[10]

The court summarized what it believed were the applicable rules: "Statements of advocacy and legal conclusions do not assist the factfinder and are inadmissible."[11] "[E]xpert opinion testimony may embrace an ultimate issue to be decided by the trier of fact. . . . Rule 704 [of the Rules of Evidence] does not permit an expert to render conclusions of law."[12]

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The court held that allowing expert testimony on mixed questions of law and fact was a Texas rule that did not apply in the federal case before the court.[13] The court opined that the opinion contained few facts pertinent to the case. As to policy interpretation, the court stated:

> Huddleston also interpreted provisions and terms of the policy. Contract law guides the interpretation of insurance policies. If the contract terms are unambiguous, the court must decide the contract's meaning. "Expert testimony on the proper interpretation of contract terms may be admissible when the meaning depends on trade or industry practice." In this case, neither party suggests the meaning of the terms of the contract depends on trade or industry practice. The policy terms are defined within the policy.[14]

The primary problem with *Stallion* is that it takes a situation where the carrier's conduct in applying legal principles is in bad faith and suggests that testimony challenging the carrier's approach is a legal conclusion. That is simply not the case. The role of the insurance carrier involves nonlawyers reaching legal conclusions, which certainly seems problematic in and of itself. The carriers typically utilize in-house or outside counsel to assist in the analysis, but then they claim the communications are subject to the attorney-client privilege. The use of a lawyer expert to pick apart and show why the carrier decision was biased or pretextual is entirely permissible, as numerous cases cited in this article show. The courts in cases like *Stallion* appear to be taking discussion in the expert report of the guiding principles for the decision, which are of necessity legal in part, and turning it into a pivot point for claiming the opinion involves legal conclusions. If an expert is to testify on mixed questions of law and fact, the expert must establish familiarity with the controlling legal standards. If they ultimately conflict with the trial court's determination of the law, then the opinions are not relevant.

Corinth. Similarly, in *Corinth Investor Holdings, LLC v. Evanston Insurance Co.*, the court held that expert testimony regarding whether statutory notices required in malpractice cases were treated by carriers as a form of notice of claim was inadmissible.[15] The court also held that the expert's discussion and disclosure of the controlling legal concepts any insurer would be required to follow amounted to inappropriate legal conclusions and invaded the province of the court and the jury.

Instead of citing controlling law from either Texas or the U.S. Court of Appeals for the Fifth Circuit, the court followed a New Jersey decision, *Holman Enterprises v. Fidelity & Guaranty Insurance Co.*[16] The court in *Corinth* noted:

> The [*Holman*] court did note that the reasonableness of an insurer's denial of a claim may be an appropriate subject matter for an expert witness, but it would not permit the expert to testify because there was not "any sort of gauge for the basis of his decision, either from his own extensive experience in the industry or some industry standards or guidelines. . . ." The Court agrees that whether an insurer acted reasonably is to be judged by the standards of the insurance industry, not by an attorney offering a legal opinion based on his interpretation of case law.[17]

If the expert is a lawyer, attacks based on whether the testimony invades the province of the court to instruct the jury on the law will more likely be made.

It should be noted that New Jersey follows the "net opinion rule." As one court has explained:

> Under New Jersey law, an expert's opinion must be based on a proper factual foundation. In other words, "[e]xpert testimony should not be received if it appears the witness is not in possession of such facts as will enable him [or her] to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." *"This prohibition against speculative expert opinion has been labelled by modern courts as the 'net opinion rule.'"* "Under this doctrine, expert testimony is excluded if it is based merely on unfounded speculation and unquantified possibilities."[18]

That was not the situation presented in *Corinth*. A more generous and more precise analysis has been provided by the courts in other jurisdictions.

Heggy. The direct opposite approach was taken regarding lawyer/claims expert testimony in *Gray Insurance Co. v. Heggy*.[19] The insurance company in that case sued its coverage lawyers to recover an excess judgment in a case the carrier did not settle supposedly because of the opinions of its lawyers. The court determined that this lawyer/claims expert was qualified under Federal Rule of Evidence 702:

> To assess [the expert's] qualifications, the Court considers his "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Green has practiced law since 1976. Insurance matters constitute a substantial percentage of his practice. Green's experience includes representing insureds and insurance companies, authoring coverage opinions for insureds and insurance carriers, handling the defense of insurance claims, evaluating claims for

settlement purposes, and providing education to insurance company employees on procedures for handling claims, coverage issues, and compliance with the duty of good faith and fair dealing. After careful review, the Court finds that Green's credentials qualify him as an expert in his field since he has "specialized knowledge" gained through "experience, training, or education."[20]

The expert in question proposed to testify "(1) [that the insurer] 'made the decision not to settle the Thomas case for reasons other than reliance on [Defendants'] opinion' and (2) 'that [Plaintiff] violated accepted industry standards in handling the coverage issue and the [underlying] Thomas claim which caused or contributed to Plaintiff's damages.'"[21] The court rejected arguments that the testimony was not based on a sufficient factual foundation. The court explained:

As insurance industry customs and procedures are beyond the realm of the ordinary juror's ken, expert testimony would be helpful to the trier of fact.

Plaintiff first argues that Green's report fails to comply with Fed. R. Civ. P. 26(a)(2). Under Rule 26(a)(2)(B), an expert witness must provide a written report containing, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming [his or her opinions]." Plaintiff complains that Green's stated "basis and reasons for his opinions . . . are so amorphous as to be essentially unstated" and that Green "[f]ail[ed] to provide a complete list of the *facts or data* he considered in forming his opinions." . . . As support, Plaintiff points to Green's citation of "the claim file" and "customs and practices in the industry" as inadequate facts and bases. The Court is unpersuaded by this argument. The Plaintiff can inquire as to which particular facts from the claim file Green relied on in a deposition. The same goes for Green's reference to industry customs and his experience with particular claims. Particularly at this stage, exclusion is not warranted on the basis of Rule 26(a)(2).[22]

With respect to the challenge that the opinion was unreliable, the court refused to straightjacket claims testimony to scientific validity testing. The court reasoned:

[T]his argument "focuses too closely on scientific testimony to the exclusion of other forms of permissible expert testimony." *Milburn v. Life Investors Ins. Co. of Am.*, No. CIV-04-0459-C, 2005 U.S. Dist. LEXIS 46926, 2005 WL 6763386, at *2 (W.D. Okla. Jan. 19, 2005). There are many different kinds of expert testimony, some of which "may focus upon personal knowledge or experience," rather than "scientific foundations." *Kumho*, 526 U.S. at 150. It is for this reason that the Supreme Court acknowledged in *Kumho* that the *Daubert* factors "do not constitute a 'definitive checklist or test'" but that instead the gatekeeping inquiry must be "'flexible'" and "'tied to the facts' of a particular 'case.'" *Id.* (quoting *Daubert*, 509 U.S. at 591, 593–94) (emphasis original). The Court has previously recognized testimony from an insurance industry expert as reliable and based on an appropriate type of "specialized knowledge and experience." *Milburn*, 2005 U.S. Dist. LEXIS 46926, 2005 WL 6763386, at *2. The Court thus finds that the reasoning and methodology employed by [the expert] is valid.[23]

Finally, the court in *Heggy* rejected arguments by the insurer that the claims expert's opinion was not relevant. The court noted:

[E]xpert testimony under Rules 401 and 702 is relevant if it would "'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Daubert*, 509 U.S. at 591 (quoting Fed. R. Evid. 702). Any doubts as to whether expert testimony would be useful in assisting the trier of fact "'should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions.'" *Robinson v. Mo. Pac. R.R. Co.*, 16 F.3d 1083, 1090 (10th Cir. 1994) (citation omitted). In this case, unfair surprise is not a factor, nor is time. Moreover, as *insurance industry customs and procedures are beyond the realm of the ordinary[] juror's ken*, Green's testimony would be helpful to the trier of fact.[24]

James. An interesting exception case to the question-of-law rule is *Royal Maccabees Life Insurance Co. v. James*.[25] That case involved a nonlawyer, former claims adjuster. The court of appeals used the expert testimony of Joseph Wilkerson regarding the meaning of the term "non-medical" used in the application for the policy, which was incorporated into the policy. Wilkerson stated that the meaning he attributed to the term was the common meaning in the "insurance industry."[26] The court of appeals clearly used the term "non-medical" to create an ambiguity, thus permitting Wilkerson to testify as to his interpretation of the policy.

A somewhat similar use of extrinsic proof was employed regarding the meaning of a term in a trade or industry insured in *Mescalero Energy, Inc. v. Underwriters Indemnity General Agency, Inc.*[27] Similarly, in *Insurance Co. of North America v. Morris*,[28] the

court upheld testimony by an insurance expert regarding the nature of suretyship in insurance law. The court also upheld the admission of testimony regarding the duty of an agent to explain material aspects of coverage in the context of taking applications for coverage.

Recent and Exemplary Cases

Hamilton. In *Hamilton v. Bayer Healthcare Pharmaceuticals Inc.*, the court determined that the expert testimony of insurance law author Allan D. Windt should be excluded.[29] Although the court found that Windt was qualified as an insurance expert because of his knowledge, skill, experience, training, or education, his opinion was deemed unreliable and was, therefore, excluded.

The court began its analysis by addressing the basic gatekeeper tests applicable:

> Pursuant to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the Court must conduct a two-part inquiry prior to permitting an expert witness to testify before a jury.
>
> "First, the district court must 'determine whether the expert is qualified "by knowledge, skill, experience, training, or education" to render an opinion.' [*United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (en banc)] (quoting Fed. R. Evid. 702). Second, if the expert is sufficiently qualified, the district court 'must determine whether the expert's opinion is reliable by assessing the underlying reasoning and methodology.' *Id*."[30]

The court applied the U.S. Court of Appeals for the Tenth Circuit's test for admissibility of expert testimony on legal issues set forth in *Specht v. Jensen*[31]:

> The line we draw here is narrow. *We do not exclude all testimony regarding legal issues.* We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, *a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms. . . .*
>
> . . . [A]n expert's testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, *when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case.*[32]

In finding Windt's testimony unreliable, the court explained:

> Windt's testimony might ordinarily be redacted to fit within those parameters, but it fails to apply the applicable law. As this Court explained in ruling on a *Daubert* challenge to an expert in an earlier bad faith case: "the focal point of her testimony must be on the Oklahoma insurance industry's practices and standards and whether they were or were not met in this case. The Court will not permit Sullivan to give testimony regarding unsupported or inadequately explored conclusions regarding issues of fact or to offer a legal opinion."[33]

As to Windt's testimony, the court observed that Windt relied only on "a book he authored as the legal basis for his opinions."[34] The court observed that although the book references Oklahoma law, it also references other states and "often conflicts with Oklahoma law."[35] According to the court, Windt made "no effort" to specify his opinions as based only on the applicable Oklahoma law.[36] As a result, for this sole reason, his opinions were not admitted.

In another opinion involving the same case, the court reached the opposite result with respect to a different insurance industry expert.[37] As to this expert, the insurance company challenged admissibility because the expert allegedly was "not qualified because she [was] not a lawyer and/or [did] not hold a special license relative to the insurance policy at issue."[38] The court held that the opinion testimony was couched in terms of "acceptable industry standards" and therefore would assist the jury "in understanding appropriate industry standards," which, the court noted, is "precisely the reason for permitting expert testimony on claims handling."[39]

Milburn. Both *Hamilton* opinions rely upon the decision of the court in *Milburn v. Life Investors Insurance Co. of America*.[40] In that case, the insurer challenged the testimony of Sue Sullivan on the bases that it was unreliable, would not assist the trier of fact, and failed the Federal Rule of Evidence 403 balancing test.[41]

First, the court found the expert reliable because she "worked for the Oklahoma Insurance Department from 1965 to 1995, thirteen years of which included the position of Assistant Insurance Commissioner," and her "work experience range[d] from coverage and liability dispute resolution to interpreting insurance-related legislation and statutes."[42]

Second, the court found a sufficient factual basis for the opinions given the expert's review of extensive materials from the matter. The court noted that the expert's testimony "appropriately focuse[d] on the reasonableness of Defendant's handling and investigation of Milburn's coverage under the terms of her insurance policy."[43] "To the extent Defendant believes Sullivan's testimony lacks a factual foundation, it may cross-examine her at trial and present contrary evidence."[44]

Third, as to whether the testimony/opinion could be tested, the court noted that claims handling expert testimony has to be treated differently from scientific testimony. It is admissible as long as the expert has sufficient experience in the field, which Sullivan did based on her work with the Oklahoma Insurance Department. The court noted:

> Using her experience and knowledge, Sullivan reviewed the relevant documents and opined on the reasonableness of Defendant's investigation and subsequent denials of Milburn's claims—this is a generally accepted practice when litigating bad faith suits. *See Kumho*, 526 U.S. at 150 ("[T]he relevant reliability concerns may focus upon personal knowledge or experience. . . . [T]here are many different kinds of experts, and many different kinds of expertise."). The Court finds that the reasoning and methodology employed by Sullivan is valid and that her methodology may be properly applied to the particular facts at issue.[45]

The proper focus of admissibility should be on the experience of the expert and the materials reviewed in order to reach an opinion.

Finally, as to whether the testimony of Sullivan would assist the trier of fact, the court concluded:

> Sullivan's testimony may encompass an ultimate issue and also be couched in legal terms. Her testimony does not merely state a legal conclusion, but identifies the evidence she considered in reaching her opinion. Her testimony also *does not tell the jury what verdict to reach, does not attempt to define the law, [and] does not comment on the weight or credibility of the evidence or "prevail[] upon [the trier of fact] to abdicate its function or responsibility for reaching an independent judgment on the ultimate issues . . . ."* The Court finds that Sullivan's testimony will assist the trier of fact in understanding insurance industry standards for claim evaluation and investigation.[46]

Thus, the court provides a helpful summary of approaches to expert testimony that raise red flags regarding whether it will assist the jury:

1. Does the testimony attempt to tell the jury what verdict to reach?
2. Does the testimony attempt to define and instruct on the law?
3. Does the testimony comment on the weight or credibility of the evidence?
4. Does the testimony encourage the jury to abdicate its independent judgment?[47]

Importantly, the court concluded that assisting the trier of fact in understanding insurance industry standards is a matter that "the trier of fact is not capable of assessing for itself."[48] Thus, the court found that "the probative value of Sullivan's testimony is not substantially outweighed by unfair prejudice or confusion."[49]

OneBeacon. The trial court in *OneBeacon Insurance Co. v. T. Wade Welch & Associates* granted the claimant/policyholder's motion in limine regarding expert testimony as to whether a carrier had a duty to settle if it had a reasonable basis, albeit a losing one, for denying the claim, in connection with a common-law *Stowers* failure-to-settle claim.[50] The court granted the policyholder's motion in limine to exclude testimony from an expert regarding whether OneBeacon could consider its policy defenses in evaluating the reasonableness of the claimant's demand to settle within limits. The court merely stated it was granting this part of the motion and further observed: "No witness may testify regarding legal issues. It is the duty of the court to instruct the jury on the law."[51] At the trial, the judge allowed testimony regarding whether the carrier had a reasonable basis as to statutory unfair claims settlement practices, which are triggered by whether the liability of the insurer is reasonably clear.

On appeal after a policyholder verdict, additional issues regarding expert testimony were raised by the parties and addressed by the Fifth Circuit.[52] The Fifth Circuit was asked to assess whether the evidence was sufficient to support a finding of "knowing" violations of the insurance code. The court looked to expert testimony on the mixed question of law and fact involving "knowing" misconduct.[53] The court noted that "knowingly" means that the carrier must have acted with "actual awareness of the falsity, unfairness, or deceptiveness of the act that made it liable under [Texas Insurance Code] Chapter 541."[54] The Fifth Circuit further noted:

> "Actual awareness" does not mean merely that a person knows what he is doing; rather, it means that a person knows that what he is doing is false, deceptive, or unfair. In other words, a person must think to himself at some point, "Yes, I know this is false, deceptive, or unfair to him, but I'm going to do it anyway."[55]

The court observed that the carrier urged that it could not be engaging in a knowing violation if the policy defense upon which it relied was literally correct but rejected in a case of first impression. To this, the court responded:

> DISH's expert testified that OneBeacon's conduct was not that of a reasonable insurer acting prudently, but was an instance of prohibited "post-claim" underwriting, which he defined as occurring when "the insurance company realizes that they

> have a problem, and they desperately look for a way to avoid paying the claim. And what they'll do is they'll try to search for a morsel of evidence that they can conceivably turn into a material misrepresentation, such as we have here."[56]

The court concluded that "the jury was free to disregard that evidence and credit the testimony of DISH's expert. The evidence does not point so strongly and overwhelmingly in OneBeacon's favor that reasonable jurors could not have reached a different conclusion."[57]

James. Obviously, admissibility is a hotly and frequently contested issue, as reflected by the varying rulings in a sampling of cases.[58] An example of the expansive approach some courts take to expert claims testimony is set forth in the aforementioned *Royal Maccabees Life Insurance Co. v. James*.[59] There, the court held:

> We review rulings on the admissibility of expert testimony for an abuse of discretion. A trial court abuses its discretion if it acts without reference to any guiding rules or principles. Expert testimony is admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue. A witness may be qualified as an expert "by knowledge, skill, experience, training, or education."
>
> An expert may offer his opinion on an ultimate issue to be decided by the trier of fact. Also, an expert may state an opinion on a mixed question of law and fact if the opinion is confined to relevant issues and is based on proper legal concepts. To be relevant, the expert testimony must be sufficiently tied to the facts of the case so that it will assist the jury in resolving a factual dispute.[60]

The court rejected arguments, followed by the federal courts and numerous other jurisdictions,[61] stating that breach of the duty of good faith is a duty to be determined by the court and involves factual issues for which the jury is amply qualified without needing an expert. The court also rejected arguments that the expert testimony involved mere unsupported conclusions and improper attempts to testify regarding matters of law and contract interpretation. The court reasoned:

> The cases relied upon by Royal Maccabees are distinguishable and inapplicable to the facts of this case. In *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357 (Tex. 2000) (per curiam), the supreme court held that the trial court properly excluded the proposed testimony of a human factors and safety expert because the expert's testimony was within the common knowledge of the jury. In *United Way of San Antonio, Inc. v. Helping Hands Lifeline Foundation, Inc.*, 949 S.W.2d 707, 712–13 (Tex. App.-San Antonio 1997, writ denied), the court of appeals held that the trial court erred in allowing a witness to give a legal conclusion where the trial court had stated that the witness could testify solely as a fact witness. In *Holden v. Weidenfeller*, 929 S.W.2d 124, 134 (Tex. App.-San Antonio 1996, writ denied), the reviewing court affirmed the trial court's ruling excluding expert testimony from an attorney as to the existence of an easement because the witness did not establish greater knowledge and education [than] the trier of fact, the trial judge.[62]

The court justified its action based on the expert's credentials:

> Wilkerson had forty-eight years' experience in the insurance industry. He is a licensed claims adjuster and a licensed risk manager. He has taught insurance courses at the college level. To maintain his licenses, Wilkerson attends many seminars including some continuing legal education courses. Although most of his career involved casualty insurance, he also handled numerous group health and life claims.
>
> In light of this Court's conclusion that the insurance policy is ambiguous as a matter of law, it was not error for the trial court to permit Wilkerson to testify as to his interpretation of the policy. Wilkerson testified that the conduct of Royal Maccabees constituted bad faith, unfair dealing and fraud and also that it violated various provisions of the insurance code and the deceptive trade practices act. These opinions on mixed questions of law and fact were proper.[63]

Trial Court Rulings on Key Coverage Issues: Instructions Impacting Experts

Strangely, motions for summary judgment resolving critical coverage issues do not come until shortly before trial. As a result, experts are left in a situation where the position of the party for whom they are testifying suddenly becomes an erroneous position according to the trial court. Where such rulings are entered, the trial of the bad faith case will almost assuredly include an instruction to the jury regarding the court's ruling. The devastation of such rulings and instructions cannot be overestimated. In such scenarios, a claims expert for the carrier must in effect appear to disagree with the judge, a dangerous thing for any expert to do. Explaining why the judge rejected a position but the position was still reasonable is no small task.

Jury instructions regarding coverage determinations by the court must steer clear of making any comment on the weight of the evidence. The decision in *Redwine v. AAA Life Insurance Co.*[64] has been used by some defense counsel as a basis for barring any comment or statement to the jury regarding coverage determinations by the court. However, that is not what *Redwine* holds.

In that case, the plaintiff sued her insurer for misrepresenting a travel accident insurance policy. She contended that the advertisements led her to believe the policy covered serious injuries, while the actual policy language only covered death, loss of limb, or loss of sight. The insurer denied the plaintiff's claim when her daughter suffered a spinal cord injury and

paralysis of her lower limbs caused by an automobile accident. The plaintiff sued for breach of contract, violations of the Deceptive Trade Practices Act and the Texas Insurance Code, fraud, and breach of the duty of good faith and fair dealing.

The trial court held as a matter of law that the policy did not cover the claim and thus granted the insurer a directed verdict on Redwine's breach of contract and duty of good faith and fair dealing causes of action. The trial court instructed the jury as follows:

> You are hereby instructed that AAA Life Insurance Company did not breach its fiduciary duty of good faith and fair dealing, or otherwise act in bad faith, by denying Deanne Redwine's claim under the 365 Travel Accident Policy.
>
> You are hereby instructed that Deanne Redwine's claim pursuant to the injuries received were not covered by the 365 Travel Accident Policy.[65]

The jury in *Redwine* found against the plaintiff on the remainder of her theories.

The court of appeals held that the trial court committed reversible error by commenting on the weight of the evidence with these instructions. The court held that these instructions were unnecessary and improperly suggested to the jury the trial judge's opinion about the remaining causes of action.[66]

The instruction in *Redwine* clearly goes too far, especially as a jury instruction. The instruction was unnecessary as to the remaining issues to be considered by the jury. From the policyholder perspective, in a case where coverage or a duty to defend that was previously contested is found, it is impossible to fairly try the case without the fact of the determination being shared with the jury. For the defendant insurer, though, such sharing is devastating because all of the insurer's protestations about being right on the law have turned out to be wrong, at least in effect.

Conclusion

Claims experts in bad faith cases are not epidemiologists. They cannot be tested in the same way. The insurance companies have diligently worked to avoid having claims manuals that can be the subject of discovery. Training and internal guidelines are in many cases vapor, mist. The adjustment process is intertwined with legal questions that are, in many cases, handled by nonlawyers. Privilege is typically asserted to bar production of any independent legal opinions or advice regarding the coverage position. Experts are used by carriers to fill the void in many cases. Policyholders best use experts to explain the process and question whether the carrier is in any way keeping the insured's interests in mind as it makes claims decisions.

It is no surprise that the end result is that there are a large number of cases seemingly all over the park in dealing with admissibility of expert claims opinions. The proper focus should be on the experience of the expert and the materials reviewed in order to reach an opinion. There is no reason why a lawyer expert cannot satisfy the expert witness requirements in this field. Adjusting requires both insurance adjustment experience and legal knowledge. Most states recognize that a lawyer is lawfully permitted to adjust claims as though actually licensed to be an adjuster. Most importantly, lawyer experts have experience that can be used on broader issues that may well go beyond adjusting claims. This is especially true in cases involving failure to settle. Lawyer experts can interpret and explain the various roles and arcane subjects, such as the tripartite relationship, and internal operations, such as large loss committees and reinsurance.

The courts and/or the legislature should more precisely define the standards and duties for carriers so that these are not amorphous and evolving seemingly in every case. Moreover, judicial recognition is needed of the concept that insurance companies must make legal decisions and that the quality of those decisions and the degree to which the policy interpretation is strained are fair game for litigation. Allowing experts to explain the process of how those decisions are rendered and when they are inappropriately rendered is testimony that will assist the trier of fact. These are not subjects on which the court will be providing legal guidance or instruction. ◄

Notes

1. Ins. Co. of N. Am. v. Morris, 928 S.W.2d 133 (Tex. App. 1996) (upholding the admission of testimony by an insurance expert regarding the nature of suretyship in insurance law; also approving of the admission of testimony regarding the duty of an agent to explain material aspects of coverage in the context of taking applications for coverage), *aff'd in part & rev'd in part*, 981 S.W.2d 667 (Tex. 1998).

2. No. 05-92-01354-CV, 1995 WL 513363, at *15 (Tex. App. Aug. 28, 1995) (Barber, J.).

3. *Id.* (citing Prellwitz v. Cromwell, Truemper, Levy, Parker & Woodsmale, 802 S.W.2d 316, 317 (Tex. App. 1990)).

