

Expert Witnesses in Commercial Litigation

Andrew W. Hull
Jason L. Fulk
Hoover Hull Baker & Heath LLP
Indianapolis, Indiana

BIOGRAPHICAL INFORMATION

Andrew W. Hull is a founding partner with Hoover Hull Baker & Heath LLP. He practices in the areas of fiduciary and commercial litigation, ERISA and employment litigation, and insurance-related litigation. Andy represents Fortune 100 companies and mid-level businesses in class-action suits and business disputes involving breach of contract, business tort and trade secret claims. He also represents ERISA plans, fiduciaries, employers, individuals and insurance companies in all forms of employee benefit litigation, closely-held companies and their officers, directors and shareholders in business disputes, shareholder litigation, and officer/director litigation, and insurers in coverage, reinsurance, complex claim and regulatory matters.

Andy received his B.G.S. degree from the University of Michigan in 1981 and his J.D., *cum laude*, from the Indiana University School of Law – Bloomington in 1986. Andy served as an editor for the *Indiana Law Journal*.

Andy is a frequent speaker and author for continuing legal education seminars, including seminars sponsored by the Indiana Continuing Legal Education Forum. Andy is an active member of the Indianapolis, Indiana State, Seventh Circuit and American Bar Associations and the Litigation, Labor and Tort and Insurance Practice Sections. Andy is also a member of the Defense Research Institute, the Defense Trial Counsel of Indiana and the Indianapolis Law Club. Andy serves on the Alumni Board for Indiana University School of Law – Bloomington and the Advisory Board for the Entrepreneurship Law Clinic for Indiana University School of Law-Bloomington. Andy is an active supporting lawyer for the Hoosier Environmental Council and the Indianapolis Bar Association Homeless Project.

Jason Fulk is an associate with Hoover Hull Baker & Heath LLP. He practices in the areas of fiduciary and commercial litigation.

Jason attended the Indiana University Kelley School of Business - Bloomington, obtaining B.S. degrees with distinction in both Marketing and Computer Information Systems in 1998. Thereafter he was employed as a Management Consultant at PricewaterhouseCoopers LLP, where he advised Fortune 500 corporations regarding information technology deployment and business process improvement. He attended Indiana University Law School - Bloomington, earning his J.D. in 2004. There Jason served as a Managing Editor of the *Indiana Law Journal*. He interned for the Honorable Magistrate Tim A. Baker, United States District Court, Southern District of Indiana.

Jason is a member of the American, Seventh Circuit, Indiana State and Indianapolis Bar Associations. He is also a member of the Sagamore American Inn of Court and the Defense Trial Counsel of Indiana. Jason also volunteers for the Indiana Sports Corporation where he currently serves on a Local Organizing Committee for the United States Outdoor Track and Field Championships to be held in Indianapolis in June 2006.

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I. INTRODUCTION: THINKING ABOUT EXPERT TESTIMONY

Over the past few decades, there has been a tremendous growth of scientific research and specialized knowledge. Entire fields of research and knowledge have only recently come to exist. Due to the expanding international exchange of research, information and trade, the rapid growth of research and knowledge is almost certain to continue.

At the same time, our clients' commercial activities have become more complex, more specialized, and less familiar to the average person. For these reasons, when your clients' commercial activities are the subject of litigation, you should consider using an expert to help you prepare for trial or to offer testimony that will assist the judge or jurors. You should always consider using expert witnesses when it may be necessary to educate a judge or jurors about complex or unfamiliar matters.

When considering expert testimony, you must refer to the Indiana Rules of Evidence which were adopted by the Supreme Court of Indiana effective January 1, 1994. Make particular note of Rules 702, 703, 704, 705, 612 and 104 for evidentiary considerations when sponsoring or opposing expert testimony.

The Indiana Rules of Evidence bear many similarities to the Uniform Rules of Evidence ("URE") and the Federal Rules of Evidence ("FRE"). When researching evidentiary issues, you should compare the particular Indiana Rule of Evidence with the language in the comparable URE and FRE rules before relying on case law or commentary construing those rules for authority. *See Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995) (holding federal evidence law of *Daubert* and its progeny are helpful in applying Indiana Evidence Rule 702). In addition, the advisory committee to the Supreme Court of Indiana presented both proposed rules and proposed commentary to the Court for its consideration. Although the Court made changes to the

proposed rules prior to adoption and did not adopt the proposed commentary, the Court advised “[p]ractitioners may find the published committee proposal and its commentary helpful as history but should exercise care in its use” Order on Adoption of the Indiana Rules of Evidence, 615 N.E.2d XXXIII (1993). The advisory committee’s proposed rules and commentary were printed in the West Publishing Co. advance sheets at 612 N.E.2d LXIX (1993).