4. *Id.* (citing Tex. Ins. Code Ann. art. 21.02, § 2(a) (Vernon Supp. 1995)).

5. *Id.* (citing Tex. Ins. Code Ann. arts. 21.02, 21.07-4, § 1(1)(b)(1) (Vernon Supp. 1995)).

6. *Id.*

7. Tex. Farm Bureau Mut. Ins. Co. v. Sturrock, 146 S.W.3d 123, 126 (Tex. 2004) (citing, among others, Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462, 464 (Tex. 1998)).

8. *See, e.g.*, Cluett v. Med. Protective Co., 829 S.W.2d 822, 827 (Tex. App. 1992) (upholding inadmissibility of expert testimony interpreting the policy based on the "usual and ordinary construction of insurance policies" and "industry custom and practice"); St. Paul Ins. Co. v. Rahn, 641 S.W.2d 276, 284 (Tex. App. 1982) (holding that expert testimony regarding whether a temporary substitute automobile was involved was inadmissible and not within a proper area for expert testimony).

9. No. SA-09-CA-0317-FB, 2011 U.S. Dist. LEXIS 3322 (W.D. Tex. Jan. 13, 2011).

10. *Id.* at *3.

11. *Id.* at *5–6 (citing Am. Home Assur. Co. v. Cat Tech, L.L.C., 717 F. Supp. 2d 672, 681 (S.D. Tex. 2010)).

12. *Id.* at *6 (alterations in original) (quoting United States v. Clark, No. 1:09-CR-114-ALLTH, 2010 WL 2710569, at *2 (E.D. Tex. July 7, 2010)).

13. *Id.* at *7.

14. *Id.* at *8 (footnotes omitted).

15. No. 4:13-CV-00682, 2014 U.S. Dist. LEXIS 172647 (E.D. Tex. Dec. 15, 2014).

16. 563 F. Supp. 2d 467, 472 (D.N.J. 2008).

17. *Corinth*, 2014 U.S. Dist. LEXIS 172647, at *13–14 (quoting *Holman*, 563 F. Supp. 2d at 473).

18. Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 323 (App. Div. 1996) (alterations in original) (emphasis added) (citations omitted).

19. No. CIV-11-733-C, 2012 WL 12863163 (W.D. Okla. 2012).

20. *Id.* at *5 n.3.

21. *Id.* at *3.

22. *Id.* at *3–4.

23. *Id.* at *5–6.

24. *Id.* at *7 (emphasis added).

25. 146 S.W.3d 340 (Tex. App. 2004).

26. *Id.* at 348.

27. 56 S.W.3d 313, 320 (Tex. App. 2001).

28. 928 S.W.2d 133 (Tex. App. 1996), *aff'd in part & rev'd in part*, 981 S.W.2d 667 (Tex. 1998).

29. No. CIV-18-1240-C, 2019 U.S. Dist. LEXIS 180318, at *1–2 (W.D. Okla. Oct. 18, 2019) (granting plaintiffs' *Daubert* objection to expert witness Allan D. Windt).

30. *Id.* at *2–3 (quoting Schulenberg v. BNSF Ry. Co., 911 F.3d 1276, 1282–83 (10th Cir. 2018)).

31. 853 F.2d 805, 809–10 (10th Cir. 1988).

32. *Hamilton*, 2019 U.S. Dist. LEXIS 180318, at *2–3 (emphasis added).

33. *Id.* at *3 (citing Milburn v. Life Inv'rs Ins. Co. of Am., No. CIV-04-0459-C, 2005 U.S. Dist. LEXIS 46926, (W.D. Okla. Jan. 19, 2005)).

34. *Id.*

35. *Id.*

36. *Id.*

37. Hamilton v. Bayer Healthcare Pharm. Inc., No. CIV-18-1240-C, 2019 U.S. Dist. LEXIS 180317 (W.D. Okla. Oct. 18, 2019) (denying motion to exclude the opinions and testimony of Diane L. Luther).

38. *Id.* at *3.

39. *Id.* at *5.

40. No. CIV-04-0459-C, 2005 U.S. Dist. LEXIS 46926 (W.D. Okla. Jan. 19, 2005).

41. *Id.* at *2.

42. *Id.* at *3–4.

43. *Id.*

44. *Id.* at *5 (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993)).

45. *Id.* at *6.

46. *Id.* at *7–8 (emphasis added) (citations omitted) (citing, among others, Fed. R. Evid. 704(a); Specht v. Jensen, 853 F.2d 805, 809–10 (10th Cir. 1988); and Frase v. Henry, 444 F.2d 1228, 1231 (10th Cir. 1971)).

47. *Id.* at *8.

48. *Id.*

49. *Id.*

50. No. H-11-3061, 2014 U.S. Dist. LEXIS 139101 (S.D. Tex. Sept. 30, 2014).

51. *Id.*

52. OneBeacon Ins. Co. v. T. Wade Welch & Assocs., 841 F.3d 669 (5th Cir. 2016) (Texas law).

53. *Id.* at 679–80.

54. *Id.* at 679 (citing St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co., 974 S.W.2d 51, 54 (Tex. 1998)).

55. *Id.* (quoting *Dal-Worth*, 974 S.W.2d at 54–55).

56. *Id.* at 679–80.

57. *Id.* at 680.

58. *See, e.g.*, Thompson v. State Farm Fire & Cas. Co., 34 F.3d 932 (10th Cir. 1994) (a first-party fire loss case seeking to admit expert testimony of an insurance expert who was not included on the witness list and whose testimony was offered on issues "that a jury is capable of assessing for itself"); Bright v. Ohio Nat'l Life Assurance Corp., No. 11-CV-475-GKF-FHM, 2013 WL 121479 (N.D. Okla. Jan. 9, 2013) (excluding offered expert Michael Quinn's report and testimony based on finding that it was "in a subspecialty [disability insurance] outside his normal expertise," "riddled with legal conclusions and improper speculation," and based on unreliable methodology). *But see* Bright v. Ohio Nat'l Life Assurance Corp., No. 11-CV-475-GKF-FHM, 2013 WL 12327512 (N.D. Okla. Jan. 9, 2013) (the same case involving analysis of the insurance company's opposing insurance expert witness, wherein the insurance company expressly acknowledged that "the jury in this case will be fully capable of determining whether Ohio National acted reasonably and in good faith"); Higgins v. State Auto Prop. & Cas. Ins. Co., No. 11-CV-90-JHP-TLW, 2012 WL 2369007 (N.D. Okla. June 21, 2012) (excluding insurance experts on both sides based on a finding that the jury was capable of making the determination of the issues without the expert opinions, and the expert opinions involved would not assist or be "helpful" to the jury); Stroud v. Liberty Ins. Co., No. 15-CV-363-GFK-PJC, 2016 WL 10043498 (N.D. Okla. Oct. 7, 2016) (excluding insurance expert witness because it would not assist the jury, repeatedly answered the "ultimate issue," and provided "ruminations on the State of Oklahoma law" that were "irrelevant").

59. 146 S.W.3d 340 (Tex. App. 2004).

60. *Id.* at 353 (citations omitted) (quoting Tex. R. Evid. 702; Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998) (experience alone may provide a sufficient basis for an expert's opinion in some cases)).

61. *See supra* note 58.

62. *James*, 146 S.W.3d at 353 n.7.

63. *Id.* at 354.

64. 852 S.W.2d 10 (Tex. App. 1993).

65. *Id.* at 13.

66. *Id.* at 16.

Chapter 21
THE USE OF EXPERTS IN LITIGATION

by Patrick J. Kenny and Jonathan D. Valentino[*]

I. OVERVIEW

II. DETERMINING WHETHER EXPERT EVIDENCE IS ADMISSIBLE IN INSURANCE CASES

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[*] Commentaries beginning with "Judge's Perspective:" were written by the Hon. Timothy M. Tymkovich Circuit Judge of the U.S. Court of Appeals, Tenth Circuit. The authors wish to acknowledge Charlena S. Aumiller and Lauren K. Shores, students at Washington University School of Law and the University of Missouri Columbia School of Law respectively, for their substantial assistance in updating this chapter in 2010. Further updates by publisher's editorial staff.

I. OVERVIEW.

21.01 Scope. This chapter covers discovery and trial testimony with respect to expert witness opinion from a practical perspective. The chapter examines approaches and techniques for investigating expert witnesses in conjunction with traditional discovery tools. Particular attention is devoted to an understanding of the types of information that commonly is the subject of expert testimony in insurance cases. Where the comments in this chapter apply differently to policyholders and insurance companies, those differences are noted. Thus, except where expressly noted, the advice and techniques in this chapter apply with equal force to investigation and discovery targeting both "plaintiff's" experts and "defendant's" experts. This chapter includes a discussion of some of the practical differences in expert witness discovery in jurisdictions where the admissibility of expert testimony is governed by *Daubert v. Merrell Dow Pharm.* [509 U.S. 579 (1993)], as opposed to jurisdictions where the admissibility of expert testimony is governed by *Frye v. United States* [293 F. 1013 (D.C. Cir. 1923)].

The topic of expert witness discovery necessarily overlaps with a variety of other practice areas. Though this chapter will contain discussions that overlap with many of the following topics, this chapter is not intended to provide a comprehensive discussion of any of the following:

1. Written discovery in general;
2. The Federal Rules of Civil Procedure;
3. The list of topics on which expert testimony is admissible in insurance cases;
4. The array of arguments that may be made to challenge expert testimony under *Daubert*;
5. The array of arguments that may be made to challenge expert testimony under *Frye*;
6. The differences between the states with respect to their adoption of the *Daubert* and *Frye* standards;
7. The potential liability of expert witnesses for the contents of their testimony; and
8. Discovery of electronically stored information.

21.02 Key Practice Insights. To gain the maximum benefit from expert witnesses, and to engage most effectively in discovery regarding expert witnesses, counsel should assess the need for experts and related discovery as early as possible in a case. Too often parties first consider whether and to what extent expert testimony might be helpful or harmful to their case only as they see specific expert-related deadlines, such as a disclosure deadline, fast approaching.

Plaintiffs' attorneys should be considering the need for expert testimony before

they accept a case. If a case presents expert witness problems, attorneys are much better off getting that news early before they invest significant time and resources in the case.

Early assessment of the need for and role of expert witnesses also is important for defense counsel. Such an assessment affords counsel the option to engage an expert at the beginning of the case to assist on case-building activities such as discovery and dispositive pleadings.

In addition, experts themselves require a certain amount of time to do their jobs correctly. If an expert's opinion requires that the expert first conduct certain experiments or tests, counsel would be well advised to engage that expert early. The expert would be able to complete those experiments and tests properly and then integrate the results into an appropriate, legally sufficient report.

Conversely, when investigating a potential expert witness, counsel should endeavor to collect written items published by the expert as well as transcripts from the expert's prior deposition and trial testimony. Trial is not the place to learn that your expert witness has expressed contrary opinions in written publications or in prior testimony. Accordingly, before deciding whether to designate an expert as a trial witness, counsel should collect and review as much as possible of the relevant written materials published by the expert as well as transcripts from prior depositions and trials where the expert testified; counsel should assume the lawyers on the other side of the case will do that homework.

Counsel should be aware of the expert witness services that are available through public sources as well as through the various professional organizations to which counsel belongs. Volumes of information regarding potential experts are now available through LexisNexis, bar organizations, and the Internet. For instance, bar organizations such as the American Association for Justice and the Defense Research Institute collect information on expert witnesses which can then be accessed by members of those organizations. There are directories of members of associations of professionals involved in various aspects of the insurance industry that may also be a source of leads. Of course, counsel also should consider individual referrals of potential expert witnesses—and referrals from individuals contacted potentially to serve as an expert witness. Colleagues who practice in the relevant subject area are good sources of information regarding potential experts. The client may well have leads on potential experts, too.

It is now increasingly likely that the admissibility of an expert's testimony will be challenged. Volumes have been written regarding the criteria that are or should be applied to determine whether an expert witness is qualified to opine on a particular topic, whether an expert's methodology is sound, and whether the expert's opinions fit the facts of the case. Counsel naturally needs to be aware of the particular standards that will govern the admissibility of their experts' opinions when they engage them. Some "experts" are happy to give their opinions but will balk if asked to validate those opinions with a

methodologically rigorous test. In addition, counsel must familiarize themselves with the local rules and, indeed, the individual judge's requirements applicable to expert witness testimony. Although trial courts often alert the parties to any unique requirements applicable to expert witness testimony in their court, counsel still should familiarize themselves with local rules and with individual judges' rules regarding expert testimony.

Counsel should make sure that any report or affidavit submitted by counsel's own expert contains a full statement of every opinion upon which the expert will testify at trial. Simply setting forth the expert's conclusions is not enough. The affidavit or report also should include the basis for each of the expert's opinions and contain or have attached (or at a minimum identify) all the data and documents upon which those opinions are based. If the expert will be using exhibits at trial, copies of all those exhibits should be attached to their report or affidavit, though often illustrative exhibits can be submitted in connection with the final pretrial order. It also usually is advisable, if not required, to have the expert's qualifications, list of recent publications, and list of prior testimony attached to or included in his or her report or affidavit.

When preparing to depose an opponent's expert, there are any number of individual, case-specific considerations that can arise. If the lawsuit is pending in a jurisdiction governed by *Daubert* or a state law equivalent of *Daubert*, and the rules require pretrial disclosure, the expert's initial report, or affidavit, or the party's interrogatory response, should provide a fairly comprehensive summary of the expert's opinions and the factual bases, data and documentary support for those opinions. The expert's report or affidavit also should include the expert's qualifications, prior publications, and list of prior testimony. Before taking the opponent's expert's deposition, subject to the cost involved, counsel should investigate the salient portions of the expert's background, collect and review as much as possible the prior written material published by and depositions given by the expert, and—regardless of the amount at stake—critically examine the expert's opinions, methodology, and underlying factual bases for those opinions.

Ultimately, there are countless reasons that counsel should determine as early as possible the need for and role of expert witnesses. Locating an expert witness who actually is qualified to opine on the issue requiring expert testimony in a case can take time. Locating a *good* expert witness who is qualified to opine on the issue can take even more time. Investigating your own expert witness' background, prior statements, and prior testimony takes more time still. Moreover, circumstances still can arise that require a properly investigated expert to modify a previously expressed opinion. If that occurs, counsel should move quickly to supplement their expert witness' report or other opinion. Even then, sometimes deadlines applicable to expert disclosure need to be extended. In those cases, counsel's earlier diligence with respect to expert witness discovery will be an asset.

21.03 Master Checklist.

21.03[1] Considering Use of Experts.

☐ For plaintiffs, before even filing suit, assess whether expert testimony will be required or advisable in order to satisfy any elements of the plaintiff's case.

Discussion: §§ 21.02, 21.07

☐ For defendants, determine as soon as possible whether the case gives rise to any potential defenses on which the defendant will need or want expert testimony.

Discussion: §§ 21.02, 21.07

☐ For all parties, determine as soon as practicable all areas on which expert testimony might be helpful, if not required.

Discussion: §§ 21.02, 21.07

☐ Learn the applicable substantive law that governs the admissibility of expert testimony in the jurisdiction where the suit is pending.

Discussion: § 21.18

☐ Decide as early as possible whether to use a consulting expert.

Discussion: §§ 21.02, 21.07, 21.09

21.03[2] Assessing Potential Experts.

☐ Check LexisNexis for prior decisions involving potential expert witnesses.

Discussion: § 21.08[1]

☐ Investigate the published works, prior testimony, and general background of potential expert witnesses using the Internet.

Discussion: §§ 21.08[1], 21.08[3]

☐ Investigate potential experts using resources available to attorneys, such as expert witness data available through the American Association for Justice, Defense Research Institute, as well as resources available through state level bar organizations.

Discussion: §§ 21.08[2], 21.08[3]

☐ Search for and investigate potential expert witnesses through professional organizations in which the prospective experts might be members.

Discussion: § 21.08[3]

☐ Consider utilizing fee-based online services to search for and investigate the prospective opposing expert witness.

Discussion: § 21.08[3]

☐ Consider engaging an expert witness service to assist in the search for

and investigation of potential expert witnesses.

Discussion: §§ 21.02, 21.07, 21.08[4], 21.09

☐ If the client is or has available someone who can serve as a consulting expert, obtain their recommendations and comments with respect to potential expert witnesses as early as possible.

Discussion: §§ 21.02, 21.07, 21.09

☐ Learn the applicable substantive and procedural rules governing the discovery of communications between an attorney and the expert witnesses retained by the attorney.

Discussion: §§ 21.12, 21.13, 21.14, 21.20[1], 21.26, 21.27, 21.29, 21.30

☐ Obtain the conflict information, curriculum vitae, publication list, a listing of prior testimony, and pricing information from all prospective experts.

Discussion: §§ 21.08[4], 21.27

☐ Obtain advice from any consulting or internal experts about topics where expert testimony would be helpful and suggestions for locating prospective expert witnesses.

Discussion: §§ 21.02, 21.07, 21.09

☐ Locate and read the potential expert's prior relevant literature.

Discussion: § 21.08[4]

☐ Locate and review the expert's prior testimony.

Discussion: § 21.08[4]

21.03[3] Working with Consulting Experts.

☐ Before communicating in any substantial way with your expert, be aware the communication might be discoverable.

Discussion: §§ 21.09[2], 21.12, 21.13, 21.14, 21.15, 21.26

☐ Instruct your experts explicitly and in writing to preserve all documents, data and electronic information, regardless of whether they consider it germane, until you instruct otherwise.

Discussion: § 21.11

☐ Instruct your experts to treat all communications with you, including electronic communications, as though they are discoverable.

Discussion: §§ 21.12, 21.13, 21.14, 21.15, 21.26

21.03[4] Expert Discovery and Disclosure.

☐ Determine which experts to disclose in the course of discovery.

Discussion: § 21.10

☐ As soon as is permissible, serve written discovery seeking all the information regarding an opponent's experts that may be obtained through written discovery.

Discussion: §§ 21.13, 21.14, 21.28, 21.29

☐ Make a complete and timely disclosure of your testifying experts.

Discussion: §§ 21.12, 21.16, 21.24, 21.25

☐ Make sure that your expert's report contains a full statement of every opinion on which your expert will testify at trial.

Discussion: §§ 21.16[2], 21.21, 21.24, 21.25

☐ Verify that the basis for each of your expert's opinions is contained in your expert's report.

Discussion: §§ 21.16[3], 21.21, 21.24, 21.25

☐ Check that your expert's report contains all data and documents upon which your expert relied.

Discussion: §§ 21.16[4], 21.21, 21.24, 21.25

☐ Confirm that your expert's report has attached to it all exhibits that the expert intends to use at trial.

Discussion: §§ 21.16[5], 21.21, 21.24, 21.25

☐ Make sure that your expert's qualifications are included with the expert's report.

Discussion: §§ 21.16[6], 21.21, 21.24, 21.25

☐ Verify that your expert's list of relevant publications is included with the expert's report.

Discussion: §§ 21.16[7], 21.21, 21.24, 21.25

☐ Confirm that the expert's prior testimony for the disclosure period required by the court is included with the expert's report.

Discussion: §§ 21.16[8], 21.21, 21.24, 21.25

☐ Consult with your experts and any consulting experts available through your client to obtain their recommendations with respect to investigating the opposing expert witness.

Discussion: §§ 21.02, 21.07, 21.09

☐ Analyze the opposing expert's curriculum vitae.

Discussion: § 21.20[1]

☐ Locate and review the opposing expert's prior testimony.

Discussion: § 21.20[3]

☐ Obtain and read the opposing expert's prior relevant publications.

Discussion: § 21.20[1]

☐ Check LexisNexis for prior decisions involving the opposing expert.

Discussion: §§ 21.08[1], 21.20[4]

☐ Investigate and verify the opposing expert's published works, prior testimony and general background information using the Internet.

Discussion: §§ 21.08[1], 21.20[1], 21.20[3]

☐ Investigate the opposing expert witness using resources available to attorneys, such as expert witness data available through the American Association for Justice, Defense Research Institute, as well as resources through state level bar organizations.

Discussion: § 21.08[3]

☐ Investigate the opposing expert witness through professional organizations in which the prospective expert witness might be a member.

Discussion: § 21.08[3]

☐ Decide whether to depose an opponent's experts.

Discussion: §§ 21.17, 21.18, 21.19, 21.20

21.03[5] Preparing to Depose an Expert Witness.

☐ Determine in advance your objectives for the deposition of an opposing expert witness.

Discussion: § 21.17

☐ Before deposing the opponent's expert, determine whether there are any sources of facts, data, information, or opinions that your experts use and that the opposing expert might authenticate or otherwise validate.

Discussion: § 21.20[2]

☐ Verify that you have obtained all discoverable communications between the opposing expert witness and opposing counsel.

Discussion: §§ 21.12, 21.13, 21.14, 21.20[1], 21.26, 21.27, 21.29, 21.30

☐ Consider having the witness confirm that his or her report contains a full statement of every opinion on which the expert witness will testify at trial.

Discussion: §§ 21.16[2], 21.19[4], 21.30

☐ Consider confirming that the bases for each of the expert's opinions are contained in his or her report.

Discussion: §§ 21.16[3], 21.19[4], 21.30

☐ Consider verifying that the report contains all data and documents upon which the expert relied.

Discussion: §§ 21.16[4], 21.19[4], 21.30

☐ Consider verifying that the report has attached to it all exhibits that the expert intends to use at trial.

Discussion: §§ 21.16[5], 21.19[4], 21.30

☐ Consider whether to examine the expert witness' qualifications.

Discussion: §§ 21.16[6], 21.19[3], 21.20[1], 21.30

☐ Consider probing the expert witness with respect to the completeness of his or her list of publications and the relevance of their prior publications.

Discussion: §§ 21.16[7], 21.20[1], 21.30

☐ Consider examining the expert regarding the relevance of his or her prior testimony.

Discussion: §§ 21.16[8], 21.20[4], 21.30

☐ Consider inquiring about the expert's electronically stored information pertinent to the case, including communications with the attorney who hired the expert, to the extent the same are discoverable.

Discussion: §§ 21.12[3], 21.26, 21.30

☐ Inquire about any prior relationships between the expert and the parties and their counsel.

Discussion: § 21.19[1]

☐ Have the witness describe his or her compensation arrangement with respect to the lawsuit at issue.

Discussion: § 21.19[2]

21.03[6] Supplementing Expert Disclosures.

☐ Supplement in timely fashion your expert witness disclosures.

Discussion: §§ 21.24, 21.25

II. DETERMINING WHETHER EXPERT EVIDENCE IS ADMISSIBLE IN INSURANCE CASES.

21.04 Matters Appropriate for Expert Testimony in Insurance Cases.

21.04[1] Understand the Factors That Determine Admissibility. As with any lawsuit, expert testimony in an insurance case is admissible only when it will assist the trier of fact to understand the evidence or to determine a fact in issue [Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 924 (1978)]. For expert testimony to assist the trier of fact, the evidence or fact at issue must be so sufficiently specialized or technical that it would be beyond the understanding of the average person [Maffei v. N. Ins. Co., 12 F.3d 892, 897 (9th Cir. 1993)]. In addition, and notwithstanding the evidentiary rules permitting "ultimate issue" testimony [*see, e.g.*, Fed. R. Evid. 704], an expert also must not invade the province of the judge by drawing a conclusion of law or invade the province of the jury simply telling the jury what result to reach [Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016–1017 (9th Cir. 2004)].

Assuming that the expert testimony meets these initial criteria, there are additional factors that must be considered, such as reliability and relevance, before the testimony ultimately is deemed admissible [*see, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)]. However, it is the initial consideration of whether the expert testimony will assist the trier of fact or amount to purely legal conclusions that largely determines whether a topic in an insurance case is appropriate for expert testimony [*see, e.g.*, Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1218 (2004); Am. Coll. of Surgeons v. Lumbermens Mut. Cas. Co., 142 Ill. App. 3d 680, 702 (1986)].

Expert testimony in insurance disputes often is based on an expert's knowledge of the industry as opposed to scientific tests. The legal duties of the insurer under a policy also are commonly at issue [*see, e.g.*, Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537, 1541 (11th Cir. 1990)]. Expert testimony in insurance disputes, therefore, often walks a fine line between that which is specialized industry knowledge (and thus a proper subject for expert testimony) and that which is common knowledge or is no more than a simple legal conclusion (and therefore not appropriate for expert testimony). Many courts have held that testimony on the following topics in insurance disputes is appropriate for expert witness testimony:

1. Bad Faith;
2. Technical Policy Language;
3. Lost Policies;
4. Industry Custom and Practice;
5. Foreign Laws and Regulations; and

6. Causation.

Cross References: For a discussion of substantive laws governing the admissibility of expert testimony, including *Daubert v. Merrell Dow Pharm., Inc.* [509 U.S. 579 (1993)], and *Frye v. United States* [293 F. 1013 (D.C. Cir. 1923)], *see* § 21.18, *et seq.* below; Evidentiary Foundations § 9.03. For a discussion of issues not appropriate for expert testimony, *see* § 21.05, *et seq.* below.

Timing: Counsel should determine as early as possible whether there are issues on which expert testimony might assist the trier of fact. If there are such issues, counsel should consider sooner rather than later whether to consult with or utilize an expert witness. An early determination on this issue allows counsel sufficient time to: identify and retain an appropriate expert; consult with the expert in the course of discovery; and work with the expert in the preparation of an appropriate report, affidavit and other materials.

Warning: A determination whether proposed expert testimony will assist the trier of fact and, ultimately, whether the expert testimony is admissible generally is within the discretion of the trial court. For that reason determinations as to the admissibility of expert evidence are highly fact sensitive. Thus, although case law can provide guidance as to whether a particular issue is a proper subject for expert testimony, a ruling in one case on that issue is not necessarily controlling in another case. If there is doubt as to whether a particular topic is appropriate for expert testimony, the better approach may be to obtain the testimony.

Strategic Point: Counsel must also be certain that any intended lay testimony will not be excluded because the subject matter is more properly within the scope of expert testimony [*see* James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207 (10th Cir. 2011) (testimony as to pre-fire valuation of a dilapidated building for insurance purposes, which had been rejected as unreliable under Fed. R. Evid. 702, was erroneously admitted as lay opinion under Fed. R. Evid. 701; because the testimony was based on technical or specialized knowledge, it was expert testimony that was inadmissible under Rule 701(c))].

Judge's Perspective: Trial courts are increasingly taking a tougher stance in reviewing proposed expert testimony prior to trial. Novel or cutting edge experts will need more time to prepare their reports. Counsel should be prepared to educate the judge through motions *in limine*. Judges are less inclined to defer to strong credentials in applying *Daubert* [*see, e.g.,* Truck Ins. Exch. v. MagneTek, Inc., 360 F.3d 1206 (10th Cir. 2004) (former Rhodes Scholar expert testimony found unreliable).

Lexis Advance Search: To understand the factors that determine the admissibility of an expert, try this source: Federal Courtroom Evidence. Enter this search request: SECTION(testimony by experts).

21.04[2] Understand Bad Faith. A claim for bad faith is based on allegations that an insurer breached the implied covenant of good faith and fair dealing by failing or delaying in its duty to pay the claim [Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Cir. 2001)]; failing in its duty to defend a claim [Marie Y. v. General Star Indem. Co., 110 Cal. App. 4th 928, 943 (2003)]; failing in its duty to settle a claim [City of Hobbs v. Hartford Fire Ins. Co., 162 F.3d 576, 587 (10th Cir. 1998)]; or failing in any of the numerous other duties that may be required by the policy. A statutory claim similar to bad faith also might exist under the laws of the relevant jurisdiction [First United Pentecostal Church v. GuideOne Specialty Mut. Ins. Co., 2006 U.S. App. LEXIS 16540, at *7–9 (11th Cir. 2006) (unpublished); Wagners v. Travelers Prop.Cas. Co. of America, 209 P.3d 1119, 1129 (Colo. App. 2008)]. Although there are various tests for determining whether an insurer has acted in bad faith, as a general rule a plaintiff in a bad faith case must show that the insurer acted unreasonably and without proper cause [Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Cir. 2001); Rawlings v. Apodaca, 726 P.2d 565, 574 (Ariz. 1986) (allowing testimony of industry custom and insurer's breach of custom as relevant to proof of bad faith)].

The ultimate conclusion as to whether an insurer performed or failed to perform its duties under an insurance agreement in bad faith is left to the jury and is not appropriate for expert testimony [Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016–1017 (9th Cir. 2004)]. However, an expert qualified by professional experience is allowed to provide testimony regarding how insurance companies normally handle claims, settlements, defenses and other aspects of insurers' duties under insurance policies and how those norms apply to the facts at issue [Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 924 (1978)]. Thus, the expert can testify as to the "standard of care" that would be appropriate in other professional contexts [Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 788 N.E.2d 522, 536 (Mass. 2003); Groce v. Fidelity Gen. Ins. Co., 448 P2d. 554, 560 (Or. 1968)]. Only where the "standard of care" is so obvious that it would be considered common sense is it not an appropriate issue for expert testimony [Weiss v. United Fire & Cas. Co., 541 N.W.2d 753 (Wis. 1995)].

Cross References: For a discussion of the tort of bad faith, *see* Ch. 6 above. *See also* Barker & Kent, New Appleman Insurance Bad Faith Litigation, Second Edition ch. 1 (understanding insurance bad faith litigation), ch. 2 (insurer duties arising in the context of settlement of liability insurance claims), ch. 5 (insurer duties arising in the context of first-party insurance coverage), ch. 6 (insurer duties arising in the context of uninsured motorist coverage); New Appleman on Insurance

Law of Library Edition ch. 23; California Insurance Law & Practice § 13.02 (the duty of good faith and fair dealing), § 13.04 (the insurer's duty to investigate), § 13.05 (insurer's duty to keep the insured informed), § 13.06 (the insurer's duty to not delay payment), § 13.08 (the insurer's duty to settle), § 13.07 (the insurer's duty to defend).

Judge's Perspective: Judges appreciate a baseline from which to evaluate proposed testimony. A solid expert report can help counsel on questions of relevancy and admissibility, both during discovery and at trial.

Cross Reference: New Appleman Law of Liability Insurance §§ 8.01–8.05.

Lexis Advance Search: To understand bad faith, try this source: Business Law Monographs. Enter this search: HEADING(bad faith and insur!).

Lexis Advance Search: To understand bad faith, try this source: Business Torts. Enter this search: HEADING(bad faith and insur!).

Lexis Advance Search: To understand bad faith, try this source: Florida Torts. Enter this search: HEADING(bad faith and insur!).

21.04[3] Understand Technical Policy Language. As a general rule, expert testimony is not admitted solely to construe unambiguous policy terms that are considered to have ordinary significance or that would be subject to a common understanding [Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1218 (2004)]. However, where the insurance agreements at issue contain language, formulas, charts, and similar technical insurance industry terminology, where the testimony about the customs and practices in the industry sheds light on the issue being tried, or where an expert's providing context based on his or her training, expertise, or specialized knowledge may be helpful to the trier of fact, expert testimony is proper and, in some cases, necessary [Am. Coll. of Surgeons v. Lumbermens Mut. Cas. Co., 142 Ill. App. 3d 680, 702 (1986)]. Expert witnesses sometimes testify in regard to the meaning of the technical terms as they are understood by persons knowledgeable in the insurance field, and translate the "insurance language" into testimony that can be understood by and be helpful to the jury [*id*.].

Cross References: For a general discussion of contractual ambiguity, *see* Ch. 4 above. For a discussion of policy language construction not subject to expert testimony on the basis that it is not sufficiently technical to be beyond a layperson's knowledge, *see* § 25.05[1] below.

Warning: Considerations of whether an insurance policy term or policy provision is ambiguous is a question of law that is to be determined by the court and not by the trier of fact, but sometimes expert testimony can be considered by the court in making that

preliminary determination, as where evidence of custom is not itself disputed but the importance of custom to the question presented is disputed [U.S. Fid. & Guar. v. Williams, 676 F. Supp.123, 126 (E.D. La. 1987)].

Example: A homeowner attempts to recover under their homeowner's policy for damage to their home. The insurer denies coverage, arguing that the damage fell within an exclusion for "dry rot." Expert testimony on the question of whether the cause of the damage was "dry rot" was properly excluded because the term "dry rot" has an unambiguous, commonly understood meaning [*see* Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1218 (2004)].

Judge's Perspective: Because at trial is the last place an insurer would want to explain insurance policies, an insurer should consider having its policies reviewed by experts from time to time to root out ambiguous language. At trial, expert testimony can be the equivalent of a specialty "dictionary" in assisting the trier of fact.

21.04[4] Understand Industry Custom and Practice. Expert testimony regarding industry custom and practice often is admitted by courts in bad faith cases on the grounds that the insurer's compliance or lack of compliance with industry standards and practice is relevant to the question whether the insurer acted in a manner inconsistent with its duty to deal with its insured fairly [Acceptance Ins. Co. v. Brown, 832 So. 2d 1, 17 (Ala. 2001)]. Other courts admit expert testimony of industry custom and practice because it constitutes evidence of the meaning of policy terms within the industry [Am. Coll. of Surgeons v. Lumbermens Mut. Cas. Co., 142 Ill. App. 3d 680, 702 (1986)]. Courts also may allow expert testimony of industry custom and practice where that testimony will provide the trier of fact with an understanding of the function and purpose of insurance agreements or give the trier of fact a general background in which to understand the unambiguous language of those agreements [Playtex FP, Inc. v. Columbia Casualty Co., 622 A.2d 1074, 1078 (Del. Super. Ct. 1992)]. As with testimony regarding industry custom and practice in the bad faith context, expert testimony regarding the function and purpose of the agreements should be based on industry knowledge and not on conclusions of law sponsored by the expert [N. River Ins. Co. v. Employers Reinsurance Corp., 197 F. Supp. 2d 972, 980–984 (S.D. Ohio 2002)].

Example: Expert testimony regarding industry custom and practice might be admitted in a reinsurance dispute where the language of the agreements is not at issue and has not been determined to be ambiguous. The concept of reinsurance can be complicated, and the specific purpose and effect of the various governing agreements may not be easily understood by the trier of fact. In such circumstances, a trial court has the discretion to allow an expert to testify generally

regarding the relevant concepts of reinsurance and the function of the various agreements at issue. That testimony will give the trier of fact a basis on which to build an understanding of the unambiguous language at issue [Playtex FP, Inc. v. Columbia Casualty Co., 622 A.2d 1074, 1078 (Del. Super. Ct. 1992)].

21.04[5] Understand Lost Policies. In some cases, the insurance policy upon which a claim is brought has been lost and, subject to "best evidence" rules [Fed. R. Evid. 1001–1008], the party claiming that an agreement exists may offer secondary evidence of its principal terms. In such a case, the insured bears the burden of presenting evidence from which the jury reasonably could find the policy was issued and contained its material terms—including the name of the insured, the period of coverage, the types of coverage, and the amount of coverage [PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705, 719 (Ind. Ct. App. 2004)]. In order to establish these elements, the insured may present secondary evidence as to the terms and provisions of the lost policy, including expert testimony from a policy reconstructionist who is duly qualified by experience in the industry and has familiarity with the type of agreements at issue [Century Indem. Co. v. Aero-Motive Co., 254 F. Supp. 2d 670, 677 (W.D. Mich. 2003)].

☒ **Strategic Point:** Although expert testimony is admissible as secondary evidence of the terms of a lost policy, it is not the only admissible evidence on this subject. Other suggested secondary evidence includes, but is not limited to, the use of any model forms or language that was in place during the applicable time period, testimony from persons who negotiated the policy, standard policies used by the insurer during the relevant time period, policy summaries and descriptions containing references to the policy language, and correspondence concerning the lost policies. Counsel in a lost policy case would be well advised to marshal all possible evidentiary sources, in addition to retaining a policy reconstructionist.

Distinguish: The averment that the policy was lost or misplaced and its existence unknown to the plaintiff does not operate to relieve the plaintiff of his obligations under the policy. Thus, an insured's loss of its own insurance policy, or its failure to thoroughly search its own files to ascertain whether it might have a policy of insurance that provides coverage for a particular loss, does not excuse the insured of its duty to notify its insurer of claims for which it seeks coverage, particularly when such notice is a condition precedent to coverage [Travelers Indem. Co. v. U.S. Silica Co., 237 W. Va. 540, 548, 788 S.E.2d 286 (W. Va. 2015)].

21.04[6] Understand Foreign Laws and Regulations. Under a variety of circumstances, one or more aspects of an insurance dispute, or perhaps even the policy itself, might be governed by foreign law. In such cases the

statement and application of the relevant foreign law are considered facts, and an expert on the particular foreign law at issue may testify as to his or her understanding of the application of that law [Tavares v. Glens Falls Ins. Co., 143 Cal. App. 2d 755, 760 (1956)]. Even where the parties have stipulated to the language of the relevant foreign statutes, the meaning of the statutes is still an appropriate matter for expert testimony, and that is the case even though the trial court also may interpret the foreign law itself [Atwood Vacuum Mach. Co. v. Cont'l Cas. Co., 107 Ill. App. 2d 248, 262–263 (1969)].

Example: The insurer issues a policy on the insured's fishing vessel, insuring against all fines and violations of the law that occur in the United States and any foreign country, but requires that the insured take all reasonable precautions to avoid such fines. The insured receives a fine when his boat enters the waters of Ecuador. Expert testimony regarding the laws governing maritime jurisdiction for the country of Ecuador and an explanation of the Ecuadorian law that was violated was appropriate.

Judge's Perspective: Judges may need help in understanding foreign law. Most courts will appreciate a showing of how an expert can clarify foreign law, but counsel should be careful to avoid telling the court the ultimate legal conclusion.

21.04[7] Understand Causation. In coverage disputes the source or condition that was the cause of damage often can be a central issue. Damage from one source may be covered by the policy at issue, while the same damage from another source is not [Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395, 412–413 (1989)]. Where the source or condition causing the damage is apparent through common sense, expert testimony is not appropriate [State Farm Mut. Auto. Ins. Co. v. Penland, 668 So. 2d 200, 202–203 (Fla. Dist. Ct. App. 1995)]. Where, however, the source or condition causing the damage requires technical or scientific understanding then expert testimony on that issue is appropriate [Maffei v. N. Ins. Co., 12 F.3d 892, 897 (9th Cir. 1993)].

Example: An insured had drums of sodium hydrosulfite stored on his property. A chemical reaction caused the chemical to explode, creating heat and a cloud of vapor and injuring nearby persons and property. The insurer refused to pay for the damage on the grounds that the policy excluded damage caused by pollutants, and claims that the coverage for "hostile fire" did not apply because there was no fire. The insured attempted to admit expert testimony that the chemical reaction and explosion constituted a "hostile fire," but the testimony was rejected by the trial court. The trial court abused its discretion by excluding the proffered testimony because the cause at issue, especially given that a chemical reaction was involved, was sufficiently

technical that expert testimony would assist the trier of fact [Maffei v. N. Ins. Co., 12 F.3d 892, 897 (9th Cir. 1993)].

Judge's Perspective: Counsel should be careful if the causation theory is novel or controversial. Extra time should be spent in educating the court and showing solid scientific or technical support for the methodology. In one case, the trial court found that the lack of evidence of actual experiments on the expert's theory fatally undercut its reliability [Truck Ins. Exch. v. MagneTek, Inc., 360 F.3d 1206, 1212–13 (10th Cir. 2004)]. Counsel may want a secondary expert to offer opinion evidence that the primary expert's methodology is sound, bolstering the methodology assessment but leaving the ultimate conclusions to the primary expert.

21.04[8] Understand the Need for Other Factual Testimony from Experts. Sometimes, coverage suits center on disagreement about what the policy says; other times, on the implementation of the policy language to the facts at hand; and still others involve questions about what really happened. Causation-of-injury evidence is one that is an example of this last category. But factual testimony in coverage cases can involve many areas describing the process leading to the loss, the immediate impact on the more direct effects, and additional impacts on individuals and businesses one step removed from the setting where the covered event took place. An expert in a coverage case over how a ladder was being used might be asked, by either side, to testify about how a ladder is made or properly used. Other "factual" experts may be asked to chronicle the financial impact to the insured's business or family from the event in question, including making projections as to the reduced amount of future income that, absent the loss, the business would have earned in profit or the injured individual would have earned for his or her family. Similarly, the nature of a chemical used in a plant or its "fate and transport" once introduced into the environment, may be the subject of expert-witness opinion.

Thus, it is sometimes necessary to develop testimony from a "factual" expert via written discovery, deposition, and trial. The standard for admitting their testimony—fundamentally qualifications and experience, methodology, reliability, and helpfulness to the jury—should take the foregoing principles and needs into account in making the decision on ultimate admissibility under *Frye* or *Daubert*.

21.05 Matters Not Appropriate for Expert Testimony in Insurance Cases.

21.05[1] Expert Testimony Concerning the Law. There are some issues that arise and are litigated with great frequency in insurance cases that may not be susceptible to or appropriate for expert testimony regardless of the qualifications of the expert, the reliability of the expert's methods, or the extent of the expert's knowledge. Expert testimony that provides nothing more than a conclusion of law, attempts to interpret the law, or is

tantamount to a statement that one side should win the case, is inappropriate [Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016–1017 (9th Cir. 2004)]. Expert testimony also is not appropriate as to issues on which the trier of fact's common or layperson understanding is sufficient or where that testimony would not be helpful to the jury in rendering its verdict [Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1218 (2004)]. Some insurance topics that commonly encounter objections to admissibility include:

1. Nontechnical policy language;
2. Current state of the law; and
3. Breach of legal duty.

Cross Reference: For a discussion of insurance issues appropriate for expert testimony, *see* § 21.04 above.

Strategic Points: Sometimes opposing counsel discloses an expert witness whose opinions would not be properly rendered in the case before the court. One may be able to respond effectively to that testimony simply through cross-examination of the opponent's expert witness or the use of other evidence. However, if you conclude that you need expert testimony to respond effectively, you should consider retaining your own rebuttal expert on the issue promptly. It is risky simply to assume that a motion to bar improper expert testimony will be granted. One should consider engaging an expert even while you await ruling on a motion to bar your opponent's improper expert testimony to allow the expert to appropriately study the record and define the opinion to be offered.

Judge's Perspective: Counsel should not expect courts to allow extra time to find or qualify an expert. Rebuttal experts can often be helpful in pointing out the flaws in proffered testimony in support of motions to exclude expert witnesses.

21.05[2] Nontechnical Policy Language. Insurance policy language usually is to be construed in its ordinary and popular sense, as a layperson would read it and not as it might be understood or analyzed by a lawyer or an insurance expert [E.M.M.I., Inc. v. Zurich Am. Ins. Co., 32 Cal. 4th 465, 471 (2004)]. In construing an insurance policy where there is no dispute as to which words were used, it is the court's function to interpret the policy language, though there sometimes is a factual dispute that forms a predicate to the construction of the policy language as a matter of law, such as what was the custom and practice at the time of contract formation [Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1218 (2004)]. Nevertheless, generally, expert testimony regarding the meaning of unambiguous policy terms is not permitted [Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 924 (1978)]. Only where the language being construed is first deemed

ambiguous or technical to the point that it is beyond the common understanding of a layperson is expert testimony appropriate [Am. Coll. of Surgeons v. Lumbermens Mut. Cas. Co., 142 Ill. App. 3d 680, 702 (1986)].

Cross Reference: For a discussion of policy language construction that is subject to expert testimony on the basis that it is sufficiently technical and beyond a layperson's knowledge, *see* § 21.04[3] above.

Example: A homeowner's policy excludes coverage for damage done to the home by "wet or dry rot." The homeowner later attempts to collect insurance proceeds for damage done to the home by a particular type of fungus. The insurer denies coverage based on the "wet or dry rot" exclusion. At trial, the plaintiff offers expert testimony that the particular type of fungus at issue would not necessarily be considered "dry rot" in the pest control industry. The trial court's exclusion of the testimony was affirmed because the common meaning of the term "dry rot" could be determined by the jury without the need for expert evidence [Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1213–1218 (2004)].

21.05[3] Current State of the Law. Expert testimony that states an opinion on the current status of the law on a particular subject is generally excluded because it does not assist the trier of fact [Hagen Ins., Inc. v. Roller, 139 P.3d 1216, 1222–1223 (Alaska 2006)]. The trial judge should be the jury's only source of the governing law [Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537, 1541 (11th Cir. 1990)]. Where the testimony presented contains mixed issues of law and fact or where unusually complex rules of the law are at issue, such as insurance taxes, courts may admit expert testimony regarding the current state of the law [N. River Ins. Co. v. Employers Reinsurance Corp., 197 F. Supp. 2d 972, 980–984 (S.D. Ohio 2002); Hagen Ins., Inc. v. Roller, 139 P.3d 1216, 1222–1223 (Alaska 2006)].

Example: In support of summary judgment in a reinsurance dispute, a party files an expert's affidavit. In that affidavit the expert states that pursuant to standard reinsurance practices prevailing for several centuries and pursuant to settled principles of indemnity law, a reinsurer's duty to indemnify does not arise unless the reinsured shows that it was actually liable for the reinsured loss. A trial court could admit such evidence to the extent that the expert was testifying as to standard reinsurance practices. To the extent that the expert simply was restating settled principles of insurance law it would be inadmissible [*see* N. River Ins. Co. v. Employers Reinsurance Corp., 197 F. Supp. 2d 972, 982 (S.D. Ohio 2002)].

21.05[4] Breach of a Duty. While expert testimony as to ultimate issues is generally allowed, the testimony must speak to an ultimate issue of fact

for jury consideration [Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016–1017 (9th Cir. 2004)]. Expert testimony that an insurer should be found liable for breach of its duty to defend, its duty to settle, its duty to investigate or any other duty called for under the insurance policy is not a statement of an ultimate issue of fact, but instead is a statement of law that must be left to the province of the jury [*id.*].

◗ **Cross References:** For a discussion of expert testimony that is permissible in the context of breaches of duty under an insurance agreement, *see* § 21.04[1] above. *See also* Barker & Kent, New Appleman Insurance Bad Faith Litigation, Second Edition Ch. 2 (insurer duties arising in the context of settlement of liability insurance claims), Ch. 5 (insurer duties arising in the context of first-party insurance coverage), Ch. 6 (insurer duties arising in the context of uninsured motorist coverage); California Insurance Law & Practice § 13.04 (the insurer's duty to investigate), § 13.05 (the insurer's duty to keep the insured informed), § 13.06 (the insurer's duty to not delay payment), § 13.08 (the insurer's duty to settle), § 13.07 (the insurer's duty to defend).

21.06 Strategies with Respect to Expert Testimony in Insurance Disputes. Trial counsel always should be alert to the presence of issues on which expert testimony would be helpful or necessary. The value of expert testimony is manifest. Juries place great weight on the opinions of credible, competent experts. In addition, expert witnesses can provide valuable assistance with respect to virtually all aspects of case preparation. It therefore is sound strategy to engage experts sooner rather than later when there are or appear to be issues upon which expert testimony would be appropriate. In addition, even in those cases where expert witnesses do not appear to be necessary, counsel may be well advised to engage an expert or experts on topics with respect to which their opponent has engaged an expert witness, even though counsel intends to file a pretrial motion to bar the admission of the expert testimony or believes that expert testimony would not assist the jury.

For instance, due to the nature of insurance litigation, it is not unusual for a party to designate an expert on a topic that, in fact, amounts to nothing more than an opinion regarding the meaning of nontechnical policy language. Often experts that are so designated are characterized by the designating party as having expertise with respect to some particular industry custom or practice. The expert then will testify as to how the particular portion of the insurance policy in dispute is addressed within the industry in which the witness claims to be an expert. When an opponent designates an expert like this, counsel is confronted with some practical problems. The expert certainly could be challenged through an appropriate motion which, presumably, would be granted. It sometimes takes significant time, however, to obtain a definitive ruling on the motion challenging an expert. In the meantime, counsel's own deadline to designate expert witnesses might pass. Accordingly, when an

opposing counsel has designated an expert on a subject matter that is not appropriate for expert testimony, counsel nevertheless should consider whether counsel should also designate an expert in that same discipline while concurrently filing a motion to bar the testimony of the opponent's expert.

III. CONSIDERATIONS BEFORE HIRING AN EXPERT.

21.07 Assess the Need for Expert Testimony. There are a limitless number of case-specific factors that might influence whether it is necessary or desirable for a party to engage an expert in a particular case. However, at its core, the decision of whether to hire, or not to hire, an expert often is determined by weighing the expected relative financial cost to engage an expert against the anticipated benefits that the expert would bring.