Expert witnesses may testify if their scientific, technical or specialized knowledge will assist the judge or jurors in understanding the evidence or deciding an issue. Rule 702 of the Indiana Rules of Evidence provides instruction:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, . . . an expert . . . may testify thereto in the form of an opinion or otherwise.

Ind. R. Evid. 702(a).

This rule permits the use of expert testimony whenever it will assist, or be helpful to, the judge or jurors. The common law rule that expert testimony would be excluded if jurors could be expected to draw their own inferences or conclusions has been rejected in Indiana and under the Federal Rules of Evidence. See J. Tanford, *Indiana Trial Evidence Manual*, § 42.05, p. 241 (3rd ed. 1993); see also 3 J. Weinstein and M. Berger, *Weinstein Evidence*, ¶ 702 [02], pp. 702-15 and 16 (1994) (“[E]ven when jurors are equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on a same issue which would be helpful.”).

To assist the judge or jurors, an expert’s opinion must describe more than mere scientific or technical “possibilities.” In order to have probative value, an expert’s opinion must quantify a degree of certainty of opinion. *K-Mart Corp. v. Beall*, 620 N.E.2d 700, 706 (Ind. Ct. App. 1993)

(“While evidence of mere ‘possibility’ is not adequate . . . we do not exclude relevant evidence that has some probative value.”).

In your initial conferences with a client, you should explore areas in which expert testimony might be of assistance to the judge or jurors. Areas in which expert testimony should be considered include:

- describing complex scientific or technical terms or phenomena;
- defining industry terms or the industry’s meaning of contract terms;
- describing industry custom and practice;
- describing compliance with, or deviation from, an industry, trade or professional standard of care;
- describing product safety or design issues;
- rebutting anticipated expert testimony by the opponent on an issue on which the opponent bears the burden of proof; and
- providing economic, valuation and other damages analyses.

If you are likely to need expert testimony, you should retain an expert as soon as practicable. Discuss with your client the reasons to retain an expert, the expert’s roles and the anticipated costs. Do not surprise the client on the eve of trial with a demand that the client hire what maybe perceived to be another expensive professional. By addressing these issues at the outset of the representation, you can address any resistance by the client to cooperate with or compensate an expert.

By retaining an expert early in the process, you can take full advantage of the knowledge and skills the expert possesses. Experts can provide valuable assistance in developing legal theories, pleadings, trial themes, discovery strategies, dispositive motion bases and demonstrative exhibits. The formal and informal opinions of experts can be crucial to the

informed assessment of the strength or weakness of a client's case and an early settlement posture.

II. DEFINING THE EXPERT

A witness may qualify to testify as an expert by reason of his or her (i) knowledge, (ii) skill, (iii) experience, (iv) training, or (v) education. Ind. R. Evid. 702(a).¹ Because a witness may become qualified under any of the aforementioned conditions, there is no requirement of formal training or education. *See Messer v. Cerestar USA, Inc.*, 803 N.E.2d 1240, 1248 (Ind. Ct. App. 2004) (Rule 702 does not require an expert to have formal training); *Landau v. Bailey*, 629 N.E.2d 264, 267 (Ind. Ct. App. 1994) (expert may be qualified by practical experience, as well as by formal training). There is no fixed standard to determine whether a witness is sufficiently qualified as an expert to render opinion testimony. *See Smith v. Yang*, 829 N.E.2d 624, 626-27 (Ind. Ct. App. 2005) (no precise quantum of knowledge required); *Corbin v. State*, 563 N.E.2d 86, 93 (Ind. 1990). The decision whether a witness is qualified, as an expert is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 308 (Ind. Ct. App. 2004); *see also Gen. Electric Co. v. Joiner*, 522 U.S. 136 (1997) (holding that federal trial court rulings are also subject to an abuse of discretion standard).