As a practical matter, you first should consider whether an expert actually is required to establish any claims or defenses and the added value that an expert could bring to your case. Be sure to review the elements of the claims and defenses that are asserted in the lawsuit, mindful whether technical information or specialized knowledge would assist in presenting the case at trial or on summary judgment. For example, a pleading alleging that a defendant violated certain engineering principles, that a material did not contain certain physical or chemical characteristics, or a defense that some aspect of a product was state-of-the-art, all should serve as warnings that expert testimony might be a necessity in establishing a claim or defense in the case. Other items that might reveal the need for expert testimony include model or court-mandated jury instructions applicable to the case and all documents particularly significant to a case (*e.g.,* whether the relevant portion of an insurance document utilizes technical terms). Of course, you also should have a thorough interview with your client regarding the source of the obligation that the defendant allegedly violated, what the client believes the parameters of that obligation to be, and how the damages that resulted from that violation should be measured.

> ⊠ **Strategic Point:** Also consider the practical issues that will arise when presenting the case to a jury. In many circumstances, testimony from an expert witness might not be *required* to establish a claim or a defense, but nevertheless might be highly advisable from a tactical point of view. An expert's affidavit might support an argument opposing the other side's motion for summary judgment as it may help establish that some genuine dispute of a material matter divides the parties.
>
> **Example:** In a liability coverage case, the insurer may want to offer expert testimony as to the state of industry practices to bolster its argument that the policyholder must have acted with knowledge to a substantial certainty that injury would result from its conduct that was below industry common practice; this type of factual testimony from an expert would support the insurer's refusal to perform on the ground that the injury at issue was "expected or intended" from the standpoint of the insured (and thus excluded).

You also should consider whether to engage an expert to serve solely as a consultant in the background for your case. The benefits from the use of a consulting expert are many. For instance, a consulting expert often would be in

a better position after reviewing the relevant facts to identify particular areas of expertise in which you might want to engage testimonial experts. A consulting expert also can provide valuable assistance in reviewing and developing strategies with respect to the reports, affidavits, and testimony of the testifying expert witnesses in the case. In addition, as a general rule, the discovery of facts known and opinions held by consulting experts are not discoverable except in "exceptional circumstances" [Fed. R. Civ. P. 26(b)(4)(D)].

Trap: Although the facts known and opinions held by consulting experts generally are shielded from discovery, that shield can be lost or compromised seriously if data, information, or documents collected or generated by the consulting expert are reviewed by a testifying expert witness. All the material considered by the testifying expert witness currently is discoverable, regardless of whether it came from an undisclosed consulting expert. [Fed. R. Civ. P. 26(a)(2)(B)[ii] and [iii]; Fed. R. Civ. P. 26[b][4][C]].

Warning: In many cases counsel will not decide at the time an expert is engaged whether to use the expert for testimony or merely as a consultant. If the expert ultimately is designated as a testifying expert then, as a practical matter, it likely will be very difficult to shield from discovery any of the material given to or received from that expert. Thus, if there is any possibility that the expert might testify at trial, counsel is well advised to consider all of counsel's communications with the expert as potentially discoverable.

Still, the decision whether to engage a particular expert as a consultant or to testify at trial ultimately is subject to a cost-benefit analysis. It makes no sense ordinarily to spend $20,000 on an expert where the amount in controversy is only $10,000, though insurance companies in particular may have a portfolio interest in a small case where the precedent it creates may have implications for a large number of other cases or a few cases with significant dollar exposures. Whether and to what extent the costs of potential expert testimony are warranted in a particular case naturally is case-specific. Nevertheless, even in disputes where the amount in controversy is relatively low, you might be able to find economically feasible expert witness testimony once you have identified the need for it—or you might decide not to take the case in the first place. Either way, it makes good sense to determine at the outset whether expert testimony is necessary or desirable and then to conduct the cost-benefit analysis.

Example: Often fact witnesses possess the requisite knowledge, skill, and experience necessary to provide expert testimony with respect to certain issues. For instance, in a medical malpractice case, if the cost of retaining an independent expert witness is prohibitive, a treating physician might be convinced to provide necessary expert opinions [*see, e.g.*, Andrew v. Hurh, 824 N.Y.S.2d 546 (N.Y. App. Div. 2006)].

Warning: If a percipient witness might be used for the purpose of providing expert opinion testimony, counsel must consider Rule 26(a)(2)(C),

requiring a disclosure of a summary of the facts and opinions to which the witness is expected to testify, even though the witness otherwise likely would be deposed and would be called at trial anyway. Failing to make such a disclosure might result in the witness being barred from providing expert testimony. In addition, counsel should be aware that Rule 26(b)(4) provides no protections to communications between counsel and an expert who is not required to provide a report beyond the actual drafts of a Rule 26(a)(2)(C) disclosure.

Judge's Perspective: Counsel should be careful not to hide proposed expert testimony that may be obtained from a fact witness. A court will exclude such evidence on the grounds of surprise or bad faith if the testimony is not disclosed prior to trial.

21.08 Obtain Information About Potential Experts.

21.08[1] Online Information. As in the past, information about potential experts can be found in the form of articles and advertisements in various journals and publications, archival files maintained by law firms and individual lawyers, word-of-mouth referrals, referrals from trade organizations, university faculties, just to name a few. Moreover, searching via the Internet may help identify possible expert witnesses and assist in locating important background information, publications, and testimonial histories with respect to expert witnesses.

> ⊠ **Strategic Point:** It ordinarily is cost effective to perform follow-up investigations via Internet searches with respect to of items that might appear on an expert's curriculum vitae as well as an opposing expert witnesses.

In addition to searching through publicly available materials on the Internet, private databases, such as LexisNexis, may contain information on experts or particular fields or disciplines. If you have the name of the expert that you want to investigate, quick searches for the name of the expert in databases containing relevant journals and news publications, as well as databases containing judicial opinions, can be a quick, effective first step in investigating an expert. (Prior judicial rulings on the admissibility of the testimony of a particular expert being considered—or identified by the other side—can shed light on the appropriateness of the expert's testimony, the competence of the witness, or other pertinent information (including whether a court has previously barred the expert witness from testifying).) Similarly, if you are looking for an expert in a particular subject area, searches using relevant keywords in databases of relevant journal and news articles can turn up not only the names of potential experts but also (and perhaps better) the identities of relevant certifying organizations and credentialing groups. Those then can provide the basis for further, more refined searches and background checks.

Warning: Online searches for a particular expert's name are a very useful starting point for investigating the expert. However, be mindful that these searches are subject to certain inherent limitations. Generally, an expert's name will appear in a state court judicial opinion only when the matter has been appealed. Although federal district court rulings are published with greater frequency than trial decisions in state courts, only a portion of federal district court rulings are contained in searchable databases. In addition, some opinions refer to experts by their trade or discipline, such as "plaintiff's engineering expert," and will not include the expert's name. Thus, a basic online search for an expert's name, though certainly a good first step in the investigation of a particular expert, should not be the only step in that investigation.

Judge's Perspective: Counsel should not forget to research how judges in the jurisdiction treat (1) particular experts; and (2) particular areas of proposed expert testimony. Counsel should know what reputation his or her expert has with the trial bench.

Lexis Advance Search: To find information on hiring experts, try this source: Patent Litigation: Procedure & Tactics. Enter this search: SECTION(hiring and expert).

21.08[2] Bar and Other Membership-Based Information Sources. Some commonly overlooked sources of information on potential expert witnesses are the databases and resources available to lawyers through their memberships in bar and other professional organizations. Attorneys always have obtained leads on potential experts through suggestions received from other lawyers. That process can be made much more efficient by seeking such referrals from colleagues on bar and professional committees who are focused on the relevant subject area.

In addition, some of the larger bar organizations actually maintain their own expert witness databases for members. For plaintiffs, the American Association for Justice (formerly American Trial Lawyers Association) maintains information on expert witnesses. Similarly, for defense lawyers, the Defense Research Institute has its own on-line expert witness database available to its members.

Lexis Advance Search: To find information on hiring experts, try this source: Patent Litigation: Procedure & Tactics. Enter this search: SECTION(hiring and expert).

21.08[3] Other Subscription-Based Services. In addition to bar and other professional organizations, there is an enormous number of additional sources for obtaining information regarding expert witnesses. Some court reporting entities can provide transcripts from an expert's prior deposition. Jury verdict reporting services also collect expert witness information. In fact, some jury verdict reporting services now have databases that are

searchable on-line using any number of search criteria including an expert's name or areas of expertise. Other services have databases that they will search for you.

⚄ **Strategic Point:** LexisNexis has an array of databases that provide excellent access to expert witness information. In the Lexis Advance Jury Verdicts & Settlement database, for instance, attorneys actually can search for terms within the "Expert" segment of the database. Searchable terms include not only expert names, but fields of expertise. LexisNexis also provides the investigator with limitless search options utilizing some of the more preeminent online expert witness databases including: JurisPro Expert Witness Directory; Daubert Tracker; as well as an array of Mealey's reports, medical sources, the Lexis Advance Jury Verdict & Settlements database and other data sources.

Of course, there also are an array of expert witness consulting businesses, the vast majority of which provide assistance in identifying and locating potential expert witnesses. Some, in addition, provide other litigation related support services. Contact information for these services can be found on-line, in trade publications, and often in the sponsorship sections of law publications.

Lexis Advance Search: To find information on hiring experts, try this source: Patent Litigation: Procedure & Tactics. Enter this search: SECTION(hiring and expert).

21.08[4] Obtain Basic Information Directly from Potential Experts. The investigation of expert potential witnesses does not end once you have identified one or more potential experts. It just becomes more focused. Be sure to obtain from any expert that you are considering engaging at least the following:

1. His or her current, updated curriculum vitae;
2. Confirm what, if any, connections to the other parties to your lawsuit the expert has and otherwise has no conflicts of interest;
3. A list of all cases in which the expert has given sworn testimony (either in a deposition or at trial) going back as far as possible, but at least for the last four years;
4. Copies of any affidavits dealing even generally with the same topic with respect to which you are considering retaining the expert; and
5. A complete listing of all published materials authored by the expert related in any way to the subject matter on which he or she is being engaged.

Warning: Be sure to ask potential expert witnesses whether they have authored anything "informal" pertaining to the subject matter, such as a letter to the editor, interviews given by the expert, or

participation in Internet bulletin boards or weblogs (or comments on weblogs). Some experts might not consider such items appropriate for inclusion in their curriculum vitae or in a list of "published works." Yet, those items can be found through diligent investigation and can prove embarrassing if found only by your opponent.

Collect transcripts of prior testimony from the potential expert. Though that seems like it should not be a difficult task, many experts do not provide sufficient information in their listing of prior testimony to enable you to track down prior transcripts. However, an expert may be able to identify the attorneys involved in the prior matters, which may provide a source for obtaining prior testimony. You should probe the expert as to the names of counsel, courts where cases were pending, and other identifying information.

Judge's Perspective: Counsel should review how other members of the expert's firm have testified. An expert may have to live with the opinions or research of partners or colleagues.

Lexis Advance Search: To find information on hiring experts, try this source: Patent Litigation: Procedure & Tactics. Enter this search: SECTION(hiring and expert).

21.09 Use of Consulting Experts.

21.09[1] A Consulting Expert Can Provide Many Types of Assistance. The process for identifying the need for and locating a consulting expert is the same as that described in the preceding sections. Once you have engaged a consulting expert he or she can provide incredibly valuable assistance in searching for and identifying other experts. A consulting expert can provide candid advice regarding the suitability of other potential experts, assist in the investigation of potential experts, can alert you to potential evidentiary problems, suggest certain areas of inquiry during discovery, alert you to areas of factual investigation, and provide other similar services. In contrast with experts retained for the purpose of testifying, the discovery of facts known and opinions held by consulting experts are generally not discoverable except in "exceptional circumstances" [Fed. R. Civ. P. 26(b)(4)(D)].

21.09[2] Consulting Expert Discovery Limitations. A consulting expert is an expert retained or employed by a party in anticipation of litigation or to prepare for trial, but who is not expected to be called as a witness at trial [Fed. R. Civ. P. 26(b)(4)(D)]. Because the expert is not retained to provide testimony at trial, there is no requirement that a party produce a report disclosing the expert's opinions [Fed. R. Civ. P. 26(b)(4)(A)]. The opposing party also is not permitted to discover facts known or opinions held by the consulting expert through interrogatories or deposition [Fed. R. Civ. P. 26(b)(4)(D)]. A party, therefore, can exchange information with a consulting expert with limited concern that work product or other protected

information will become subject to disclosure.

> **Warning:** To the extent that a consulting expert is subsequently disclosed as a testifying expert, all of the previous disclosure protections are waived [S.E.C. v. Koenig, 557 F.3d 736, 744 (7th Cir. 2009)]. Once an expert report is produced, a party cannot regain those disclosure protections by attempting to withdraw the testifying expert designation [*Id.*]. It is important, therefore, that one considers all of the information provided to the consulting expert and the ramifications of that information being disclosed before making such a designation and providing an expert report.

21.09[3] Use of Consulting Experts to Assist Testifying Experts. The ability to more freely exchange information makes a consulting expert a valuable tool in any litigation. First, the consulting expert can assist in identifying and preparing your testifying expert. A consulting expert can provide candid advice regarding the suitability of other potential experts and assist in the investigation of those potential experts' qualifications to testify at trial. Once you have retained a testifying expert, the consulting expert can alert you to evidentiary, factual and methodological issues that the other side is likely to exploit and that your testifying expert, therefore, needs to address. In some instances, the consulting expert may even act as your "guinea pig," for purposes of determining what opinions you want your testifying expert to develop. If your consulting expert determines that a particular area of inquiry is likely to lead to an opinion that is adverse to your legal position, then you can avoid asking your testifying expert to explore that topic, as well as the disclosure of the adverse opinion that would follow.

> **Warning:** Keep in mind that although discovery directed at the knowledge of a consulting expert is generally prohibited, to the extent information from a consulting expert is provided to a testifying expert the same likely will be subject to discovery [*see, e.g.*, Fed. R. Civ. P. 26(a)(2)(B)(ii); Tex. R. Civ. P. 192.3].

21.09[4] Use of Consulting Experts in Connection With an Opposing Expert. A consulting expert also can be extremely useful in gathering information regarding the opposing party's testifying expert and subsequently in the deposition of that opposing expert. In connection with written discovery, the consulting expert can provide advice as to the types of documents that should be requested and the questions that should be asked in order to understand an expert's opinions. The consulting expert also can assist in the preparations for the deposition of the opposing expert by simplifying hyper-technical methodologies and explanations contained in the opposing expert's report, and by pointing out any gaps or flaws in the opposing expert's reasoning.

> **Strategic Point:** Importantly, a consulting expert may continue to

provide those services in "real time" during the actual deposition of the opposing expert. The utilization of a consulting expert in this role seems to be fairly rare and, as a consequence, counsel for the party whose expert is being deposed sometimes will attempt to invoke Federal Rule of Evidence 615 (sometimes referred to as the "Rule") in an attempt to prohibit the consultant's participation in the deposition. However, since 1993, it has been clear that the "Rule" has no application to depositions [Fed. R. Civ. P. 30(c)(1)]. Accordingly, unless the opposing party obtains a protective order in advance of the deposition, a consulting expert may actually be present for the opposing expert's deposition and provide "real time" insight and suggestions as to the opposing expert's testimony and further lines of inquiry [*id.*].

21.09[5] Use Caution Around a Possible Opposing Consulting Expert. As the use of consulting experts has become more common, so too has the problem of the inadvertent interaction with an opponent's consulting expert. This can occur, for example, when one party makes an initial contact with an expert for the purpose of determining whether to engage the expert in a particular case. Though counsel would expect an expert witness to disclose prior contacts with the expert about the same litigation matter, that does not always occur [*see, e.g.*, Mid America Agri Products/Horizon, LLC v. Rowlands, 286 Neb. 305 (2013)]. The rules applicable to improper contact with consulting experts, though still to be articulated in many jurisdictions, can have fairly harsh consequences. Often the remedies considered include disqualification of the law firm involved, and the analysis employed by the courts can involve presumptions that are difficult to overcome.

⊠ **Strategic Point:** Should a proposed expert give any indication that the expert may have been contacted by the opposing party, or the opposing party's counsel [*see* Mid America Agri Products/Horizon, LLC v. Rowlands, 286 Neb. 305, 309 (2013) (where the prospective expert advised that he "believed another lawyer had contacted him regarding the same case")] counsel should ensure that the expert has properly vetted the expert's conflicts. Any doubts on that point should be resolved early and completely. Further, counsel should document the nature and scope of counsel's contact with the proposed expert. Doing so will prove useful later should an improper contact issue arise.

21.10 Strategic Considerations When Designating Experts. The strategy with respect to the disclosure of expert witnesses is fairly straightforward. From a tactical point of view there usually is nothing to be gained by disclosing earlier than required the identity of an expert who is anticipated to be a testifying expert. Thus, in most cases the best approach is to disclose testifying experts only when required to do so; however, sometimes disclosing that you have

retained the leading expert and taken him or her "off the board" may provide a tactical advantage and may lead to a settlement.

Warning: Trial courts might bar the testimony of an expert witness that is not disclosed in a timely manner, and such rulings are very difficult to get reversed on appeal. There are many potential sources that might give rise to an expert witness disclosure deadline. Certainly, a trial court might establish a deadline in a scheduling order. However, in the absence of a scheduling order do not assume that there are no fixed expert witness disclosure deadlines. Many trial courts have expert witness disclosure provisions in their local rules and/or in standing orders. Failing to familiarize yourself with the provisions of those rules and orders might result in an adverse ruling with respect to the admissibility of your expert witness' testimony.

IV. PREPARING AND RESPONDING TO WRITTEN DISCOVERY PERTAINING TO EXPERTS.

21.11 Formulate Strategies While Complying with the Civil Procedure Rules. Much of the tactical decision-making that pertains to written discovery regarding expert witnesses has been eliminated by court rules that govern expert witness disclosure. For instance, in federal civil procedure (and in state analogs), a party must disclose to all other parties all opinion witnesses that they might use at trial [Fed. R. Civ. P. 26(a)(2)(A)]. That Rule also requires that parties disclose an array of information related to their expert witnesses including: (a) the complete statement of all opinions that the expert is expected to express together with the bases and reasons for those opinions; (b) all facts or data that was considered by the expert in forming those opinions; (c) all exhibits that support those opinions or might be used as a summary of them; (d) all the witness' qualifications, including a list of publications authored by the witness in the preceding 10 years; (e) a list of all the other cases in which the witness has testified as an expert either at trial or in a deposition in the preceding four years; and (f) the compensation paid for the study and testimony in the case. In cases that are governed by this Rule or some variant of it parties do not have much in the way of tactical considerations available to them.

Even in courts with rules substantially different from Federal Rule 26 [*see, e.g.*, N.J. Ct. R. 4:10-2], the relevant procedural rules still do not leave much room for tactical decision making with respect to written discovery regarding experts. Often state court rules specify what information may be obtained through written discovery. For instance in Illinois, Supreme Court Rule 213(f) specifies what information a party must provide in response to a written interrogatory regarding "independent" expert witnesses and "controlled" expert witnesses [Ill. S. Ct. R. 213(f)]. Under that Rule parties must identify the expert witnesses who "will testify" at trial and then provide certain specified information regarding the expert witness' opinions which is based on whether the expert is "independent" or "controlled" [Ill. S. Ct. R. 213(f)(2) & (3)]. Thus, perhaps the only "tactic" available in states like Illinois for written discovery concerning expert witnesses is to make sure that you have asked for the information to which you are entitled under the expert witness discovery rule.

> ⊠ **Strategic Point:** If permitted by the applicable rules, counsel might consider making a request that the opposing party produce all documents and things provided to a testifying expert witness. In many cases the information produced in response to such a request will duplicate the information that the expert witness will attach to or incorporate into an expert report. However, further investigation might be warranted in those cases where additional information was provided to an expert but is not produced based on the expert's claim that he or she did not rely upon the withheld information.

⊠ **Strategic Point:** To avoid potential spoliation issues counsel should instruct all experts retained by counsel to preserve all documents and things, data and electronic information related to the case and the expert's involvement in the case until counsel instructs otherwise [Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001)].

Judge's Perspective: Counsel should be sure to know if the judge has a "local rule" governing expert practice. Many judges have complex rules for their courtroom that can make or break a case.

Counsel should make sure that their opponent's discovery requests do not ask for information to which they are not entitled under the applicable procedural rules. However, aside from that, there likewise are not many strategic considerations left in responding to written discovery directed at expert witnesses. As set forth above, quite often the applicable rules of procedure dictate what type of information *must* be provided to the opposing parties either in the form of a mandatory disclosure or in response to written interrogatories. Attempting to "hide" or "gloss over" certain opinions, facts, or information causes much greater risks to the party attempting the concealment than to the party from whom the information is being withheld. The responding party should ensure that expert discovery requests are properly within the scope of the applicable rule. Whether by party disclosure or in response to a specific expert discovery request, counsel should be sure to provide adequate disclosure of the bases for an expert's opinion and the scope of anticipated testimony. The case law is replete with opinions striking or limiting expert testimony on the basis of incomplete, inadequate, or untimely disclosures of expert opinions, the bases for those opinions, and other required information. The most important "tactical" consideration for parties when responding to written discovery pertaining to their own experts is to be sure that their responses are full, complete and timely.

◗ **Cross Reference:** For a more complete discussion of mandatory disclosures in conjunction with experts, *see* § 21.12. For a more complete discussion of interrogatories in conjunction with experts, *see* § 21.13. For a more complete discussion of requests for production in conjunction with experts, *see* § 21.14.

21.12 Mandatory Disclosures as Applicable to Experts.

21.12[1] Failure to Follow the Civil Procedure Rules Can Result in Inadmissibility.

The rules of civil procedure in many jurisdictions require parties to disclose certain, specific information about their expert without that information being requested [*see, e.g.,* Fed. R. Civ. P. 26(a)(2)]. These rules generally also establish default deadlines for the information to be disclosed, although those default deadlines may be altered by the trial court's entry of a scheduling order [*see, e.g.*, Fed. R. Civ. P. 26(a)(2)(D)]. Under the federal rules and similar state rules there are essentially two components to the mandatory disclosures required for expert witnesses:

(1) disclosure of the identification of the expert or experts [*see, e.g.*, 26[a][2][A]; and (2) disclosure of a (i) written expert report for witnesses retained or specially employed to provide expert testimony or who regularly give expert testimony as a party's employee [*see, e.g.*, Fed. R. Civ. P. 26(a)(2)(B)], or (ii) the subject matter and a summary of facts and opinions on which a non-retained expert will testify. [*See e.g.*, Fed. R. Civ. P. 26[a][2][C]. It is important to comply with all applicable disclosure rules because, even if the expert testimony otherwise would be admissible, the failure to make the disclosure when and how required by the applicable rules can result in the expert testimony being declared inadmissible [Certain Underwriters at Lloyd's v. Sinkovich, 232 F.3d 200, 202–203 (4th Cir. 2000)].

Cross Reference: For a more complete discussion of mandatory disclosure requirement under Fed. R. Civ. P. 26, *see* § 21.12[2]. For a more complete discussion of mandatory disclosure requirements for state jurisdictions, see § 21.12[3]. For a more complete discussion of what should be included in an expert report, *see* § 21.16 below.

Warning: While mandatory disclosures may be supplemented with later discovered facts, this ability to supplement cannot be used as a means of extending the jurisdictional deadlines. Counsel cannot provide an incomplete disclosure and then attempt to cure the defect through supplementation. Therefore, counsel should be sure to gather all of the relevant information early in the case to ensure that the expert's initial report is as complete as possible.

Lexis Advance Search: To find information on mandatory expert disclosures, try this source: Moore's Federal Practice—Civil. Enter this search: SECTION(26.23).

Lexis Advance Search: To find information on mandatory expert disclosures, try this source: Bender's Forms of Discovery Treatise. Enter this search: SECTION(mandatory and expert and disclosure).

21.12[2] Understand Federal Rule 26. The expert witness disclosure requirements of Federal Rule 26 are fairly straightforward. Rule 26(a)(2)(A) requires that parties disclose "the identity of any witness it may use at trial to present evidence under Federal Rules of Evidence 702, 703, or 705." [Fed. R. Civ. P. 26(a)(2)(A)]. In addition, the party must provide with their expert witness disclosure the written report "prepared and signed by the witness" that contains: (a) the complete statement of all opinions that the expert is expected to express, together with the bases and reasons for those opinions; (b) all the facts and data that were considered by the expert in forming those opinions; (c) all exhibits that support those opinions or might be used as a summary of them; (d) all the witness' qualifications including a list of publications authored by the witness in the preceding 10

years; (e) a list of all the other cases in which the witness has testified as an expert either at trial or in a deposition in the preceding four years; and (f) the compensation to be paid for the study and testimony in the case. [Fed. R. Civ. P. 26(a)(2)(B)]. Both the identification of the expert and the production of the accompanying report are required to be made without the necessity of a request from the opposing party.