For a witness to qualify as an expert, two requirements must be met. These requirements are: (1) “the subject matter must be distinctly related to some scientific field, business, or profession beyond the knowledge of the average layperson”; and (2) “the witness must be shown to have sufficient skill, knowledge, or experience in that area so that the opinion will aid the trier

¹ Under Federal Rule 702, a witness may be qualified to testify “as an expert by knowledge, skill, experience, training, or education” if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]”

of fact.” *Norfolk Southern Railway Co. v. Estate of Wagers*, 833 N.E.2d 93, 102 (Ind. Ct. App. 2005).

An expert need not be formally schooled to qualify as an expert. Rather, an expert can be qualified based on the expert’s practical experience. *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000) (finding that a licensed practical nurse who had worked in a nursing home for nine years was qualified as an expert to assess the mental state of one of the nursing home patients); *Marks v. Gaskill*, 546 N.E.2d 1245 (Ind. Ct. App. 1989) (finding that a police officer was qualified to give expert testimony on the cause of an accident after serving 19 years in the police department, most of which time he investigated automobile accidents and during which time he took numerous refresher courses in accident investigation); *Landau v. Bailey*, 629 N.E.2d 264 (Ind. Ct. App. 1994) (finding that an accountant was qualified as an expert in evaluating a business, even though he was not a Certified Public Accountant). However, if the expert’s testimony is based upon skill or experience, the proponent must demonstrate that “the subject matter is related to some field beyond the knowledge of lay persons and that the witness possesses sufficient skill, knowledge or experience in the field to assist the trier of fact to understand the evidence or to determine an issue of fact.” *Norfolk*, 833 N.E.2d at 102.

Expert qualifications have been challenged on the grounds that the subject on which the expert seeks to testify is not truly a science, and, thus, inadmissible under Rule 702 analysis. In Indiana, social sciences which employ the scientific method, such as economics and psychology, are treated the same as traditional “hard” sciences for Rule 702 purposes. *See Ollis v. Knecht*, 751 N.E.2d 825, 829 (Ind. Ct. App. 2001) (citing *Time Warner Entm’t Co., L.P. v. Whiteman*, 741 N.E.2d 1265, 1273-75 (Ind. Ct. App. 2001), to demonstrate that cost accounting is a proper subject of scientific expert testimony).

Assuming an expert's opinion is based on a recognized field of "science," it must be limited to the general scientific field(s) in which he or she is qualified to testify. *Lytle*, 814 N.E.2d at 308. *See* Part VI.A *infra*. However, once a witness's competency as an expert has been determined by his or her knowledge of the subject matter generally, the knowledge of specific subject inquiry goes to the weight to be accorded his or her opinion. *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453, 461 (Ind. 2001). As discussed in Part VI *infra*, once the witness is qualified as an expert, the proponent of his or her testimony must then establish the "foundation and reliability of the scientific principles upon which the expert's testimony is based." *Norfolk*, 833 N.E.2d at 101-02.

III. FINDING AND RETAINING AN EXPERT

Be imaginative and resourceful when attempting to locate an expert. You should apply the same energies and skills that you use to conduct thorough witness interviews and legal research when you search for and decide upon an expert witness.

The starting place is always with your client. Your client can be a tremendous resource for identifying potential experts or referral sources. Other referral sources for experts include:

- other counsel that practice predominately in the areas presented in the litigation;
- other experts (with each expert that you interview, discuss other possible experts);
- trade, industry and scientific journals and publications;
- universities, colleges and trade schools;
- reported decisions involving similar commercial activities; and
- online expert referral directories, including JurisPro (<http://www.jurispro.com>), FindLaw (http://marketcenter.findlaw.com/expert_witnesses.html) and ExpertLaw (<http://www.expertlaw.com>).

After developing a pool of eligible experts from which to choose, you should, prior to engagement, personally interview these candidates with the client. At the meeting, you should fairly recite the pertinent facts and, if necessary, pertinent *non*-privileged documents. You should explore with the candidate the areas in and means by which the candidate believes he or she may be of assistance. Involving the client in this process can greatly serve to enhance both the client's and counsel's understanding of the technical areas of the case, and to build a positive relationship between the client and the candidate.

Consider the following steps when evaluating a candidate:

- Consider the impact that a local witness will have on the judge or jurors. Whenever possible, make use of local witnesses—e.g., Purdue University engineers, Indiana University economists, or witnesses from local businesses and industry.
- Carefully review the candidate's resume. Education and experience should be scrutinized for relevance and accuracy.
- Explore whether the qualification requirements of Ind. R. Evid. 702(a) are satisfied and how the expert might fare in a battle of credentials with an adversary's expert—e.g., knowledge, skill, experience, training or education.
- Explore the degree to which the candidate's qualifications relate to specific areas in which the expert will consult and may provide testimony.
- Determine the existence of any possible bias or conflict—e.g., with parties, potential witnesses, counsel or industry participants.
- Review whether circumstances exist that might be used to impeach the candidate—e.g., past crimes, prior lawsuits, military history, substance abuse, health, employment criticism or discharge, or academic dishonesty charges.
- Confirm the availability and willingness of the candidate to study, provide assistance, prepare demonstrative evidence and prepare for testimony.
- Assess the candidate's enthusiasm for and commitment to the client's cause.
- Read and discuss potentially relevant past writings and testimony of the candidate.

- Explore cases in which the candidate served as a mediator, umpire or arbitrator.
- Discuss the candidate's compensation and the terms of a retainer agreement.
- Discuss the candidate's past deposition and courtroom experience.
- Discuss those cases in which the candidate was qualified or not qualified to testify as an expert.
- Assess the candidate's ability to communicate clearly and with a minimum of technical jargon.
- Assess the candidate's appearance, charisma and sincerity.
- Check references provided by the candidate and check with counsel who have recently employed the candidate.

An expert should be engaged by counsel under the terms of a written retainer agreement.

That agreement should retain the expert initially as a consultant, leaving open the possibility that the expert may become a testifying expert at a later time. The agreement should detail the activities expected of the expert, including anticipated research, document review, assistance to counsel and possible testimony. The expert should receive reasonable compensation for his or her time and effort, not premised on the outcome of the litigation or any particular opinion to be rendered. The terms of the retainer agreement should state that the relationship is one that would permit counsel to take full advantage of the work product privilege under Indiana Rule of Trial Procedure 26(B).

In initial conferences with the expert, describe the case and ask where the expert can be of greatest help. Learn from the expert that information and documentation that he or she believes will be necessary to form an opinion. Be certain to obtain a budget from the expert for all activities.

With respect to the expert's efforts at forming an opinion, place the expert at ease. Advise the expert that you and your client are seeking a well-grounded, honest opinion within a

reasonable degree of scientific certainty. You need, and your client deserves, an independent evaluation of the case. Keep in mind that it is the expert's own opinions (not the opinions urged by counsel or the client) that he or she will most vigorously defend on cross examination. Do not forget to explain the discovery process to the expert. In most instances, the expert witness should not prepare notes, memoranda or preliminary drafts of opinions without the prior knowledge and consent of counsel. These papers can be discoverable and might serve as a fruitful source of material to cross-examine the expert witness.

IV. DISCOVERY OF EXPERTS

Under Indiana Rule of Trial Procedure 26(B)(4) and Federal Rule of Civil Procedure 26(b)(4), experts may be divided into four classes receiving different treatment under the discovery rules: (1) testifying experts; (2) non-testifying experts retained in anticipation of litigation; (3) non-testifying experts informally consulted in preparation for trial but not retained; and (4) experts whose information was not acquired in preparation for trial. The discovery tools available for each category of expert is discussed below.

A. Testifying Experts

A testifying expert witness and counsel should expect to turn over during trial discovery not only the opinions that the expert has, but also all of the materials furnished to the expert which are used in forming those opinions. Under the Indiana Rules of Trial Procedure, an opponent may learn by interrogatories the names of testifying experts and the substance of their testimony. Further discovery, including the deposition upon oral examination of an expert, can only be had on motion and court order. Ind. R. Tr. P. 26(B)(4)(a). However, prior to trial one has the ability to remove an expert who was to testify to protect his or her opinions from discovery. *See Reeves v. Boyd & Sons, Inc.*, 654 N.E.2d 864, 874-75 (Ind. Ct. App. 1995).

Under the Federal Rules, far broader discovery is permitted. Under the disclosure rule contained at Fed. R. Civ. P. 26(a)(2), counsel must make extensive disclosures about an expert witness's activities and qualifications. An expert's report, signed by the expert, is also required. Under Fed. R. Civ. P. 26(b)(4), a discovery deposition of a testifying expert is permitted and the party seeking discovery must pay the expert a reasonable fee. Always check federal court local rules for practices regarding expert witness discovery.