It has become more or less customary for federal courts to address pretrial expert witness disclosure in scheduling orders. In those relatively rare instances where the court does not address the scheduling of expert witness disclosures, counsel should be sure to check the local court rules for guidance with respect to expert witness disclosures. In the event that there are no local rules governing disclosure, and the district court does not have set deadlines for disclosure, then the parties' respective Rule 26 disclosures "must be made at least 90 days before the date set for trial or for the case to be ready for trial" [Fed. R. Civ. P. 26[a][2][D][i]]. If the expert testimony is intended solely to contradict or rebut the evidence on the same subject matter identified by another party in accordance Rule 26, however, then the *default* deadline for disclosing that expert witness evidence is "30 days after the other party's disclosure" [Fed. R. Civ. P. 26(a)(2)(D)(ii)].

The failure to timely disclose an expert in accordance with Rule 26(a)(2) or in accordance with the scheduling order of the trial court, may result in the expert's opinion being struck under Rule 37 of the Federal Rules of Civil Procedure [Yeti By Molly Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001)]. Failure to prepare an expert report that complies with the requirements of Rule 26(a)(2) also might result in the expert's opinion being struck under Rule 37 [*id.*]

Judge's Perspective: The trial court's ruling will be reviewed for abuse of discretion. Counsel should not expect appellate courts to provide a second opportunity to correct mistakes.

Cross Reference: For a more complete discussion of the elements of an expert's written report, *see* § 21.16.

Timing: In the federal courts, the scheduling conference will occur within the first few months of the case being filed as required by Fed. R. Civ. P. 16(b). Although not specifically included in Rule 16(b), the deadline for disclosing experts typically is included in the resulting scheduling order. Counsel will want to schedule the disclosure deadline late enough in the discovery period to allow sufficient time to acquire any potentially relevant documents from the opposing party that should be provided to the expert. Counsel also will want to schedule the disclosure deadline early enough in the discovery period to allow sufficient time for counsel to review the expert disclosures of

the opposing party and to prepare for and take the deposition of the opposing party's expert.

Lexis Advance Search: To find information on mandatory expert disclosures, try this source: Moore's Federal Practice—Civil. Enter this search: SECTION(26.23).

Lexis Advance Search: To find information on mandatory expert disclosures, try this source: Bender's Forms of Discovery Treatise. Enter this search: SECTION(mandatory and expert and disclosure).

21.12[3] Understand the 2006 Version of Rule 26. The Federal Rules of Civil Procedure were modified significantly, effective December 1, 2006. A comprehensive discussion of all those changes is beyond the scope of this chapter. The amendments did not alter any of the requirements for production relating to experts, but instead simply erased any ambiguity on the issue that might have previously existed. The most fertile area for electronic discovery relating to an expert arises in conjunction with electronic communications to and from the expert. Following the 2006 changes to Rule 26, electronic communications with an expert were generally discoverable. These communications often are made for the purpose of providing information to the expert and would, thus, form the basis for their opinions. Moreover, to the extent that previous drafts of an expert's report or opinions were generated and provided to counsel, the electronic version of the expert's previous drafts would generally be discoverable. Under the 2006 version of Rule 26, it therefore was necessary to preserve these electronic documents and to produce them to the extent required.

Warning: Remember that work product protection can be overcome upon a showing of substantial need and hardship [see Fed. R. Civ. P. 26[b][3][A]. Thus, although the current form of Rule 26 affords work product protection to draft reports and certain attorney communications with experts failure to preserve the electronic communications between expert and counsel or electronic versions of documents passed between expert and counsel could result in a claim of spoliation.

Strategic Point: In order to avoid the potential for inadvertent destruction of e-mails or other electronic documents or the inadvertent failure to collect and produce all of the electronic documents, counsel would be well advised to communicate with his or her expert by a nonelectronic means, such as phone calls or in-person meetings.

Example: An expert witness forwards a draft of her expert report to counsel. Upon reviewing the report, counsel determines that the expert has not been provided with certain pieces of information that might affect the expert's opinions. Counsel drafts an e-mail to the expert providing him or her with the additional information. The

expert's original draft of the report now is protected work product. [Fed. R. Civ. P. 26[b][4][B]]. The e-mails from counsel providing the additional information also would be protected communications [Fed. R. Civ. P. 26[b][4][C]], but the portions that identify facts or data still would be discoverable and would need to be preserved and produced [Fed. R. Civ. P. 26[b][4][C][ii]].

Example: An expert witness forwards a draft of her expert report to counsel by e-mail. The expert subsequently amends the report to include additional facts, but does so by saving over the initial draft. The e-mail forwarding the initial draft was deleted by both counsel and the expert, leaving no electronic version of the initial draft of the report. Under the pre-2010 version of Rule 26 the party might have been held liable for spoliation under these facts. Under the current version of Rule 26, assuming the facts and data upon which the expert relied are disclosed, there would not be a substantial risk of a spoliation claim. [See, e.g., Fed. R. Civ. P. 26[b][4][B]].

21.12[4] Understand the Current Version of Rule 26.

Duty to Disclose: General Provisions Governing Discovery
Required Disclosures.

* * * * *

Disclosure of Expert Testimony.

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, the Rule 26(a)(2)(A) disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial;

or

(ii) if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

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Discovery Scope and Limits.

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Trial Preparation Experts.

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial Preparation Protection for Communications Between Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony.

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

* * * * *

Warning: The 2010 changes to Rule 26 plainly were intended to address some of the pragmatic problems that attorneys previously experienced with expert witness discovery. Though helpful, the rule changes did not eliminate the discovery risks previously encountered with experts. For instance, under the current version of Rule 26 communications between an attorney and an expert witness who is required to provide a report ostensibly are shielded from discovery by

work product rules. Of course, the work product rule is subject to exceptions in some cases, and the work product protections for communications between an attorney and a retained expert are subject to even more exceptions. Communications that identify facts or data or assumptions provided by the attorney to an expert upon which the expert relies still are discoverable. The Committee Notes to the 2010 rule changes state that the changes to Rule 26 are meant to prevent the disclosure of theories or mental impressions of counsel. However, those same Committee Notes also state that Rule 26 should be read with a broad interpretation of the phrase "facts or data" such that any communications that contain "factual ingredients" might be discoverable. Counsel would be well advised to continue to be cautious about their communications with their experts and to preserve those communications until the conclusion of the suit.

21.12[5] Understand Mandatory Disclosures at the State Level. Some states, such as Colorado, have adopted Rule 26(a)(2) of the Federal Rules of Civil Procedure practically verbatim [Colo. R. Civ. P. 26(a)(2)]. Other states, such as California, have adopted a version of the mandatory requirements that, while they do require some action on the part of the requesting party, do not require the use of traditional discovery tools such as interrogatories or requests for production [Cal. Code Civ. Proc. § 2034.210]. Still other states, such as Illinois, refer to their expert disclosure requirements as being mandatory, but actually require that the request be made through the use of interrogatories [Copeland v. Stebco Prods. Corp., 316 Ill. App. 3d 932, 942 (2000); Ill. Sup. Ct. R. 213].

Although the different state jurisdictions have different requirements governing the request for and production of expert disclosures, there is little or no variation from Fed. R. Civ. P. 26 with regard to the information required to be disclosed. As with that rule, these states require that the identity of the expert be disclosed and that an expert report be provided [Colo. R. Civ. P. 26(a)(2); Cal. Code Civ. Proc. § 2034.210; Ill. Sup. Ct. R. 213].

Cross References: For a more complete discussion of the elements of a complete expert report, *see* § 21.16 below. For a more complete discussion of the California rules relating to the mandatory disclosure of expert information, see Matthew Bender Practice Guide: California Civil Discovery, Ch. 13.

Compare: Fed. R. Civ. P. 26(a)(2) requiring disclosure of the expert's identity and a written expert report with Rule 213(f)(3) of the Illinois Supreme Court Rules requiring disclosure of the expert's identity and any report prepared by the expert.

Warning: Counsel should consult the rules for the jurisdiction in which he or she is practicing and determine the applicable require-

ments for disclosing information regarding an expert. There currently is very little variation between jurisdictions regarding the type of information that needs to be provided, but the timing and method of disclosures can vary substantially. Assuming that the rules of the relevant jurisdiction are similar to Federal Rule 26(a)(2) can result in a failure to timely request the necessary information or an untimely disclosure that eliminates counsel's ability to present expert testimony at trial.

21.13 Consider Use of Interrogatories with Experts. For those jurisdictions that do not require mandatory disclosures, interrogatories are generally used to obtain the same information that would have been obtained through mandatory disclosures. In the jurisdictions where interrogatories are used to obtain this information, the rules of civil procedure will typically state the types of information regarding an opposing party's expert that may be requested [*see, e.g.*, N.J. Ct. R. 4:10-2(d)(1); Mo. R. Civ. P. 56.01(b)(4)]. This information is typically the same as that which a party would be required to produce in those jurisdiction that do have mandatory disclosure requirements, including disclosure of the identification of the expert or experts, and disclosure of a written expert report [*see, e.g.*, N.J. Ct. R. 4:10-2(d)(1); N.J. Ct. R. 4:17-4(a)].

⧫ **Cross Reference:** For a sample shell interrogatory requesting information regarding an expert, *see* § 21.28.

Compare: The rules of civil procedure for New Jersey do not require mandatory disclosures, and the Federal Rules of Civil Procedure do. As with the mandatory disclosure requirements of the federal courts, the rules of civil procedure for New Jersey allow a party, through interrogatories, to require the opposing party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness and to disclose that expert's report [Fed. R. Civ. P. 26(a)(2); N.J. Ct. R. 4:10-2(d)(1)]. Both sets of rules also require an expert report to contain a complete statement of that person's opinions and the bases for those opinions, the facts and data considered in forming the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, and whether compensation has been paid to the expert and, if so, the terms of the compensation.

⧰ **Strategic Point:** In jurisdictions where there are no mandatory disclosure requirements, counsel would be well advised to serve an interrogatory requesting the identification of opposing party's expert even if it appears unlikely that the parties will retain experts for purposes of the litigation. If the request for information is not contained in the interrogatories then the opposing party might have no duty to disclose the existence of a retained expert and counsel potentially could be surprised by the expert's existence after discovery has closed.

21.14 Consider Use of Requests for Production with Experts. Requests for production should be used to maximize discovery of documents exchanged between an expert and the counsel who has retained them. To the extent they are discoverable under the applicable rules, documents that should be requested include: the data and documents relied upon by the expert in forming his or her opinion; any exhibits summarizing or supporting the expert's opinions; publications authored by the expert; all previous drafts of the expert's report (if any); all documents provided by opposing counsel to the expert regardless of whether the opposing expert admits having relied upon them; and all communications between counsel and the expert.

Consider: If the expert has materials that have not been relied upon but are within his or her custody and control (and outside that of the party who retained the expert), and if the materials are discoverable under the applicable rules, a subpoena to the expert might be appropriate.

Cross Reference: For an example of basic requests for production to be used in conjunction with obtaining information regarding experts, *see* § 21.29 below.

21.15 Responses to Written Discovery Pertaining to Experts. Responding to written discovery pertaining to experts is no different from responding to any other form of written discovery. Responding counsel should ensure that the discovery requests seek only that information and those documents and things allowed in written discovery. Responses should be complete and timely so as to avoid any challenges based on the sufficiency of the discovery responses.

21.16 Expert Reports.

21.16[1] Check Jurisdictional Requirements. In jurisdictions where they are required, failure to prepare and disclose a complete expert report is grounds for striking the testimony of the expert witness [*see* Jacobsen v. Deseret Book Co., 287 F.3d 936, 953 (10th Cir. 2002)]. The required contents of an expert report may vary slightly from jurisdiction to jurisdiction [*see, e.g.,* Fed. R. Civ. P. 26(a)(2)(B); Cal. Code Civ. Proc. § 2034.260]. Thus strict attention to the requirements of the relevant jurisdiction should be paid. Generally, expert reports should contain at least the following:

1. A statement of the opinions that the expert intends to express;
2. A statement of the basis for those opinions;
3. A list of the data and documents relied on in arriving at those opinions;
4. A list of exhibits summarizing or supporting the expert's opinions;
5. A statement of the expert's qualifications to give the opinions;
6. A list of publications authored by the expert;
7. A list of cases in which the expert has previously testified; and
8. A statement of the compensation rate for the expert.

◗ **Cross Reference:** For a more complete discussion of the individual elements of the expert report, *see* §§ 21.16[2] through 21.16[8].

Distinguish: Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires that an expert report contain: (1) a complete statement of all opinions to be expressed; (2) the basis and reasons therefore; (3) the facts or data considered by the witness in forming the opinions; (4) any exhibits to be used as a summary of or support for the opinions; (5) the qualifications of the witness; (6) a list of all publications authored by the witness within the preceding ten years; (7) the compensation to be paid for the study and testimony; and (8) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. In contrast, Section 2034.260 of the California Code of Civil Procedure requires that an expert report contain only: (1) a brief narrative statement of the qualifications of the expert; (2) a brief narrative statement of the general substance of the testimony that the expert is expected to give; (3) a representation that the expert has agreed to testify at the trial; (4) a representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including the opinion and its basis; and (5) a statement of the expert's hourly and daily fee for providing deposition testimony and consulting with the retained attorney.

21.16[2] Review Statement of Opinions. The expert report should contain a statement of all the opinions that the expert may express at trial. It is important to ensure that the statement of those opinions is sufficient to put the opposing party on notice of all the issues on which the expert might opine [Nicholl v. Reagan, 208 N.J. Super. 644, 651–52 (App. Div. 1986)]. If an expert, at deposition or at trial, attempts to opine on issues that are not within the fair scope of the statement of opinions contained in the report such that opposing counsel would not be presented with the opportunity to prepare a meaningful response, the trial court has the discretion to declare the expert's testimony on that issue inadmissible [Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc., 348 Pa. Super. 285, 290 (Pa. Super. Ct. 1985)].

⛝ **Strategic Point:** Because an opinion can be excluded if it is not within the fair scope of the opinions stated in the expert's report, counsel should make sure the expert's report includes all opinions that counsel might possibly need from the expert.

Judge's Perspective: Judges seek to minimize surprise. Counsel should err on the side of a more thorough and comprehensive report. Counsel can always limit the expert's testimony at trial. The last thing counsel would want is to have to defend an expert witness deposition the night before trial testimony.

21.16[3] Review Bases for Opinions. The basis for an expert's opinion typically includes the tests, methods, measurements and theories upon which the expert based his or her conclusions [Copeland v. Stebco Prods. Corp., 316 Ill. App. 3d 932, 940–44 (Ill. App. Ct. 2000)]. An expert might be barred from testifying regarding a particular test, method, measurement, or theory if it was not identified originally as a basis for the opinion in the expert's report [*id.*]. Ensuring that a proper basis for an expert's opinion is included in the expert report also is important because challenges to the admissibility of the expert's testimony are often based on the propriety of the expert's tests, methods, measurements and theories that were used in coming to that opinion [*see, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)].

◗ **Cross References:** For a discussion of substantive laws governing the admissibility of expert testimony, including *Daubert v. Merrell Dow Pharm., Inc.* [509 U.S. 579, 113 S. Ct. 2786 (1993)], and *Frye v. United States* [293 F. 1013 (D.C. Cir. 1923)], *see* § 21.18 below; Evidentiary Foundations § 9.03.

21.16[4] Review Data and Documents Relied on. A party is required to disclose all data or documents considered by the party's testifying expert in forming his opinion even if those documents were not specifically relied upon in generating the final report [Fid. Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 751–52 (7th Cir. 2005)]. Failure to preserve or produce these documents along with the expert report can result in sanctions being entered under Rule 37, including exclusion of the expert's testimony at trial [*id.*] The data and documents upon which the expert relied also provide fertile ground for challenges to the expert's testimony [*see, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993)]. An expert's use of unreliable data can result in limitation or exclusion of an expert's testimony [*id.*].

◗ **Cross References:** For a discussion of substantive laws governing the admissibility of expert testimony, including *Daubert v. Merrell Dow Pharm., Inc.* [509 U.S. 579 (1993)], and *Frye v. United States* [293 F. 1013 (D.C. Cir. 1923)], *see* § 21.18 below; Evidentiary Foundations § 9.03.

21.16[5] Review Exhibits. Disclosing counsel must produce all exhibits that will be used as a summary of the expert's testimony or that will be used to support the expert's testimony. Whether these summary documents can be admitted at trial, however, is based on Rule 703 of the Federal Rule of Evidence. That Rule addresses the admissibility of "facts or data" that form the basis for an expert's opinion and provides that they will be admitted only to the extent that the disclosure will assist the jury in understanding and evaluating the expert's opinion [United States v. Milkiewicz, 470 F.3d 390, 400 (1st Cir. 2006)].

21.16[6] Review Qualifications. By definition an expert's qualifications are

based on knowledge, skill, experience, and training with regard to the area in which they are being asked to provide an opinion [Fed. R. Evid. 702]. That may include, among other things, evidence of educational degrees, certifications, years of practicing or working within the relevant field, and publications authored. In the insurance context, a person may be qualified to give an opinion regarding insurance matters based on the person's years of experience in the insurance industry. However, the experience of the proposed expert must relate to the subject matter on which they are opining [City of Hobbs v. Hartford Fire Ins. Co., 162 F.3d 576, 587 (10th Cir. 1998)].

21.16[7] Review List of Publications. An expert report typically will include a list of all publications authored by the expert within a specified time frame. Failure to provide the required list of publications can result in the court holding that the expert's testimony is inadmissible [Nelson v. City & County of San Francisco, 2005 U.S. App. LEXIS 3386, at *3–8 (9th Cir. Feb. 28, 2005) (unpublished)].

Keep in mind that this list is important for both parties. For the disclosing party, a review of articles previously published by the expert can reveal prior inconsistent statements, ideally before counsel disclosed the expert. For the opposing party, an expert's publications provide fertile ground for investigation and cross-examination.

> ⊠ **Strategic Point:** Disclosing counsel should review all of their own expert's publications, ideally prior to retention or, at least, prior to disclosure in order to ensure that none of the expert's prior statements contradict the expert's expected testimony.

21.16[8] Review Prior Testimony. An expert report typically includes a list of other cases in which the witness has testified as an expert, whether at trial or by deposition, within a specified time frame. Failure to provide a list of the expert's prior testimony can result in the court holding that the expert's testimony is inadmissible [Nelson v. City & County of San Francisco, 2005 U.S. App. LEXIS 3386, at *3–8 (9th Cir. Feb. 28, 2005) (unpublished)]. This list serves much the same function as the list of the expert's publications. For the disclosing party, a review of the expert's prior testimony can reveal inconsistent positions taken by the expert previously. In addition, a review of the cases in which the expert previously testified also could provide counsel with access to some of the expert's prior "*Daubert* challenges" and rulings thereon. For the opposing party, the list of previous cases can lead to the same sort of information. Review of that material would be particularly helpful in cross-examining the expert.

> ⊠ **Strategic Point:** As with an expert's list of publications, the disclosing counsel should review all of their own expert's deposition and trial transcripts before disclosing the expert. If the applicable rules permit

it, opposing counsel might not confront the expert with prior inconsistent testimony until cross-examination at trial.

21.16[9] Review Compensation. As a general rule experts are required to disclose the compensation they are receiving for their work in the case where they are retained. Although that information has no bearing on the admissibility of the expert's testimony, it is still important to provide it. Failure to provide an expert's rate of compensation can influence a court as to whether to strike an expert's testimony [*see* Nelson v. City & County of San Francisco, 2005 U.S. App. LEXIS 3386, at *3–8 (9th Cir. Feb. 28, 2005) (unpublished)]. Moreover, the expert's rate of compensation is relevant to the consideration of the expert's bias in that it can be inferred that an expert being paid a significant amount of money for his or her testimony may have a vested interest in providing testimony that is helpful to his or her employer [Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 998 (Fla. 1999)].

Example: A party wishes to compel evidence of the compensation paid to the opposing expert in not only the current case, but in a series of cases in which the expert has been retained by the opposing party. The party that retained the expert opposes the discovery. Most likely the requested information will be discoverable. The expert might be more likely to testify in favor of the opposing party because of the witness' financial incentive to continue the financially advantageous relationship [Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 998 (Fla. 1999)].

Judge's Perspective: If expert fees can be recovered after trial, counsel should be sure to keep careful and thorough time records and make sure that expert compensation is within a defensible range in the jurisdiction.

V. TAKING AND DEFENDING THE DEPOSITIONS OF EXPERTS.

21.17 Formulate Objectives and Strategies. There are many discrete roles that the deposition of an expert witness might serve. However, those largely can be categorized as serving one of three objectives: (1) discovering everything about which the expert is likely to testify and the reasons and bases for that testimony; (2) eliciting testimony for use at trial or in connection with dispositive motions; and (3) developing a factual record upon which to challenge the admissibility of one or more of the expert's opinions. As a general rule, the strategies and techniques that counsel would use to depose a lay witness are equally useful when deposing an expert witness as well. Similarly, if the expert deposition is being taken for the purposes of trial testimony (that is, the expert will be testifying at trial through their deposition) or to develop a record on which to challenge the admissibility of all or part of the expert's testimony, many of the same techniques and strategies that counsel would use at trial will be useful in the deposition of the expert witness.

In any event, the best "strategy" for the deposition of an expert witness is to be fully prepared. At a minimum, as discussed below, counsel should follow up and investigate the relevant information contained in the expert's curriculum vitae, locate and review statements made by the expert in published materials, locate and review prior testimony from the expert, and determine whether the expert has an adverse "*Daubert* history."

21.18 Understand Procedures and Mechanics.

21.18[1] Consider Procedures in Federal Cases. As a practical matter the deposition of expert witnesses almost always is scheduled and conducted by agreement between the parties. In fact, most district courts will address the scheduling of expert depositions in pretrial orders. Thus, for instance, a district court might set a deadline for the plaintiff to disclose their experts, another deadline by which those experts must have been made available for deposition, a date for the defendants to disclose their expert, and so on.

> ⛒ **Strategic Point:** Consider whether your expert will be used in rebuttal and whether separate designations, reports, and depositions are needed. An expert who is testifying in the case in chief may be required to testify on rebuttal to the other side's experts, and thus your expert may need to be designated also as a rebuttal witness. Further, experts retained only for the purpose of rebuttal generally should not have their depositions taken until after the case-in-chief experts are deposed.

Once a schedule that addresses the date by which experts must be available for deposition is in place, parties typically agree upon dates, places and times for the depositions of their respective experts. The party taking the deposition serves a notice with respect to the deposition in

accordance with Federal Rule 30(b). In addition, parties often will agree to produce before or at the deposition of their expert those documents and things that were provided to and considered by the expert in forming their opinions. In practice, these arrangements quite often are very informal, details of which might be documented simply in a letter between counsel.

The Federal Rules have provisions that govern the procedures for setting up and taking an expert witness deposition in the absence of agreement between the parties. Federal Rules 30 and 45 set forth the procedure through which to subpoena a witness, including an expert witness, to give a deposition. Under Rule 30(b)(1), a party must give reasonable notice in writing to all other parties of the time and place of the expert witness' deposition. Under Rule 26(b)(4)(A), a deposition of an expert witness from whom a report is required "may be conducted only after the report is provided" [Fed. R. Civ. P. 26(b)(4)(A)]. If a *subpoena duces tecum* is being served on the expert, the designation of the materials that the expert is being directed to produce must be set forth in the subpoena and also must be attached to or included in the notice of the deposition [Fed. R. Civ. P. 30(b)(2)]. The deposition notice also must identify the method by which the testimony will be recorded (sound, sound-and-visual, stenographically, etc.) [Fed. R. Civ. P. 30(b)(3)]. The party taking the expert's deposition is obligated to pay the expert's reasonable fee for the time "spent in responding" to the party's subpoena.