If you retain an expert witness who will testify at trial, you must be cautious to the possibility that all communications with the expert and the materials provided to the expert may be discoverable. This would include not only documents that are provided to the expert by counsel, but also comments provided by counsel to the expert, as well as the expert's draft reports, notes, and other written comments. The following sections address a few of these areas which have received recent attention in courts in further detail.

1. Discoverability of Attorney Work Product Provided to an Expert

Courts have differing views as to whether attorney work product that has been disclosed to a testifying expert is discoverable. One line of thought is that Rule 26 requires the disclosure of all information shared with a testifying expert, including mental impressions and opinions of the attorney. Courts that have found the attorney work product privilege waived include both the Southern and Northern Districts of Indiana. For example, in *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 647 (S.D. Ind. 2000), the court held, "An intentional disclosure of opinion work-product to a testifying expert effectively waives the work-product privilege." It reasoned that "an attorney should not be permitted to give a testifying expert witness a detailed 'road-map' for the desired testimony without also giving the opposing party an opportunity to discover that 'map' and cross-examine the expert about its effect on the expert's opinions in the case." *Id.* Additionally, in *Karn v. Ingersoll-Rand*, 168 F.R.D. 633, 635 (N.D. Ind. 1996), the

court determined that attorney work product given to an expert was information that had been considered in the forming of the expert's opinion; thus, it had to be disclosed. *See also TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585 (S.D. Miss. 2000) (affirming Magistrate's denial of a protective order that was sought to protect correspondence between expert witnesses and counsel as attorney work product); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302 (W.D. Va. 1998) (in finding that work product turned over to a testifying expert was discoverable, the court reasoned that if the attorney wanted to maintain the privilege he or she could provide the expert with all relevant facts rather than directing the expert to certain facts and the opinions and conclusions of the attorney).

On the other hand, a number of courts have concluded that the opinions and conclusions of attorneys are still protected even after they are disclosed to testifying experts. *See, e.g., Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627 (E.D.N.Y. 1997) (holding "the data or other information considered by an expert witness in forming his opinions required to be disclosed in the expert's report mandated under Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product considered by an expert." (internal citations omitted)); *Krisa v. Equitable Life Assurance Soc'y*, 196 F.R.D. 254, 260 (M.D. Pa. 2000) ("Adopting a 'bright-line' rule in favor of mandating production of attorney work product, while increasing the potential for a party to effectively cross-examine an opponent's expert, abridges the attorney work product privilege without specific authority to do so."); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294 (W.D. Mich. 1995) (concluding the protection given to attorney's work product was intended to apply to disclosures to testifying experts).

State courts in Indiana have not reported a decision on the topic. As such, the safest path is to provide a testifying expert with only that which you would be comfortable producing to your opponent.

What is clear is that a party must produce attorney work product relied on by an expert to refresh his or her memory prior to or while testifying. Indiana Rule 612 provides:

- (a) While Testifying. If, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.
- (b) Before Testifying. If, before testifying, a witness uses a writing or object to refresh the witness's memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.
- (c) Terms and Conditions of Production and Use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Ind. R. Evid. 612.

In its proposed commentary, the advisory committee described the interplay between the work product protections and the operation of Rule 612, as follows:

Indiana Trial Rule 26(B)(3) provides that materials which qualify as work product are discoverable only upon a showing that the party seeking discovery has substantial need of the materials in preparation of their case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. When a witness has used such materials to actually refresh their recollection prior to testifying, Rule 612 weighs the balance in favor of finding that the "substantial need" exists, because of the policy in favor of effective cross examination. *See In re Comair Air Disaster Litigation*, 100 F.R.D. 350 (E.D. Ky. 1983).

When the requirements of this Rule to disclose materials used to refresh recollection conflicts with the protections afforded by the attorney-client privilege and the work product doctrine, the weight of authority holds that Rule 612 prevails. *S & A Painting Co., Inc. v. O.W.B. Corp.*, 103 F.R.D. 407 (W.D. Pa. 1984).

2. Discoverability of Draft Expert Reports or Opinions

It should be assumed that all drafts of expert reports, as well as any notes and/or comments that are contained in such drafts, are discoverable. Whether the comments and communications between counsel and testifying experts are discoverable is an issue that has split courts. Many courts hold that all communications between counsel and testifying experts are discoverable; others come to the opposite conclusion. In jurisdictions where all communications between counsel and testifying experts are discoverable, litigants are often advised to retain separate consulting experts with whom counsel may exchange ideas without the threat of discovery.

There are no reported Indiana cases addressing the issue of the discoverability of drafts created by testifying experts; however, federal courts have found these drafts discoverable. Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires that a testifying expert provide a written pre-trial report containing a complete statement of all the “data or other information considered by the [expert] witness” in the report. In both *Trigon Ins. Co. v. United States*, 234 F. Supp. 2d 581 (E.D. Va. 2001) and *W.R. Grace & Co.-Conn. v. Zotos Intern., Inc.*, No. 98-CV-838S, 2000 WL 1843258 (W.D.N.Y. Nov. 2, 2000), the courts found that drafts of reports by a testifying experts were discoverable, and deliberate destruction of those reports constituted spoliation which led to sanctions. Additionally, the Seventh Circuit in *Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005), stated that while an expert is not required to retain every “scrap of paper that he created in the course of his preparation,” an expert is required to retain those documents “that would be helpful to an

understanding of his expert testimony or that the opposing party might use in cross-examination.”

As a result of the concerns with discoverability of communications between counsel and expert(s), there are certain suggestions that careful counsel is advised to make when retaining an expert. First, counsel should point out to the expert that everything the expert writes or receives is potentially discoverable. The expert should be cautioned to not throw away or purge any materials received, nor should the expert discard anything that he prepares. Second, cautious counsel will probably advise the testifying expert to prepare nothing in writing until counsel requests a written document. In order to protect himself and his client, counsel should instruct testifying experts to be cautious about the regular purging of electronic documents, which can result in inadvertent destruction of written materials with consequent spoliation of evidence claims by the opponent in litigation. Third, lawyers and experts should both be conscious that all notes of conversations between them may be discoverable, so lawyers and experts should be cautious in taking notes. Fourth, cautious lawyers should greatly limit any written communications with testifying experts, since it must be presumed that such communications will be disclosed during the discovery process. This would include drafts of expert reports.

B. Non-Testifying Experts Retained in Anticipation of Litigation

Except as provided in Indiana Trial Rule 35, providing for discovery from an attending physician, the facts known and opinions held by non-testifying experts retained in anticipation of litigation can only be discovered upon a showing of exceptional circumstances. *See* Ind. R. Tr. P. 26(B)(4)(b) and Fed. R. Civ. P. 26(b)(4)(B).

Indiana counsel should be aware of the decision in *American Buildings Co. v. Kokomo Grain Co.*, 506 N.E.2d 56 (Ind. Ct. App. 1987). In that decision, the court ruled that facts known

and opinions held by experts retained in prior litigation were not protected by Trial Rule 26(B)(4) and were discoverable. *See generally* A. Hull, Pre-Trial Discovery of Trial Preparation Materials Prepared, and Non Testifying Experts Retained, in Anticipation of Prior Litigation, 21 Ind. L. Rev. 57 (1988).

C. Non-Testifying Experts Informally Consulted in Preparation for Trial but Not Retained

The Indiana and Federal Rules do not address experts informally consulted to prepare for trial but not retained. It is arguable that no discovery may be had of the names or views of such persons. *See* Advisory Committee On Rules Of Practice And Procedure Of The Judicial Conference Of The United States, Proposed Amendments To The Federal Rules Of Civil Procedure Relating To Discovery (1969), *reprinted in* 48 F.R.D. 487, 504 (1969).

D. Experts Whose Information Was Not Acquired in Preparation for Trial

The class of experts whose information was not acquired to prepare for trial includes experts who are employees of a party not specifically employed for litigation and also experts who are actors or viewers of the subject matter of the suit. All information known and opinions held by these experts are freely discoverable. *Id.*

V. PREPARING AN EXPERT TO TESTIFY

When preparing an expert for testimony, you should disclose all facts pertinent to the expert's opinions—favorable and unfavorable. The expert needs to be kept apprised of new information and deposition testimony pertinent to the opinions. Carefully consider the need to disclose to the expert facts, opinions or work product that are not necessary to the expert's opinions or his or her ability to support the opinions on cross examination. If disclosed to the expert, these facts, opinions and work product may become discoverable (*see* Part IV *infra*).

Even if determined to be not discoverable, you and the expert may find yourselves embroiled in discovery disputes and distracted from your trial preparation. You should maintain a document inventory of all materials provided to the expert. This inventory will serve as a check that the expert has reviewed all pertinent materials and provide a touchstone for the boundaries of disclosure required under Ind. R. Evid. 705 for those facts underlying the expert's opinions.