☒ **Strategic Point:** Although district courts' pretrial orders often set deadlines by which an expert's deposition must be taken, they rarely contain an explicit deadline by which the expert's deposition must be requested or addressed in a notice of deposition. Some parties, therefore, will request deposition of their opponents' expert shortly before the expiration of the time within which that deposition is supposed to be taken. This causes needless problems. Rule 30(b)(1) requires nothing more than "reasonable written notice" in advance of the deposition date [Fed. R. Civ. P. 30(b)(1)]. Of course, what is "reasonable" often is in the eye of the beholder. However, when dealing with expert witnesses, "reasonable" notice might require much more than seven days notice. Thus, as a practical matter, parties should endeavor as soon as possible to agree upon or otherwise set a date for the depositions of expert witnesses and serve notices with respect to those dates promptly. Indeed, even if those dates later must be changed, the party taking the expert's deposition will have a more compelling argument for extensions of the previously set expert deposition deadline than if the party waited to schedule the deposition at the last minute.

Judge's Perspective: Counsel should know how his or her judge conducts trials. Many judges will refuse to extend pretrial deadlines, especially if there is not a record of cooperation. If opposing counsel is

obstructionist, counsel should create a record to:

1. Support reasonable time extensions if opposing counsel has inadequately disclosed the substance of expert testimony or motions, or
2. Compel compliance with the procedural rules.

21.18[2] Consider Procedures in State Cases. As in federal cases, the procedural aspects of depositions of expert witnesses in cases governed by state law almost always are a product either of trial court orders and agreements between the parties, or both. States also have their own notice and subpoena procedures for taking depositions where there is no agreement between the parties.

21.18[3] Consider Date, Place and Time of Depositions. There really is only one rule that controls the date, place and time for the taking of an expert witness' deposition: if the parties cannot agree between themselves as to the date, place and time of the deposition, those issues are all well within the discretion of the trial court [*see* Trepel v. Roadway, Inc., 194 F.3d 708, 716 (6th Cir. 1999); Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir. 1994)]. Having said that, trial courts generally will require the parties (again assuming the parties cannot agree among themselves) to take the deposition of an expert witness more often where the witness is located and less often in the forum where the lawsuit has been filed.

21.18[4] Be Guided by the Substantive Law. Given the amount of discussion generated by *Daubert* and its progeny with respect to various aspects of expert witness testimony, it is all too easy to lose sight of the most fundamental rule governing the admissibility of expert testimony: the applicable rules of evidence. The seminal decision of *Frye v. United States* [293 F. 1013 (D.C. Cir. 1923)], established as a matter of common law that "courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, [but] the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs" [*Frye*, 293 F. at 1014]. Thereafter, many states adopted the so-called *Frye* test as the rule governing the admissibility of expert testimony in their courts. Other states enacted rules of evidence that were intended to codify the *Frye* test [*see, e.g.*, Md. Rule 5-702; *see also* People v. McKown, 924 N.E.2d 941, 944 (Ill. 2010)].

In 1993 the Supreme Court handed down its landmark decision in *Daubert v. Merrell Dow Pharm., Inc.* [509 U.S. 579 (1993)], in which the Court held that Rule 702 of the Federal Rules of Evidence had superseded the common law *Frye* rule [*Daubert*, 509 U.S. at 586–87]. (The Supreme Court considered expert testimony again shortly after *Daubert* in *Weisgram v. Marley Co.* [528 U.S. 440 (2000)], *General Electric Co. v. Joiner* [522 U.S. 136 (1997)], which concern some further procedural implications of *Daubert*.) After Congress enacted Rule 702 of the Federal Rules of Evidence in 1975,

many states enacted their own statutes and rules governing expert witness testimony. In 2000, Congress amended several of the Rules of Evidence governing expert witnesses, including Rule 702, in response to *Daubert*. Again, some states followed suit. In the end, to obtain a correct understanding of the rules governing the admissibility of expert witness testimony in a particular case, counsel must be familiar with the statutes and/or court rules that govern the admissibility of expert witness testimony in that jurisdiction.

When last checked, the following jurisdictions had one or more statutes or court rules in place governing the admission of expert witness testimony. Consider beginning your research with the following:

- **Federal Courts:** Fed. R. Evid. 701–705
- **Alabama:** Ala. R. Evid. 702; Ala. Code § 12-21-160; Ala. Code § 36-18-30
- **Alaska:** Alaska R. Evid. 702; Alaska Stat. § 09.20.185
- **Arizona:** Ariz. R. Evid. 702; Ariz. Rev. Stat. § 12-2604
- **Arkansas:** Ark. R. Evid. 702
- **California:** Cal. Evid. Code §§ 720, 801
- **Colorado:** Colo. R. Evid. 702
- **Connecticut:** Conn. Code Evid. § 7-2
- **Delaware:** Del. R. Evid. 702
- **Florida:** Fla. Stat. Ann. § 90.702; Fla. Stat. Ann. § 90.704
- **Georgia:** Ga. Code Ann. § 24-7-702; Ga. Code Ann. § 24-7-703
- **Hawaii:** Haw. R. Evid. 702
- **Idaho:** Idaho R. Evid. 702
- **Illinois:** Ill. R. Evid. 702
- **Indiana:** Ind. R. Evid. 702
- **Iowa:** Iowa R. Evid. 5.702
- **Kansas:** Kan. Stat. Ann. 60-456(b)
- **Kentucky:** Ky. R. Evid. 702
- **Louisiana:** La. Code Evid. art. 702
- **Maine:** Me. R. Evid. 702
- **Maryland:** Md. R. 5-702
- **Massachusetts:** Mass. R. Evid. 702
- **Michigan:** Mich. R. Evid. 702
- **Minnesota:** Minn. R. Evid. 702
- **Mississippi:** Miss. R. Evid. 702
- **Missouri:** Mo. Rev. Stat. Ann. § 490.065

- **Montana:** Mont. R. Evid. 702
- **Nebraska:** Neb. Rev. Stat. § 27.702
- **Nevada:** Nev. R. Stat. § 50.275
- **New Hampshire:** N.H. R. Evid. 702
- **New Jersey:** N.J. R. Evid. 702
- **New Mexico:** N.M. R. Ann. 11-702
- **New York:** No Rule.
- **North Carolina:** N.C. Gen. Stat. § 8C-1, Rule 702
- **North Dakota:** N.D. R. Evid. 702
- **Ohio:** Ohio R. Evid. 702
- **Oklahoma:** 12 Okla. St. Ann. § 2702
- **Oregon:** Or. Rev. Stat § 40.410
- **Pennsylvania:** Pa. R. Evid. 702
- **Rhode Island:** R.I. R. Evid. 702
- **South Carolina:** S.C. R. Evid. 702
- **South Dakota:** S.D. Codified Laws § 19-15-2
- **Tennessee:** Tenn. R. Evid. 702
- **Texas:** Tex. R. Evid. 702
- **Utah:** Utah R. Evid. 702
- **Vermont:** Vt. R. Evid. 702
- **Virginia:** Va. Code Ann. § 8.01.401.1
- **Washington:** Wash. Evid. R. 702
- **West Virginia:** W.V. R. Evid. 702
- **Wisconsin:** Wis. Stat. Ann. § 907.02
- **Wyoming:** Wyo. R. Evid. 702

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21.18[5] Consider Jurisdictions Governed by *Frye*. Though not applicable in every case, the following jurisdictions appear to apply some version of the *Frye* test regarding the admissibility of expert witness testimony:

- **California:** *People v. McWhorter*, 47 Cal. 4th318 (Cal. 2009)
- **Illinois:** *People v. McKown*, 924 N.E.2d 941 (Ill. 2010)
- **Kansas:** *Kuhn v. Sandoz Pharms. Corp.*, 14 P.3d 1170 (Kan. 2000); *State v. Wells*, 221 P.3d 561 (Kan. 2009)
- **Maryland:** *Bomas v. State*, 987 A.2d 92 (Md. 2010)
- **Minnesota:** *State v. Loving*, 775 N.W.2d 872 (Minn. 2009)

- **New York:** *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006); People v. Wesley, 83 N.Y. 2d 417 (1994)
- **North Dakota:** *State v. Hernandez*, 707 N.W. 2d 449 (N.D. 2005) (J. Crothers, concurring); *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994)
- **Pennsylvania:** *Commonwealth v. Dengler*, 890 A.2d 372 (Pa. 2005)
- **Washington:** *State v. Copeland*, 922 P.2d 1304 (Wash. 1996)
- **Washington, D.C. (local courts):** *Taylor v. United States*, 661 A.2d 636 (D.C. 1995)

Of course, even among the states that still are following some version of *Frye*, there are any number of distinctions and nuances with respect to how that test is applied within each jurisdiction. Thus, counsel who are addressing expert witness testimony in jurisdictions that follow *Frye* must familiarize themselves with the particular case law from the jurisdiction at issue. That being said, the *Frye* standard itself is relatively straightforward. The sum total of the reasoning in *Frye* is as follows:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs . . . . We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made" [Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)].

Based on that language, jurisdictions that follow *Frye* generally hold that "the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate" [State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980)].

Warning: The procedural rules pertaining to the admission of expert witness testimony vary from jurisdiction to jurisdiction. Failing to follow local procedural requirements for challenging experts can cause significant problems. In *Snelson v. Kamm* [787 N.E.2d 796 (2003)], for instance, the Illinois Supreme Court held that the failure to request a *Frye* hearing results in the waiver of any objection to the foundation of the expert's opinion.

Strategic Point: In many of the jurisdictions that still follow *Frye*, courts might nonetheless be receptive to a good faith argument for the abandonment of *Frye* in favor of *Daubert* [*see, e.g.*, Taylor v. United

States, 661 A.2d 636, 652 (D.C. 1995) (J. Newman, dissenting) ("we should join the Supreme Court's rejection of *Frye*")]. Thus, even in those jurisdictions that continue to follow *Frye*, counsel should make sure that their own experts' testimony will satisfy *both Daubert* and *Frye* and preserve any challenges based on *Daubert* to the opposing experts.

Lexis Advance Search: For an article on the *Frye* jurisdictions, try this source: Scientific Evidence. Enter this search: SECTION(1.16).

21.18[6] Consider Jurisdictions Governed by *Daubert*. Unsurprisingly, the rules governing the admission of expert testimony in a majority of jurisdictions now either expressly or constructively follow *Daubert*. The following provide useful starting points for researching the applicable rules governing the admissibility of expert testimony in "*Daubert* jurisdictions."

Warning: Keep in mind that some jurisdictions that follow *Daubert* have not necessarily followed all of *Daubert*'s progeny [*see, e.g.*, Watson v. Inco Alloys Int'l, Inc., 545 S.E.2d 294, 301 n.11 (W.Va. 2001) (West Virginia follows *Daubert* but not Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999))]. In other jurisdictions, though the applicable evidentiary rule and case law largely follow *Daubert*, variations in those rules still can give rise to particularized state law arguments [*compare* Fed. R. Evid. 702 *with* Tenn. R. Evid. 703 (the Tennessee Rule states that the trial court "shall disallow testimony" when "the underlying facts or data indicate lack of trustworthiness")].

- **Alaska:** *Apone v. Fred Meyer, Inc.*, 226 P.3d 1021 (Alaska 2010)
- **Arizona:** *State v. Miller*, 316 P.3d 1219 (Ariz. 2013)
- **Arkansas:** *Green v. Alpharma, Inc.*, 284 S.W.3d 29 (Ark. 2008)
- **Colorado:** *People v. Ramirez*, 155 P.3d 371 (Colo. 2007)
- **Connecticut:** *State v. St. John*, 919 A.2d 452 (Conn. 2007)
- **Delaware:** *Bawen v. E.I. Dupont de Nemours & Co., Inc.*, 906 A.2d 787 (Del. 2006)
- **Florida:** *Conley v. State*, 129 So. 3d 1120 (Fla. Dist. Ct. App. 2013)
- **Georgia:** *Mason v. HomeDepot U.S.A., Inc.*, 658 S.E.2d 603 (Ga. 2008)
- **Kentucky:** *Jenkens v. Commonwealth*, 308 S.W.3d 704 (Ky. 2010)
- **Louisiana:** *In re Alford*, 977 So. 2d 811 (La. 2008)
- **Massachusetts:** *Baudanza v. Comcast of Mass. I, Inc.*, 912 N.E.2d 458 (Mass. 2009)
- **Michigan:** *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004)
- **Mississippi:** *Tunica County v. Matthews*, 926 So. 2d 209 (Miss. 2006); *Maliyah Ashunti Hubbard v. McDonald's Corp.*, 2010 Miss. LEXIS 316

(Miss. 2010)

- **Montana:** *State v. Bowman*, 89 P.3d 986 (Mont. 2004)
- **Nebraska:** *Carlson v. Okerstrom*, 675 N.W.2d 89 (Neb. 2004); *Schafersman v. Agland Coop.*, 631 N.W.2d 862 (Neb. 2001)
- **New Hampshire:** *Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 813 A.2d 409 (N.H. 2002)
- **New Mexico:** *State v. Fry*, 126 P.3d 516 (N.M. 2005); *Lee v. Martinez*, 96 P.3d 291 (N.M. 2004)
- **Ohio:** *Valentine v. Conrad*, 850 N.E.2d 683 (Ohio 2006); *Miller v. Bike Athletic Co.*, 687 N.E.2d 735 (Ohio 1998)
- **Oklahoma:** *Christian v. Gray*, 65 P.3d 591 (Okla. 2003)
- **Oregon:** *State v. Marrington*, 73 P.3d 911 (Or. 2003); *State v. O'Key*, 899 P.2d 663 (Or. 1995)
- **Rhode Island:** *Beaton v. Malouin*, 845 A.2d 298 (R.I. 2004); *Raimbeault v. Takeuchi Mfg. U.S., Ltd.*, 772 A.2d 1056 (R.I. 2001)
- **South Dakota:** *State v. Guthrie*, 627 N.W.2d 401 (S.D. 2001)
- **Tennessee:** *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002), *cert. denied,* 537 U.S. 1115 (2003); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997)
- **Texas:** *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998)
- **Vermont:** *USGen New England, Inc. v. Town of Rockingham,* 862 A.2d 269 (Vt. 2004); *State v. Kinney*, 762 A.2d 833 (Vt. 2000)
- **West Virginia:** *Gentry v. Mangum*, 466 S.E.2d 171 (W. Va. 1985)
- **Wisconsin:** *State v. Knipfer (In re Knipfer)*, 842 N.W.2d 526 (Wis. Ct. App. 2013)
- **Wyoming:** *Dean v. State*, 194 P.3d 299 (Wyo. 2008).

Lexis Advance Search: For an article on the *Daubert* jurisdictions, try this source: Scientific Evidence. Enter this search: SECTION(1.14).

21.18[7] Consider Other Jurisdictions. There remain a fair number of jurisdictions that have not explicitly adopted either the *Daubert* or the *Frye* test with respect to the admission of expert witness testimony. Often these jurisdictions refuse to adopt *Frye* and *Daubert* because of differences between Federal Rule 702 and the statute or court rule that governs the admissibility of expert testimony in their jurisdiction [*see, e.g.,* State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 160 (Mo. 2003) (*en banc*) (J. Wolff concurring) (stating "Forget *Frye*. Forget *Daubert*. Read the statute. Section 490.065 is written, conveniently, in English.")]. Jurisdictions that appear to fall into this category are:

- **Alabama:** *Hegarty v. Hudson*, 123 So. 3d 945 (Ala. 2013); *Thompson v.*

State, 2012 Ala. Crim. App. LEXIS 10 (Ala. Crim. App. Feb. 17, 2012)

- **Hawaii:** *State v. Werle*, 218 P.3d 762 (Haw. 2009)
- **Idaho:** *State v. Merwin*, 962 P.2d 1026 (Idaho 1998); *Weeks v. Eastern Idaho Health Servs.*, 153 P.3d 1180 (Idaho 2007)
- **Indiana:** *Malinski v. State*, 794 N.E.2d 1071 (Ind. 2003); *Wilkes v. State*, 917 N.E. 2d 675 (Ind. 2009)
- **Iowa:** *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525 (Iowa 1999); *Ranes v. Adams Labs, Inc.*, 778 N.W. 2d 677 (Iowa 2010)
- **Maine:** *State v. Bickatt*, 963 A.2d 183 (Me. 2009)
- **Missouri:** *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003); *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752 (Mo. 2010)
- **New Jersey:** *Kemp v. State*, 809 A.2d 77 (N.J. 2002)
- **Nevada:** *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008); *Higgs v. State*, 222 P.3d 648 (Nev. 2010)
- **North Carolina:** *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674 (N.C. 2004)
- **South Carolina:** *Watson v. Ford Motor Co.*, 2010 S.C. Lexis 50 (S.C. Mar. 15, 2010)
- **Utah:** *Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 15, 651 Utah Adv. Rep. 33
- **Virginia:** *John v. Im*, 559 S.E.2d 694 (Va. 2002); *Keesee v. Donigan*, 524 S.E.2d 645 (Va. 2000)

Because each of these jurisdictions eschew *Daubert* and *Frye* in favor of their own particular statutes and rules, general statements of the law in these jurisdictions is ill-advised. Of course, as always, counsel should be familiar with the applicable law that governs the admissibility of expert testimony in their case. That is particularly so in the above jurisdictions where mistaken reliance on *Frye* or *Daubert* might not be well received by the court.

Judge's Perspective: Even in jurisdictions adopting *Daubert*, decisions interpreting that case are varied. Counsel should thoroughly research each jurisdiction's jurisprudence in the wake of *Daubert*.

Lexis Advance Search: For an article on other jurisdictions, try this source: Scientific Evidence. Enter this search: SECTION(other and jurisdictions).

21.19 Topics to Consider for All Expert Depositions.

21.19[1] Relationships to the Parties. When deposing an opponent's expert, one area of examination that usually warrants some attention is the nature of the relationship between the expert witness being deposed and

(a) the opposing party, (b) the opposing party's attorneys and/or (c) other witnesses who are "friendly" with the opposing party. When the opposing party is an individual, more often than not the expert witness will not have any meaningful connection to them. The most common scenario in which an expert witness has a connection to a party arises when the party is a corporate entity. Some corporate entities have considerable expertise in house. Thus, perhaps for cost reasons, a corporate entity might opt to have one of its in-house people serve as an expert witness rather than incur what most likely would be significantly greater expenses to retain an "independent" expert. Also, with very large corporate parties, the proper examination of an expert witness might reveal an incidental relationship, such as a prior consulting relationship between the expert and the corporate entity that has engaged the expert.

Relationships between expert witnesses and other "friendly" witnesses can arise in an array of contexts. Of course, not all cases warrant significant exploration of these types of relationships. In a medical malpractice case, for instance, the likelihood that a life-care planning expert would happen to know the defendant physician is not nearly as great as the likelihood that a local banking expert might know one or more of the officers of the defendant bank. However, counsel should be most alert to the existence of such relationships when there are multiple potential witnesses from the same industry testifying in the case. The most common type of relationship, by far, that an expert witness is likely to have is the relationship with the counsel who engaged him or her, especially where specialized counsel is involved for a party and the expert testimony concerns insurance issues or a recurring factual dispute in a type of coverage case (*e.g.*, waste disposal practices in certain time periods or financial losses and forensic accounting reconstruction in a fidelity bond ("embezzlement") case). The tactical significance of that type of relationship will be case specific. For instance, counsel might be able to undermine the credibility of an expert witness if, for instance, the expert witness earns a significant portion of his or her income by testifying on behalf of clients who are represented by the same attorney. Conversely, if an expert is routinely hired by an attorney for a seemingly legitimate reason (for instance, the expert has survived numerous *Daubert* challenges with respect to testimony on a particular topic), efforts to undermine the expert's credibility based on the relationship with the counsel who hired the expert may not be worth exploring at length.

> ⊠ **Strategic Point:** Attorneys and firms with more than just a few lawyers should consider asking an opposing expert whether they have any relationship with attorneys in the examiner's own firm. The fact that an opposing expert has done work for attorneys in the examiner's own firm does not insulate the opposing expert from a challenge in any particular case. However, that fact certainly will warrant a

different approach for mounting that challenge. In any event, counsel certainly does not want to have the connection between the opposing expert and counsel's own firm during the re-direct examination of the opposing expert at trial.

21.19[2] Payment. As a general rule, the compensation provided to an expert witness by the party who engaged the expert must be disclosed either in the form of interrogatory responses or at the deposition of the expert. Beyond that, however, there are generally no specific rules that govern the nature and scope of the examination which may be conducted with respect to the expert's financial connection to the opposing party. In fact, some experts take it upon themselves to try to limit the nature and scope of the examination with respect to their financial relationship to the opposing party. In the end, questions regarding the financial relationship of the witness to the opposing party will be governed by the general rules applicable to all discovery ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" even if not admissible at trial so long as "the discovery appears reasonably calculated to lead to the discovery of admissible evidence.") [Fed. R. Civ. P. 26(b)(1)]. Thus, counsel likely is permitted to examine an expert to an extent sufficient to reveal whether an expert receives a significant portion of their income by testifying as an expert witness generally, and/or receives a significant portion of income from the opposing party or the opposing party's attorneys. In addition, in any particular case counsel may be entitled to conduct further examination of an expert witness' finances as long as that line of examination bears a reasonable relationship to the discovery of facts that might be admissible at trial.

21.19[3] Qualifications. Probably the most overlooked area of examination concerns the qualifications of the expert to provide the expert witness testimony at issue in the case. From an evidentiary point of view, an expert's qualifications are critical to the admissibility of the expert's testimony. As a general rule, witnesses may not testify in the form of opinions or inferences if those opinions and inferences are "based on scientific, technical, or other specialized knowledge . . . ." [Fed. R. Evid. 701]. Expert witnesses are excepted from the preceding Rule as long as they are qualified "as an expert by knowledge, skill, experience, training, or education" to render opinions on the subject matters about which they are testifying [Fed. R. Evid. 702]. Thus, a critical examination of the qualifications of an opponent's expert witness would seem like a natural starting point for examination. However, when an expert witness' curriculum vitae is several pages long, it is not unusual for attorneys to gloss over the preliminary question of whether the expert indeed is an "expert" with respect to the subjects on which they are testifying. Indeed, one of the more common problems that expert witnesses encounter is being asked to

testify about matters that are close to, but not actually within, their area of expertise.

Example: In a fidelity insurance case, a party might engage an accounting expert to review and testify about accounting irregularities that helped cover up an employee's embezzlement. Later, when the party discloses its expert witnesses, it might identify the accountant not only as an expert with respect to the bookkeeping irregularities at issue in the case, but also with respect to the damage calculations at issue in the case. Whether the credentials of the accountant are sufficient to support opinion testimony as to damages can be an entirely different question from whether the accountant is qualified to opine about bookkeeping irregularities. Thus, a careful examination of the accountant's qualifications will enable the examining party possibly to limit the scope of the accountant's testimony at trial.

⊠ **Strategic Point:** Keep in mind that it is not always clear in what subject areas expert witness testimony is required. For instance, in a lawsuit where the dispute centers on an insurance claims person's interpretation of a provision in an ERISA plan as applied to a participant's medical condition, expert testimony might be warranted with respect to: (a) the customs and practices in the claims handling industry; (b) the meaning attributed to the disputed language by various industry bodies that draft proposed insurance language; (c) the custom and practice within the industry for drafting language for ERISA plans; and/or possibly (d) the participant's medical condition. A party might be able to obtain the exclusion of an otherwise well qualified expert by convincing the trial court that the issue in dispute requires expert testimony in a different field or discipline from that of the opposing expert.

21.19[4] Examine Specific Opinions. The area upon which most attorneys focus during the examination of expert witnesses is on the specific opinions provided by the experts. The specific opinions of the experts should be examined for a variety of reasons. Lines of questioning which counsel should consider in examining the opposing experts include:

1. Confirm that you have all the expert's opinions;
2. Have the expert thoroughly identify the factual basis upon which each opinion is based;
3. Have the experts identify all the sources of information upon which they based their opinions;
4. Ask the experts about information provided to them by the attorneys who hired them that, according to the expert, they did not consider in forming their opinions;
5. Have the experts explain the methodology they used to form their

opinions in the case, and why they chose that particular methodology.

6. If there are competing methodologies, have the expert explain why the competing methodologies were not used.
7. Have the expert walk through the application of the facts in the case to the methodology employed.
8. Have the expert produce and identify all exhibits, charts, summaries, and other demonstrative aids that relate to their opinions;
9. Ask the witnesses to identify the subject matters upon which they consider themselves competent to testify as expert witnesses;
10. Where appropriate ask the experts leading questions intended to obtain a concession that the expert are *not* qualified to testify as experts with respect to certain subjects;
11. If the experts claim expertise in areas that are suspect, consider having the experts identify their relevant qualifications in their curriculum vitae;
12. If appropriate, have the experts identify those publications that they maintain are relevant to the subject upon which they are testifying;
13. If appropriate, confront the experts with the absence of publications relevant to the subject matter upon which they claim expertise;
14. Decide whether to confront the experts with inconsistent opinions or statements made in prior publications or testimony;
15. If appropriate, have the experts identify the prior testimony that the experts maintain are relevant to the subject upon which they are testifying;
16. If appropriate, confront the experts with the absence of prior testimony relevant to the subject matter upon which they claim expertise;
17. Decide whether to confront the experts with inconsistent opinions or statements made in prior testimony; and
18. Ask the experts if there are any publications that they have authored that are not identified in their list of publications.