Remind the expert that it is his or her role to serve as an educator. The expert's language needs to be reviewed carefully for clarity and simplicity. Demonstrative exhibits should be entertaining, forceful and easily integrated into the expert's presentation. You should make extensive use of videotaped interrogation of the expert to prepare for direct and cross examination.

Prior to offering expert testimony, you and your expert should:

- review all facts pertinent to the opinions, including all facts favorable and unfavorable to the client's position;
- make certain the expert clearly understands all case themes, legal theories, defenses and burdens of proof;
- confirm the opinions of the expert and, as importantly, the parameters and applications of those opinions;
- detail those facts or assumptions which are irrelevant to the expert's opinions;
- review relevant prior writings or testimony by the expert;
- review relevant writings, authorities and theories in the area, including all materials and theories favorable and unfavorable to the expert's opinions;
- review the expert's file, particularly if the file is going to be produced to opposing counsel; and
- provide all the usual witness instructions, including instructions about mannerisms and communication skills and the admonishment that the expert not become hostile or antagonistic during interrogation.

You should be sure to explain to the expert the differences between his testimony at a discovery deposition and his testimony at trial. Instruct the expert witness that at his deposition opposing counsel is seeking information that will later be used to discredit him or his testimony. For that reason, the expert should review the discovery deposition as an exercise in transcript recitation. The expert should be cautioned against answering ambiguous questions or providing far-ranging narrative on issues that might be used for later cross examination. You may find that tendering the expert's resume along with a written statement of the expert's opinions may serve to focus both the expert and interrogating counsel.

VI. ADMISSIBILITY OF EXPERT TESTIMONY

To be admissible, a qualified expert's opinion must be more than helpful (*see* Part I *supra*). Due to the explosion of scientific research and the expanding use of expert testimony, courts increasingly must rule on the admissibility of novel scientific testimony. Despite the liberal admissibility of expert testimony, *see Sears*, 742 N.E.2d at 461, an expert's testimony should be excluded if: (1) the scientific evidence is unreliable, (2) the expert offers testimony outside of the expert's field, (3) the expert's opinion is irrelevant, or (4) it incites undue prejudice, or (5) the expert relies upon unreliable hearsay.

Further, it is often possible to challenge the bases underlying the expert's opinion as inadmissible or, in some cases, to challenge his or her opinion as an inadmissible legal conclusion. Each of these bases for exclusion will be set forth below.

A. Testimony Outside the Expert's Field of Expertise

An expert must offer testimony within the expert's field of expertise. "An expert in one field of expertise cannot offer opinions in other fields absent a requisite showing of competency in that other field." *Hegerfeld v. Hegerfeld*, 555 N.E.2d 853, 855-56 (Ind. Ct. App. 1990);

Hannan v. Pest Control Svcs. Inc., 734 N.E.2d 674, 680 (Ind. Ct. App. 2000). For example, in *Hannan*, the court rejected testimony of a proposed expert where the expert was an osteopathic physician but his proposed testimony presumed knowledge in other medical specialties including neurology, toxicology, immunology and medical causation. 734 N.E.2d at 680.

B. Reliability

To be admissible, an expert's opinion must be reliable. Rule 702(b) of the Indiana Rules of Evidence provides instruction on the reliability of scientific evidence.

Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Ind. R. Evid. 702(b).² Pursuant to Rule 702(b), the court is to consider the "underlying reliability of the general principles involved in the subject matter of the testimony, but it does not require the trial court to reevaluate and micromanage each subsidiary element of an expert's testimony within the subject." *Sears*, 742 N.E.2d at 461.

The language contained in Indiana Rule 702(b) is not found in either the FRE or the IRE. This language was proposed by the advisory committee appointed by the Supreme Court of Indiana. In its proposed commentary, the advisory committee provided the following useful discussion of the circumstances in which scientific evidence may be admissible:

Scientific evidence "capable of producing reliable results" is admissible. *Davidson v. State* (1991), Ind., 580 N.E.2d 238. The court may determine scientific reliability in any one of three ways:

- (1) Courts may take judicial notice of simple scientific principles which are well known or indisputable to all people of ordinary understanding and intelligence. See, e.g., *Hishew v. Kushto* (1956), 126 Ind. App. 584, 131 N.E.2d 652.
- (2) The reliability of established scientific evidence is normally proved by showing that the principles upon which it is based have achieved general acceptance in the scientific community. See *Hopkins v. State* (1991), Ind., 579 N.E.2d 1297.