Judge's Perspective: Judges will carefully scrutinize the methodology used to reach an opinion and the reliability of those methods. Whether taking or defending an expert, counsel should be sure to focus on these points. It may be too late to explain weaknesses in testimony in responding to a motion *in limine* or at a *Daubert* hearing.

21.20 Prepare for the Deposition of Opposing Experts.

21.20[1] Follow up on the Expert's Curriculum Vitae. As can be true regard-

ing any witness, a person designated as an expert might misrepresent—or at least overstate—his or her credentials or experience. "Padding" of an expert's curriculum vitae can range from a deliberate misrepresentation to seemingly innocent misstatements. For instance, some experts have misrepresented the nature of their college or graduate degrees. Some experts "forget" to update their curricula vitae and thereby fail to disclose an adverse change in their qualifications (*i.e.*, a failure to be recertified). Some experts try to bolster their qualifications by listing on their curricula vitae memberships in professional organizations that require nothing more than an application and the payment of a fee in order to obtain membership.

> ⊠ **Strategic Point:** There obviously are cost-benefit considerations that come into play when investigating an expert's qualifications. One simple, relatively inexpensive method to test statements in an expert's curriculum vitae is to track down an older version of the expert's curriculum vitae and check for differences. Items that the expert added to or re-characterized in the newer curriculum vitae might warrant further investigation.

There are many legitimate certificating and accrediting organizations regarding insurance professional training, fire investigation and fire safety training, and other topics that provide appropriate continuing education and competency verifications for their respective disciplines. Among insurance-specific accreditations are the following: Certified Property Casualty Underwriter (CPCU); Associate in Risk Management (ARM); Associate in Claims (AIC); Registered Health Underwriter (RHU); Chartered Life Underwriter (CLU); Certified Professional Public Adjuster; and IAAI-CFI (arson and fire investigator). In addition to private certifying organizations, state insurance departments may require certification and continuing education for insurance professionals. But the most credentialed expert in the world may not prove to be the most effective witness; credentials are only an indication of appropriate technical competence in the expert's field of endeavor.

In addition, counsel is well advised, before the expert witness' deposition, to track down and review written material published by the expert. In some cases, an expert's list of publications can be so extensive that practical considerations might dictate a selective review of the expert's publications. Some review should be conducted. If counsel has retained an expert witness in the same discipline, that expert could provide guidance as to which of the adverse expert's publications counsel should review. If in doubt, consider reviewing those publications that (a) are most likely to contain truthful statements from the expert (*e.g.*, chapters in widely accepted medical textbooks) and (b) publications with materials published by organizations with clear agendas (*e.g.*, an article written by an expert that was published by a plaintiff or defense lawyer's bar organization).

Lexis Advance Search: To find information on preparing for deposition of an expert, try the following source: Federal Litigation Guide. Enter this search: SECTION(preparing and expert deposition).

21.20[2] Collect Documents for Authentication. The deposition of an opponent's expert witness presents an opportunity to eliminate some foundational requirements with respect to certain types of evidence. For instance, Rule 703 of the Federal Rules of Evidence states that an expert may testify on the basis of facts of data that are not admissible as long as those facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" [Fed. R. Evid. 703]. Thus, if there are any facts or data which the opposing attorney intends to ask the opposing attorney's own expert to consider, and there is any debate about whether they are "of a type reasonably relied upon," the deposition of an opponent's expert might provide an opportunity to obtain a concession on the point from the opposing expert. Similarly, one of the exceptions to the hearsay rule allows for statements to be read into evidence from "learned treatises," but only to the extent "established as a reliable authority by the testimony or admission of the [expert] witness or by other expert testimony or by judicial notice" [Fed. R. Evid. 803(18)]. If the deposing counsel plans to use particular statements from a learned treatise at trial, counsel might be able to establish their admissibility in the course of deposing the opponent's expert.

Lexis Advance Search: To find information on preparing for deposition of an expert, try the following source: Federal Litigation Guide. Enter this search: SECTION(preparing and expert deposition).

21.20[3] Review Prior Testimony. An expert's prior testimony can be a gold mine for the attorney preparing to cross-examine the expert. Review of an expert's prior testimony can suggest lines of inquiry that counsel might not have contemplated. Prior transcripts can alert counsel to areas of examination that are not likely to be productive and, conversely, can identify areas on which the expert witness previously had trouble testifying. Perhaps most important, prior testimony of an expert might provide ammunition, if not outright concessions, that can be used to narrow the scope of that expert's putative area of expertise.

⊠ **Strategic Point:** Transcripts of prior testimony can be obtained through bar organizations, from court reporting companies, from courts where the testimony was submitted in the form of partial or whole transcripts, as well as from colleagues and independently maintained databases. Ordinarily, the process of identifying those sources that have transcripts of prior testimony from a particular expert witness is not particularly difficult, but it can take some time to locate, obtain and review transcripts of prior testimony. Therefore, counsel should begin the process of tracking down transcripts on an

expert's prior testimony as soon as the expert is identified.

Lexis Advance Search: To find information on preparing for deposition of an expert, try the following source: Federal Litigation Guide. Enter this search: SECTION(preparing and expert deposition).

21.20[4] Admissibility Rulings. An area that often is overlooked in the course of preparing to examine an opposing expert is the expert's "*Daubert* history." Since the Supreme Court's decision in *Daubert vs. Merrell Dow Pharm., Inc.* [509 U.S. 579 (1993)], courts have issued tens of thousands of published and unpublished (but discoverable) opinions commenting on the admissibility of the opinions offered by particular experts. There is also a developing cottage industry that tracks and maintains "*Daubert* histories" of experts, often providing access to materials such as curricula vitae, prior deposition and trial testimony, and even unreported decisions commenting on the admissibility of the expert's testimony. Counsel should check for the availability of a "*Daubert* history" on every expert in their case (their own experts and opposing experts) as soon as the expert is identified. An impressive list of insurance cases in which the expert has testified invariably yields rulings on admissibility of the expert's testimony in those earlier cases.

Cross Reference: For a more detailed discussion of potential sources of information on an expert's "*Daubert* history," *see* § 21.08 above.

Lexis Advance Search: To find information on preparing for deposition of an expert, try the following source: Federal Litigation Guide. Enter this search: SECTION(preparing and expert deposition).

21.21 Prepare for the Deposition of Your Experts. In many respects the process of preparing for the deposition of your expert should begin even before you engage your expert. Opposing counsel likely will probe for relationships between your expert and you, your client and your witnesses [*see* § 21.19[1]], and probably will have scrutinized your expert's curriculum vitae [*see* § 21.20[1]], reviewed the materials published by your expert [*see* § 21.20[1]], reviewed your expert's prior testimony [*see* § 21.20[3]], and will be aware of the expert's "*Daubert* history" [*see* § 21.20[4]]. At the time you engaged your expert, and certainly by the time that you disclosed your expert, you should have satisfied yourself that these areas of inquiry will pose no threat to the testimony to be provided by your expert. Certainly, those are topics on which you want to be satisfied before your expert gives his or her deposition. In addition, you should review the pleadings, discovery responses, your expert's opinions and the bases for them, and the opposing expert's affidavit or report so as to anticipate the areas of likely examination. Be sure that your expert has reviewed any disclosed report (or interrogatory response summarizing the expert's opinion) and related materials in advance of the deposition. Remember that most expert witnesses are not lawyers. Although experts who testify frequently likely "know the ground rules" for giving effective deposition testimony, many

experts do not. Thus, provide the same general deposition advice to your expert witnesses that you would provide to a lay witness preparing for a deposition (*i.e.*, remind the expert to answer truthfully and completely but not to volunteer unnecessary information, to answer the question asked, and to ask for clarification when a question is confusing, etc.).

Consider: Treat the deposition as the equivalent of cross-examination of the expert at trial, with the expert report being the equivalent of direct testimony, and prepare the expert accordingly to be forthright and clear and to comport himself or herself with the equivalent decorum as is appropriate before the jury (even though the deposition may take place in a law firm or research center conference room).

Videotaping of important depositions is increasingly common in larger-dollar disputes, so you should advise your expert of this prospect, have the expert dress in "court-appropriate clothing," speak to the camera more than to the interlocutor, and use a voice that projects from the witness' mouth so that the testimony is recorded effectively.

Lexis Advance Search: To find information on preparing for deposition of an expert, try the following source: Federal Litigation Guide. Enter this search: SECTION(preparing and expert deposition).

21.22 Objections During Expert Depositions. The same rules that govern objections in the course of any deposition govern objections in the course of an expert's deposition. In federal courts the Federal Rules of Civil Procedure govern deposition objections. Under that Rule, any objection during a deposition "must be stated concisely and in a nonargumentative and nonsuggestive manner" [Fed. R. Civ. P. 30(c)(2)]. A witness should be instructed not to answer only "when necessary to preserve a privilege, to enforce a limitation ordered by the court," [id.] or to present a motion to the court arguing that the deposition is being conducted in such a manner as to annoy, embarrass, or oppress a deponent or a party [Fed. R. Civ. P.30(d)(3)(A)]. Otherwise, as with all witnesses, an expert witness should answer all the questions at their deposition, including those to which an objection was made.

Lexis Advance Search: To find information on objections during a deposition, try the following source: Moore's Federal Practice—Civil. Enter this search: SECTION(30.43).

21.23 Strategic Considerations for Expert Depositions. As noted in § 21.17 above, depositions of expert witnesses can serve an array of different purposes. Expert depositions can be conducted for "discovery" reasons, so as to confirm that the deposing party knows everything about what the expert is likely to testify and the bases for that testimony. When an expert's deposition is being conducted for this purpose, the techniques and strategies that counsel should consider are essentially the same as the techniques and strategies that counsel would use to depose a fact witness. On the other hand, if the object of the deposition is to

generate testimony to be used at trial or in support of a motion challenging the admissibility of the expert's opinions, the strategic considerations for the deposition will be similar to those for examining a witness at trial, *e.g.*, one should develop crisp testimony by use of well-framed leading or summarizing questions.

Of course, in every case counsel must be familiar with all the materials provided by the expert. Counsel should have scrutinized the deponent expert's curriculum vitae [*see* § 21.20[1]], collected and reviewed the expert's relevant prior publications [*see* § 21.20[1]], collected whatever documentation counsel would like to have authenticated through the deposition [*see* § 21.20[2]], and obtained and reviewed as much prior testimony from the expert as possible [*see* § 21.20[3]]. Counsel also should be familiar with the expert's "*Daubert* history" [*see* § 21.20[4]]. Counsel should use the expert's affidavit or report, together with information gleaned from the expert's prior testimony, to create the outline for counsel's examination of the expert.

VI. SUPPLEMENTING YOUR EXPERT DISCLOSURES.

21.24 There Is a Duty to Supplement Expert Disclosures. A party has a duty to timely amend its expert disclosures if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing [Colon-Millin v. Sears Roebuck de Puerto Rico, 455 F.3d 30, 37–38 (1st Cir. 2006)]. Supplementation, however, should not be used as a method of attempting to extend the expert disclosure deadline [Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 570–71 (5th Cir. 1996)].

The duty to supplement expert disclosures exists in the federal courts [Fed. R. Civ. P. 26(e); Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 855 (5th Cir. 1999)] and in the state courts [*see, e.g.*, White v. Garlock Sealing Techs., LLC, 373 Ill. App. 3d 309, 323–27 (Ill. App. Ct. 2007). The duty also exists regardless of whether the information was initially produced as part of mandatory disclosures [*Valdespino*, 168 F.3d at 855] or in response to interrogatories [White, 373 Ill. App. 3d at 324].

Failure to supplement expert disclosures may result in the court declaring that any testimony relating to the new information is inadmissible. In making this determination, the court will consider: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence [Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003)].

> **Example:** At the disclosure deadline, the disclosing party produces an expert report that consists of nothing more than an outline of the expert's points of testimony and a brief summary of his opinions. After the deadline, the disclosing party produces supplemental information regarding the expert's opinions and containing the additional required elements. Under these circumstances a court might bar the expert from testifying at trial for failure to file a sufficient expert report [Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 570–71 (5th Cir. 1996)].
>
> **Judge's Perspective:** A court will not be sympathetic to parties that abuse the rules. A strategic motion in the face of incomplete disclosures can alert the court that counsel may be unprepared or has a weak case.
>
> **Lexis Advance Search:** To find information on the duty to supplement expert disclosures, try the following source: Federal Litigation Guide. Enter this search: SECTION(23.15).

21.25 Limitations to Supplementation. The need to supplement expert disclosures is limited by the availability from other sources of the material that would

constitute supplementation. There is no need to supplement where the information otherwise has been made known to the opposing parties during the discovery process or in writing [Colon-Millin v. Sears Roebuck de Puerto Rico, 455 F.3d 30, 37 (1st Cir. 2006]. The need to supplement expert disclosures is also limited to information that is actually material to the expert report and would in some way affect the opposing party's ability to cross-examine the witness or prepare for trial [Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592 (4th Cir. 2003)]. If the additional information or expert opinions are in accord with and amount to clarification or examples of the opinions already stated, there is no need to supplement the expert disclosures [Wilburn v. Cavalenes, 923 N.E.2d 937, 950 (Ill. App. Ct. 2010).

⊠ **Strategic Point:** There are situations in which counsel does not need to supplement the expert disclosures in order for additional information or additional testimony to be admissible at trial. However, questions as to whether the new information was otherwise available to the opposing party likely will arise in the context of a motion to limit or bar the expert's testimony. Thus, absent specific reasons to the contrary counsel should always supplement their expert disclosures even if it appears that the new information or opinions otherwise are known by the opposing party.

Timing: A court refused to consider five expert reports, in a multi-million dollar dispute over insurance coverage after Hurricane Wilma, because plaintiff failed to comply with procedural deadlines and rules [La Gorce Palace Condo. Assoc v. QBE Ins. Corp., No. 10-20275-CIV, 2011 U.S. Dist. LEXIS 44748 (S.D. Fla. Apr. 12, 2011)]. After plaintiff's attempts to introduce more expert reports was denied, it tried to introduce "supplemental" expert reports, but the court found that the "supplemental" reports constituted an effort to get through the back door what they failed to bring in the front door, under the guise of rebuttal evidence.

VII. RECOGNIZING PRIVILEGE AND WORK PRODUCT ISSUES.

21.26 Discovering Communications Between Expert and Counsel. There is ongoing tension over the scope of available discovery regarding documents and information provided to experts. Under the prior version of the Federal Rules of Civil Procedure, and under the current version of some states' rules of civil procedure [*see, e.g.*, the discussion of the Texas rules in *In re* Chrisus Spohn Hosp. Kleberg, 222 S.W.3d 434 (Tex. 2007)], documents and information disclosed to a testifying expert in connection with his or her testimony may be discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his or her opinions [Elm Grove Coal Co. v. Dir., Office of Workers' Comp. Programs, 480 F.3d 278, 301–03 (4th Cir. 2007)]. The same concern applies to documents and communications provided to a consulting expert who is later disclosed as a potentially testifying expert or whose mental impressions and opinions have been considered or reviewed by a testifying expert [*see, e.g.*, Tex. R. Civ. P. 192.3[e]]. Under the current version of the Federal Rules of Civil Procedure only communications between the attorney and the expert that relate to the expert's compensation or to the facts, data or assumptions provided by the attorney and considered by the expert in forming the expert's opinion would be automatically discoverable. [Fed. R. Civ. P. 26[b][4][C][i–iii]. Other factors may also cause additional communications to be discoverable. [Fed. R. Civ. P. 26[b][3][A]].

> **Strategic Point:** Even under the current version of Rule 26, at least some communications between counsel and an expert are discoverable. Accordingly, counsel should continue to be careful with all written communications (including, for instance, e-mail) sent to the expert and advise the expert to exercise similar discretion.

> **Warning:** If a party discloses an expert and then retracts that disclosure prior to the time that the expert disclosures are due, to the extent that the documents and communications were discoverable when the expert was disclosed, the documents and communications provided to or received from the expert may still be discoverable, especially if there is some ulterior, illegal, or improper motive in retracting the expert [Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 559–60 (Tex 1990)].

21.27 Experts' Conflicts. Any communications between counsel and a potential expert during the period when counsel is determining whether to hire the potential expert are not discoverable typically [*see, e.g.*, W. Digital Corp. v. Super. Ct., 60 Cal. App. 4th 1471, 1480–89 (Cal. Ct. App. 1997)]. The attorney-client privilege is not waived as to these communications unless the potential expert is retained and disclosed as a testifying expert [Collins v. State of California, 121 Cal. App. 4th 1112, 1124 (Cal. Ct. App. 2004)]. If opposing counsel interviews or hires an expert that was interviewed but not retained by the other party, opposing counsel could be barred from further representation

in the case for improperly eliciting the privileged information [Shandralina v. Homonchuk, 147 Cal. App. 4th 395 (Cal. Ct. App. 2007).

⊠ **Strategic Point:** In order to avoid potential conflicts or problems caused by expert witnesses, counsel should be sure the expert has undergone a thorough conflicts check before counsel interviews that expert.

VIII. FORMS AND CHECKLISTS.

Use of Forms:The forms contained in §§ 21.28 through 21.32 are not designed for use in every jurisdiction or for every circumstance. The forms should be used as guides only and modified to fit the particular rules of the jurisdiction and the facts at hand.

21.28 Form Interrogatories.

Use of Form: The Form Interrogatories in this section are an example of interrogatories that might be used in a jurisdiction that does not have mandatory disclosures. The form interrogatories request much of the same information that would be required automatically under Rule 26 of the Federal Rules of Civil Procedure. These interrogatories, therefore, would not be necessary in federal courts where disclosures under Rule 26(a)(2) are required. For jurisdictions that specifically set out the types of information about experts and expert testimony that can be requested by interrogatory, the form questions should be modified accordingly.

[STATE COURT TITLE]

JOHN SMITH
Plaintiff,

vs.

INSURANCE CO.
Defendant.

No. _____

PLAINTIFF'S FIRST SET OF INTERROGATORIES DIRECTED TO DEFENDANT

Plaintiff John Smith, by and through counsel, pursuant to Rules of Civil Procedure, hereby submits the following interrogatories directed to Defendant Insurance Company to be answered under oath within the time and in the manner required by the applicable court rules.

[Include the following along with other interrogatories relevant to your case.]

1. Identify each person whom you expect to call as a witness to offer expert opinion testimony in this matter. For each individual identified in response to this Interrogatory, describe:

a. The individual's educational background, place of employment, area of expertise, and qualifications to give an opinion;

b. The subject matter on which the individual is expected to testify;

c. The individual's hourly deposition fee;

d. The substance of all facts and opinions to which the individual is expected to testify;

e. A summary of the individual's grounds for each such opinion;

f. All publications which the individual has authored in the last ten years;

g. The caption, including case number, for all cases in which the individual has testified in the last four years; and

h. If the individual is a nonretained expert witness, including a party, state the individual's title and field of expertise.

ANSWER:

2. For each expert witness identified in response Interrogatory [insert number of interrogatory above], describe all information and identify all documents provided to, reviewed by, considered by, or relied upon by said expert in forming his or her opinions and conclusions.

ANSWER:

[Signature Block]

21.29 Form Requests for Production.

Use of Form: The Form Requests for Production in this section contained in the form are designed to cover not only those documents specifically required under mandatory disclosure rules, such as Rule 26 of the Federal Rules of Civil Procedure, but also additional materials such as communications between counsel and a retained expert that the opposing party might not produce otherwise. Some of the documents and information requested in this form, may be subject to objections based on privilege and/or work product, depending on the applicable expert discovery rules. The requests in the form should be modified in light of any statutory or common law rules in the relevant jurisdiction.

Requests for Production

[STATE COURT TITLE]

JOHN SMITH
Plaintiff,

vs.

INSURANCE CO.
Defendant.

No. _____

DEFENDANT'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS DIRECTED TO PLAINTIFF

Defendant Insurance Co., by and through counsel, pursuant to Rules of Civil Procedure hereby submits the following requests for production of documents directed to Plaintiff John Smith with production to be made in the time and in the manner required by the applicable court rules.

[Include the following along with other requests for production relevant to your case.]

1. Please produce all documents and things that you have provided to any person whom you anticipate calling as an expert witness at the trial of this case.

2. Please produce all documents and things that you have received from any person whom you anticipate calling as an expert witness at the trial of this case.

[Signature Block]

21.30 "Shell" Outline Deposition of an Expert.

Use of Form: The "Shell" Outline for an Expert Deposition in this section is a sample outline for deposing an opposing expert. The outline is just that—a generic outline. It must be modified to address the substantive and expert issues in the particular case where it is being used. The object of the outline is the discovery of the opponent's expert's opinions as well as information that will assist in a *Daubert* challenge, if appropriate. If the expert deposition is being taken for some other purpose (i.e., counsel might depose counsel's own expert in order to obtain testimony for use at trial), the outline would need to be modified appropriately. Those questions in the outline that relate to communications between counsel and the expert may be subject to objection and instructions not to answer depending on the applicable rules of procedure.

SHELL OUTLINE FOR DEPOSITION OF AN EXPERT

1. Introductory Information
2. Expert Report
    a. Authenticate the expert report and all materials provided by the expert
    b. Confirm that the report contains all of the expert's opinions
    c. Confirm that the expert's report is accurate
    d. Pin the expert down on any variations from or changes to the report
    e. Retention as Expert
        i. How was he or she retained as an expert
            1. Describe contact with counsel
            2. Describe contact with party
        ii Compensation rate
            1. Hourly rate/flat rate
            2. Amount paid until present
            3. Expected compensation through trial
    f. Previous Retention as an Expert
        i. Cases in which he or she has previously been retained

1. Number of cases
2. Names of cases
3. Substance of testimony in those cases
4. Explore opinions/conclusions from previous cases relating to the present action

ii. Plaintiff v. Defendant

1. Percentage of cases that he or she was retained by plaintiffs in cases
2. Percentage of cases that he or she was retained by defendants in cases

iii. Cases retained by counsel in this action

1. Number of cases
2. Names of cases
3. Substance of testimony in those cases
4. On behalf of plaintiff or on behalf of defendant

g. Qualifications to Give an Opinion

i. Authenticate the expert's curriculum vitae

ii. Confirm that what the curriculum vitae contains is up-to-date and complete

iii. Pin the expert down on any variations from or changes to their curriculum vitae

iv. Review relevant education

1. Undergraduate degrees
2. Postgraduate degrees
3. Certifications

v. Review relevant work experience

1. Places of employment
2. Job titles
3. Type of work performed at each place of employment and for each job title
4. Work experience specifically relating to issues in action at hand

vi. Professional associations, boards, and committees

vii. Publications

1. Confirm that list provided by expert is up-to-date and complete
2. Identify publications relevant to the expert's opinions at issue

3. Explore opinions/conclusions from articles relating to the present action

viii. Prior testimony

1. Confirm that list provided by expert is up-to-date and complete
2. Identify prior testimony on topics related to the expert's opinions at issue
3. Ask expert about their *Daubert* history (note that many experts do not know whether they have been challenged in prior litigation)

ix. Seminars, speeches, and other qualifying events

h. Explore each of the expert's opinions individually

i. What is the substance of the expert's opinion?

ii. What documents/data/facts did the expert use in reaching his or her conclusions?

1. What are the sources of the documents/data/facts?
2. How did he or she rely on a particular document?
3. What are the important facts or data contained in each document relied on?
4. How does each document/fact/data work into the overall opinion?
5. Are there any additional documents or pieces of information that would be helpful in generating an opinion?
6. What types of documents and data does the expert normally rely on in reaching a conclusion?
7. Did counsel provide the expert with any other information not contained in the expert report?
8. Did counsel provide any direction to aid the expert in reaching his or her conclusions?
9. What did the expert know about the litigation positions of the parties before forming his or her expert opinions?

iii. How did the expert use the documents/data to reach his or her conclusions?

1. What scientific tests or theories did the expert apply?
2. What experience is the opinion based on?
3. How did the expert apply the tests/theories/experience to the facts at hand?
4. Were there any factors not considered by the expert that he or she would normally consider in reaching these

types of conclusions?

5. What assumptions were required for the expert to reach his or her conclusions?
6. Any further investigation or research the expert intends to conduct?

iv. Apart from the opinions discussed so far in the deposition, is there any other opinion that the expert intends to offer?

i. Exploring Tests Methods and Theories

i. Has the expert authored any publications regarding the method used to reach his or her opinions?

ii. Does anyone else in the expert's field use this method to reach a conclusion?

iii. Are there any publications supporting the use of this method in the particular field?

iv. Has the method used been tested by others in the field?

v. Does the expert's methodology have a known error rate?

vi. What is the rate of error?

vii. What are elements that could cause erroneous results when using the expert's methodology?

viii. Is the method generally accepted in the relevant field?

1. On what does the expert base this assertion of acceptance?
2. Are there any authoritative texts in this regard?

ix. Are there critics or dissenters with respect to the scientific validity of the field in which the expert is providing opinion testimony?

x. Is the expert testimony at issue the product of research conducted independent of the litigation or was it developed expressly for purposes of testifying?

j. Further Testimony

i. Are there any other tests or calculations that the expert believes could or should be done to improve or clarify his or her conclusions?

ii. Are there any additional facts or data that the expert believes would warrant a modification or clarification of their conclusions?

iii. Does the expert intend to perform the additional tests or calculations or acquire the additional facts or data?

21.31 "Shell" Pleading in Support of a *Daubert* Motion.

Use of Form: The "Shell" Pleading in Support of a *Daubert* Motion in this section provides a starting point for the preparation of a memorandum or brief in support of a *Daubert* motion. The expectations and requirements for the length, form and content of pleadings vary from jurisdiction to jurisdiction and sometimes between judges within the same jurisdiction. Thus, counsel should consider this shell pleading a guide only. Specific information about the expert being challenged and the case in which the challenge is being made will be required in any memorandum or brief in support of a *Daubert* motion. The argument section in the shell pleading will need to be changed or expanded in accordance with the focus of counsel's particular *Daubert* challenge. Before utilizing the citations contained in the shell pleading, counsel must verify the current state of the law in the jurisdiction where the *Daubert* motion will be filed. Moreover, even if the law in the relevant jurisdiction is as set forth in the shell pleading, counsel would be well advised to utilize the most current decisions from the jurisdiction where the *Daubert* motion will be filed in counsel's motion and supporting material. The "Shell" Pleading in Support of a *Daubert* Motion, in this section, only should be used in jurisdictions where the *Daubert* standard has been adopted. It should not be used in jurisdictions that use the *Frye* standard or in jurisdictions that follow a state-specific rule governing the admissibility of expert testimony.

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

JOHN SMITH Plaintiff, vs. INSURANCE CO. Defendant.	No. _____

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO EXCLUDE PLAINTIFF'S EXPERT TESTIMONY

The testimony of Plaintiff's expert, _____, should be excluded because it plainly does not satisfy the requirements as set out in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and its progeny. Specifically,

[Briefly summarize the key points of your argument here].

Rules of Decision

As the party seeking to admit the expert opinions at issue, Plaintiff bears the burden of establishing the admissibility of that opinion testimony by a preponderance of the evidence. *See, e.g.*, Polski v. Quigley Corp., 538 F.3d 836,

841 (8th Cir. 2008). The admissibility of expert testimony is governed by Federal Rule of Evidence 702. That Rule provides that:

> 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.

Fed. R. Evid. 702.

The Supreme Court held in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993), that Rule 702 requires that the trial judge act as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149 (1999), the Supreme Court clarified that *Daubert* applies to all expert matters described in Rule 702. Thus, it is now well established that under *Daubert* and its progeny the Court must engage in a "flexible" inquiry to make sure that the expert's testimony is relevant and that it is based on reliable methodology. *Daubert*, 509 U.S. at 594–95.

An expert's testimony is relevant only if "it will assist the trier of fact to understand the evidence or to determine a fact in issue." To determine whether an expert's methodology is reliable *Daubert* suggested that trial courts consider whether an expert's technique or theory: (1) can be or has been tested; (2) has been subject to peer review and publication; (3) has a known or potential rate of error; and (4) has been generally accepted in the scientific community. *Daubert*, 509 U.S. at 593–95. Another key inquiry is "whether the expert is proposing to testify about matters growing naturally and directly out of research conducted independent of the litigation, or whether the expert's opinion has been developed expressly for purposes of testifying." Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1317 (9th Cir. 1995) ("*Daubert II*"); *see also* Presley v. Lakewood Eng'g & Mfg. Co., 553 F.3d 638 (8th Cir. 2009). Where the proffered expert testimony is not based on independent research, Plaintiff must come forward with other verifiable evidence that the testimony is based on scientifically valid principles, such as proof that the research has been subjected to scientific scrutiny through peer review or publication. *Daubert II*, 43 F.3d at 1317.

The above factors are not a "definitive checklist or test." *Daubert*, 509 U.S. at 593. Later decisions confirmed that the considerations set forth above, now loosely known as the "*Daubert* factors," do not necessarily or exclusively apply to all experts or in every case. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141–42 (1999). Other factors that trial courts have considered include whether the expert's opinion:

—rules out "other possible causes" for the matter that is the subject of the expert's testimony, Claar v. Burlington N. R.R. Co., 29 F.3d 499, 502 (9th Cir. 1994);

—involves "too great an analytical gap" from the data upon which it is based, General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997);

—is in a field "known to reach reliable results for the type of opinion the expert would give," *Kumho*, 526 U.S. at 151 (noting that generally accepted methodologies in astrology and necromancy nonetheless do not result in admissible expert opinions); and

—is based on "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152.

Where the expert witness is "relying solely or primarily on experience, [they] must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee's notes. Otherwise their "opinions" amount to nothing more than inadmissible "*ipse dixit* of the expert." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

It is settled law that "[e]xpert testimony on legal matters is not admissible." Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc., 320 F.3d 838, 841 (8th Cir. 2003). As a consequence, experts may not testify on the meaning or effect of contracts. *See, e.g.,* United States ex rel. Compton v. Midwest Specialties, Inc., 142 F.3d 296, 301–02 (6th Cir. 1998) (upholding exclusion of expert who would have testified concerning the proper interpretation of contract). In fact, even when testimony is not purely legal in nature, it still is subject to exclusion if it is so couched in legal conclusions that it supplies the fact finder with no information other than what the witness believes the verdict should be. *See, e.g.,* Hogan v. AT&T, 812 F.2d 409, 411 (8th Cir. 1987).

Exclusion of expert witness testimony is also warranted where the expert's "opinions" are nothing more than an attempt to validate a party's view of disputed facts and bolster their witnesses' credibility, *see, e.g.,* Westcott v. Crinklaw, 68 F.3d 1073, 1076 (8th Cir. 1995); Bachman v. Leapley, 953 F.2d 440, 441 (8th Cir. 1992), or are nothing more than inferences and conclusions drawn from the record. *See, e.g.,* United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991), *mandate recalled and amended on unrelated technical issue,* 957 F.2d 301 (7th Cir. 1992). Similarly, "testimony which essentially simply vouches for the truthfulness of another witness is impermissible." U.S. v. Velarde, 214 F.3d 1204, 1211 (10th Cir. 2000).

Under these standards, Plaintiff's proffered expert testimony in this case is improper and Defendant's motion to exclude this testimony should be granted.

The Testimony of Plaintiff's Expert Should Be Excluded

[Describe the proposed testimony of the expert and the reasons why that testimony fails to meet the standards set out above].

Conclusion

For the reasons set forth above Defendant respectfully suggests that the

Court should grant Defendant's motion to exclude the testimony of Plaintiff's expert, _____.

[Signature Block]

21.32 "Shell" Pleading in Support of a *Frye* Motion.

Use of Form: The "Shell" Pleading in Support of a *Frye* Motion in this section provides a starting point for the preparation of a memorandum or brief in support of a *Frye* motion. The expectations and requirements for the length, form and content of pleadings vary from jurisdiction to jurisdiction and sometimes between judges within the same jurisdiction. Thus, counsel should consider this shell pleading as a guide only. Specific information about the expert being challenged and the case in which the challenge is being made will be required in any memorandum or brief in support of a *Frye* motion. The argument section in the shell pleadings will need to be changed or expanded in accordance with the focus of counsel's particular challenges to the expert at issue. Before utilizing the citations contained in the shell pleading counsel **must** verify the current state of the law in the jurisdiction where the *Frye* motion will be filed. Moreover, even if the law in the relevant jurisdiction is as set forth in the shell pleading, counsel would be well advised to utilize the most current decisions from the jurisdiction where the *Frye* motion will be filed in counsel's motion and supporting material. The "Shell" Pleading in Support of a *Frye* Motion, in § 21.32, only should be used in jurisdictions where the *Frye* standard has been adopted. It should not be used in jurisdictions that use any version of the *Daubert* standard or in jurisdictions that follow a state-specific rule governing the admissibility of expert testimony.

IN THE CIRCUIT COURT
_____ JUDICIAL CIRCUIT
_____ COUNTY, [STATE]

JOHN SMITH Plaintiff, vs. INSURANCE CO. Defendant.	No. _____

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO EXCLUDE DEFENDANT'S EXPERT TESTIMONY

The testimony of Defendant's expert, _____, should be excluded because it plainly does not satisfy the requirements as set out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) and its progeny. Specifically,

[Briefly summarize the key points of your argument here].

Rules of Decision

Expert testimony is not admissible unless it satisfies the standards first expressed in Frye v. United States, 293 F. 1013, 54 App. D.C. 46 (D.C. Cir. 1923); People v. McKown, 924 N.E.2d 941, 944 (Ill. 2010). Under the *Frye* standard scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *McKown*, 924 N.E.2d at 944; *see also* Agnew v. Shaw, 823 N.E.2d 1046, 1052 (Ill. App. Ct. 2005). Though the *Frye* "general acceptance" does not require universal acceptance it does require that the underlying method used to generate an expert's opinion be relied upon by other experts in the relevant field. *McKown*, 924 N.E.2d at 944.

As the proponent of _____'s expert testimony, Defendant has the burden to prove general acceptance of the scientific principles upon which that testimony is based by surveying scientific publications, judicial decisions or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists. State of Illinois v. Canulli, 792 N.E.2d 438, 444 (Ill. App. Ct. 2003). Defendant cannot meet that burden here.

The Testimony of Defendant's Expert Should Be Excluded

[Describe the proposed testimony of the expert and the reasons why that testimony fails to meet the standards set out above].

Conclusion

For the reasons set forth above, Plaintiff respectfully suggests that the Court should grant Plaintiff's motion to exclude the testimony of Defendant's expert, _____.

[Signature Block]

§ 21.33 Checklist: Selecting and Working With Expert Witnesses in Insurance Litigation

Expert Insights:

Jeff Thomas, University of Missouri-Kansas City School of Law

One of the most common mistakes made with expert witnesses is waiting too long to retain the expert consultant/witness. Although discovery is important to provide the factual basis for expert analysis, an expert consultant may help to identify key legal issues and give direction about discovery that can make the expert witness statement more valuable. Many experts in insurance coverage cases end up testifying to conclusions of law, and therefore may be stricken or not allowed into the record. This is a serious risk in coverage cases. On the other hand, while the expert witness report or affidavit may be rejected by the court as invading the province of the court, the process of reviewing and ruling on the expert witness report or affidavit may provide persuasive support

to the party's position and may have some persuasive effect. In addition, expert reports or affidavits from credible and well-credentialed witnesses may be persuasive enough to assist in reaching a settlement prior to trial regardless of whether the evidence would be allowed.

☐ Evaluate need for expert witnesses and related discovery at outset of case.

- ○ Determine as soon as practicable all areas on which expert testimony might be helpful, if not required.
- ○ Review elements of claims and defenses asserted in lawsuit and assess whether technical information or specialized knowledge provided by expert witness would assist in presenting case at trial or on summary judgment.
- ○ Determine whether to engage expert solely as consultant to case.
- ○ Perform cost benefit analysis based on estimated cost of expert and benefit to case.

Cross References: §§ 21.02, 21.06, 21.07 above.

☐ Determine whether to engage expert solely as consultant to case.

- ○ Use consultant to identify particular areas of expertise to engage expert testimony.
- ○ Use consultant to review and develop strategies with respect to reports, affidavits and testimony of testifying experts.
- ○ Consider general protection against discovery of facts known or opinions held by expert consultants.
- ○ Obtain advice from consulting or internal experts about topics and suggestions for locating prospective expert witnesses.

Authority: Fed. R. Civ. P. 26(b)(4)(D) (expert consultant discovery).

Cross References: §§ 21.02, 21.07, 21.09 above.

☐ Consider use of fact witness as expert witness.

- ○ Determine whether fact witness is qualified to testify as expert.
- ○ Determine whether fact witness offering expert opinion testimony will require compliance with expert testimony disclosure and discovery rules.
- ○ Determine whether fact witness' expert testimony will be excluded at trial if not revealed during discovery.

Authority: James River Ins. Co. v. Rapid Funding, LLC, 658 F.3d 1207 (10th Cir. 2011); Andrew v. Hurh, 824 N.Y.S.2d 546 (N.Y. App. Div. 2006).

Cross References: § 21.07 above.

☐ Distinguish where expert testimony is and is not appropriate.

- ○ Consider following matters are appropriate for expert testimony:
  - Bad faith issues.
  - Technical policy language.
  - Industry custom and practice.
  - Lost policies.
  - Foreign laws and regulations.
  - Causation.

  Consider following matters are not appropriate for expert testimony:
- ○ Testimony concerning law.
- ○ Non-technical policy language.
- ○ Current state of law.
- ○ Breach of duty.

Authority: Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1016–1017 (9th Cir. 2004); Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1218 (2004).

Cross References: §§ 21.02, 21.04, 21.05 above.

☐ Determine how applicable rules and applicable case law will affect use of expert testimony.

- ○ Consider whether expert will be used as rebuttal witness and/or as witness in case-in-chief.
- ○ Learn applicable substantive law that governs admissibility of expert testimony in jurisdiction where suit is pending.

Authority: Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Cross Reference: § 21.18 above.

☐ Search for potential expert witnesses.

- ○ Obtain, if client is or has available someone who can serve as consulting expert as early as possible in case preparation.
- ○ Search for and investigate potential expert witnesses through professional organizations in which prospective experts might be members.
- ○ Consider utilizing fee-based online services to search for and investigate prospective opposing expert witness.

- ○ Consider engaging expert witness service to assist in search for and investigation of potential expert witnesses.

Cross Reference: §§ 21.02, 21.08, 21.07 above.

☐ Conduct conflicts check before interviewing potential expert witnesses.

- ○ Determine whether potential expert has already interviewed with opposing counsel.
- ○ Forgo interviewing expert if risk of eliciting privileged information could lead to being barred from further representation in case.

Authority: County of Los Angeles v. Superior Court, 222 Cal. App. 3d 647 (Cal. Ct. App. 1990).

Cross References: § 21.27 above.

☐ Investigate potential experts.

- ○ Check LexisNexis for prior decisions involving potential expert witnesses.
- ○ Investigate the published works, prior testimony and general background of potential expert witnesses using general Internet search.
- ○ Investigate potential experts using resources available to attorneys, such as expert witness data available through the American Association for Justice and the Defense Research Institute, as well as resources available through state level bar organizations.
- ○ Review how other members of expert's firm have testified on subject.
- ○ Research how the judge treats particular experts and particular areas of proposed expert testimony.

Cross References: §§ 21.02, 21.08, 21.07, 21.09 above.

☐ Obtain information directly from all potential expert witnesses.

- ○ Obtain conflict information.
- ○ Obtain curriculum vitae.
- ○ Obtain publication list.
- ○ Obtain list of "informal" but potentially relevant and/or damaging publications, such as internet postings.
- ○ Obtain listing of prior testimony.
- ○ Obtain pricing information from all prospective experts.

Cross References: §§ 21.02, 21.07–21.09, 21.12–14, 21.26–30 above.

☐ Work with consulting experts.

- ○ Before communicating in any substantial way with expert, be aware communication might be discoverable.

- Instruct experts explicitly and in writing to preserve all documents, data and electronic information, regardless of whether he or she considers it germane, until counsel instructs otherwise.
- Instruct experts to treat all communications, including electronic communications, as though they are discoverable.

Cross References: §§ 21.12, 21.13, 21.14, 21.15, 21.26 above.

Related Master Checklist: § 21.03 above.

Other Related Checklist:

§ 21.34 Checklist: Managing Expert Discovery, Disclosure and Depositions in Insurance Litigation, below.

§ 21.34 Checklist: Managing Expert Discovery, Disclosure and Depositions in Insurance Litigation

Expert Insights:

Jeff Thomas, University of Missouri-Kansas City School of Law Use of expert witnesses in insurance coverage cases is become more and more common. Although the disclosure of experts often comes during a very busy time, often close to the close of discovery, time and energy should be reserved to investigate expert witnesses. Useful impeachment material in prior cases or in the expert's writings is often missed because the attorneys involved do not take the time to undertake a thorough investigation. In addition, attorneys often do not take full advantage of the expertise of their expert witnesses by having them review others' reports and asking them to prepare rebuttal reports. While the time and the expense associated with these efforts must be weighed in light of all of the circumstances of the case, these efforts can provide an extra edge in the case that may be worth the investment.

☐ Create initial expert witness disclosure and discovery plan.

- Determine which experts to disclose in course of discovery.
- Serve written discovery requests, as soon as permissible, seeking all information regarding opponent's experts.
- Do not ask for information in discovery requests that is not allowed under applicable procedural rules.
- Comply with scope of applicable procedural rules of discovery.

Cross References: §§ 21.10, 21.13, 21.14, 21.28, 21.29 above.

Related Checklist: § 20.16 Checklist: Preparing for Discovery in Lost Policy Claims and Policy Interpretation Disputes, above.

☐ Comply with mandatory disclosure requirements for testifying expert witnesses.

- Determine whether applicable jurisdiction requires mandatory disclosure.
- Disclose identification of expert or experts.

- ○ Disclose written expert report prepared and signed by expert.
- ○ Comply with deadlines to disclose required expert information.
  - Review local court rules to determine any scheduling requirements or restrictions.
  - Schedule disclosure deadline to allow sufficient time to acquire relevant documents from opposing counsel and to allow sufficient time to review expert disclosures.
- ○ Ensure expert's report contains full statement of every opinion on which expert will testify at trial.
- ○ Verify that basis for each of expert's opinions is contained in expert's report.
- ○ Determine that expert's report contains all data and documents upon which expert relied.
- ○ Confirm that expert's report has attached to it all exhibits that expert intends to use at trial.
- ○ Confirm that expert's qualifications are included with expert's report.
- ○ Confirm that expert's list of relevant publications within preceding ten years is included with expert's report.
- ○ Confirm that any compensation paid to expert is included with expert's report.
- ○ Confirm that expert's prior testimony for disclosure period required by court is included with expert's report.

Authority: Fed. R. Civ. P. 26(a)(2)(B).

Cross References: §§ 21.12, 21.16, 21.21, 21.24, 21.25 above.

☐ Use interrogatories where applicable jurisdiction does not require mandatory disclosures of expert witnesses.

- ○ Serve interrogatories requesting identification of opposing party's expert.
- ○ Consider whether opposing party has no duty to disclose existence of retained expert in interrogatories, if not specifically asked.

Cross Reference: § 21.13 above.

Form: § 21.28 above.

☐ Request documents for production to maximize discovery of documents exchanged between expert and counsel.

- ○ Request data and documents that expert used to form opinion.
- ○ Request any exhibits summarizing or supporting expert's opinion.
- ○ Request publications authored by expert.

- ○ Request previous drafts of expert's report.
- ○ Request all documents provided by opposing counsel to expert regardless of whether opposing expert relied on them.
- ○ Request all communications between expert and counsel.

Cross References: §§ 21.14, 21.19 above.

Forms: § 21.29 above.

☐ Review expert's report before disclosing it to opposing counsel.

- ○ Review expert's statement of opinions to ensure all opinions expert might testify about are included to avoid inadmissibility of expert's testimony on that issue.
- ○ Establish that report contains proper basis for expert's opinion to avoid inadmissibility of expert's testimony.
- ○ Establish that report includes data and documents used by expert to form opinion.
- ○ Review report to ensure all exhibits, expert's qualifications and list of publications are included.
- ○ Review report to ensure cases in which expert previously testified are included.
  - Review cases to ascertain prior challenges to expert's testimony.
  - Use information from prior cases to develop cross-examination questions for expert.
- ○ Ensure expert's compensation for testimony is included in report.

Authority: Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Scottsdale Ins. Co. v. City of Waukegan, 689 F. Supp. 2d 1018 (N.D. Ill. 2010); Nicholl v. Reagan, 208 N.J. Super. 644, 651–52 (App. Div. 1986).

Cross References: §§ 21.16, 21.18 above.

☐ Investigate opposition's expert witnesses.

- ○ Consult with experts and any consulting experts available to obtain their recommendations with respect to investigating opposing expert witness.
- ○ Analyze opposing expert's curriculum vitae.
- ○ Locate and review opposing expert's prior testimony.
- ○ Obtain and read opposing expert's prior relevant publications.
- ○ Check LexisNexis for prior decisions involving opposing expert.
- ○ Investigate and verify opposing expert's published works, prior testimony and general background information using Internet.
- ○ Investigate opposing expert witness using resources available to

attorneys, such as expert witness data available through American Association for Justice, Defense Research Institute, as well as resources through state level bar organizations.

- ○ Investigate opposing expert witness through professional organizations in which prospective expert witness might be member.

Cross References: §§ 21.02, 21.07, 21.08, 21.09, 21.20 above.

☐ Decide whether to depose opponent's experts.

- ○ Determine everything expert is likely to testify about at trial.
- ○ Elicit testimony for use at trial.
- ○ Develop factual record upon which to challenge admissibility or expert's testimony.

Cross References: §§ 21.17, 21.18, 21.19, 21.20 above.

☐ Schedule deposition of experts in accordance with agreement between parties, court plan or applicable federal and state rules.

- ○ Consider applicable federal procedures.
- ○ Consider applicable state procedures.
- ○ Consider date, place and time of depositions are under discretion of trial court, when parties can't agree.

Authority: Fed. R. Civ. P. 30(b); Trepel v. Roadway, Inc. 194 F.3d 708, 716 (6th Cir. 1999).

Cross Reference: § 21.18 above.

☐ Review substantive evidentiary laws applicable in jurisdiction that govern admissibility of expert testimony.

Authority: Fed. R. Evid. 701–705; Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Frye v. United States 293 F. 1013 (D.C. Cir. 1923).

Cross Reference: § 21.18 above.

Forms: §§ 21.31, 21.32 above.

☐ Prepare to depose opposition's expert witness.

- ○ Before deposing opponent's expert determine whether there are any sources of facts, data, information or opinions that experts use and that opposing expert might authenticate or otherwise validate.
- ○ Verify all discoverable communications between opposing expert witness and opposing counsel have been obtained.
- ○ Consider having witness confirm that his or her report contains full statement of every opinion on which expert witness will testify at trial.

- ○ Consider confirming that bases for each opinion contained in expert's report.
- ○ Consider verifying that report contains all data and documents upon which expert relied.
- ○ Consider verifying that report has attached to it all exhibits that expert intends to use at trial.
- ○ Consider whether to examine expert witness's qualifications.
- ○ Consider probing expert witness with respect to completeness of his or her list of publications and relevance of prior publications.
- ○ Consider examining expert regarding relevance of his or her prior testimony.
- ○ Consider inquiring about expert's electronically stored information pertinent to case, including communications with attorney who hired expert.
- ○ Inquire about any prior relationships between expert and parties and their counsel.
- ○ Have witness describe his or her compensation arrangement with respect to lawsuit at issue.

Authority: Fed. R. Evid. 701–705.

Cross References: §§ 21.12, 21.13, 21.14, 21.16, 21.20, 21.26, 21.27, 21.29, 21.30 above.

Form: § 21.30 above.

☐ Supplement expert witness disclosures in timely fashion when new information comes to light.

Authority: Fed. R. Civ. P. 26(e); Copeland v. Stebco Prods. Corp., 316 Ill. App. 3d 932, 940–44 (2000).

Cross References: §§ 21.26, 21.27 above.

Related Master Checklist: § 21.03 above.

Other Related Checklists:

§ 21.33 Checklist: Selecting and Working with Expert Witnesses in Insurance Litigation

§ 20.15 Checklist: Preparing For Discovery in General Insurance Litigation