² Under Federal Rule 702, a qualified expert may testify to an opinion 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."

- (3) The reliability of new scientific procedures will have to be established at a pre-trial hearing by the testimony of properly qualified expert witnesses. See *Cornett v. State* (1983), Ind., 450 N.E.2d 498 (to establish the reliability of a new scientific procedure, a party must call neutral expert witnesses from a number of related scientific fields). In addition to the expert's testimony that the procedure is reliable, the court can look to cases in other jurisdictions to see if they admit such evidence. *Jones v. State* (1981), Ind., 425 N.E.2d 128 (neutron activation analysis).

Ind. R. Evid. 702(b) advisory committee notes.

The search for reliability contemplated under Ind. R. Evid. 702(b) is not inconsistent with the United States Supreme Court analysis in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which considered the standard for the admissibility of expert evidence under Rule 702 of the FRE. *Sears*, 742 N.E.2d at 460-61 (noting that Rule 702 is analogous in operation to the *Daubert* standard). In *Daubert*, the Supreme Court rejected the “general acceptance” test articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in favor of a more liberal standard of admissibility of scientific evidence. *Daubert* provided a much broader standard, holding that the turnkey for the admissibility of scientific evidence under Federal Rule 702, enacted post-*Frye*, is that the evidence be based on a “reliable scientific methodology.” *Ollis v. Knecht*, 751 N.E.2d 825, 829 (Ind. Ct. App. 2001). In addition to screening expert testimony for reliability, under the analysis espoused in *Daubert*, the trial judge further serves as “gatekeeper” to determine whether proffered scientific knowledge will “assist the trier of fact to understand or determine a fact in issue.” 509 U.S. at 591-97. Thus, the trial judge must make two assessments: (1) “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid” and (2) an assessment “of whether that reasoning or methodology properly can be applied to the facts in issue.” 509 U.S. at 592-93.

The *Daubert* Court makes no attempt to provide a definitive test for admissibility, but did set forth a list of factors that trial courts may consider to guide them in assessing reliability:

- (1) whether the theory or technique at issue can be and has been tested;
- (2) whether the theory or technique has been subjected to peer review and publication;³
- (3) the known or potential rate of error;
- (4) the existence and maintenance of standards controlling the technique's operation; and
- (5) whether the technique is generally accepted within the relevant scientific community.

Smith v. Yang, 829 N.E.2d 624, 626-27 (Ind. Ct. App. 2005). The Supreme Court later clarified that the “gatekeeper” function of which it spoke in *Daubert* applies to all expert testimony, not just testimony based in science. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (noting that the trial court need not consider all of the *Daubert* factors in ruling on non-scientific testimony).

The role of the trial court in applying Indiana Rule of Evidence 702 has similarly been described as that of a “gatekeeper.” *Lytte*, 814 N.E.2d at 309. The *Lytte* court explained that it was the job of the trial court to ensure an expert's testimony “both rests on a reliable foundation and is relevant to the task at hand.” *Id.* However, non-scientific evidence does not need to satisfy the Rule 702(b) factors to be admissible. *Carter v. State*, 766 N.E.2d 377, 380-81 (Ind. 2002).

However, while the Indiana Supreme Court finds *Daubert* and related federal opinions instructive, Indiana courts are not bound by them in deciding evidentiary issues under Indiana Rule 702. *Sears*, 742 N.E.2d at 461 n.5 (citing *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995)); *see also Carter v. State*, 766 N.E.2d at 381 (stating that *Kumho Tire* was simply an interpretation of the Federal Rules of Evidence and should not cause Indiana courts to modify or replace Indiana Rule 702); *McGrew v. State*, 682 N.E.2d 1289, 1292 (Ind. 1997) (“[T]here is no

specific ‘test’ or ‘set of prongs’ which must be considered to satisfy Indiana Evidence Rule 702(b).”); *Harrison v. State*, 644 N.E.2d 1243, 1252 (Ind. 1995) (discussing for the first time the impact of *Daubert* on Indiana’s Rules of Evidence). Nevertheless, if you are presented with the question of the reliability of scientific evidence under Indiana Rule 702, you should consider the analyses and rulings that flow from *Daubert* and its progeny.

Ultimately, an opinion based on say-so and nothing more is not reliable and, therefore, unhelpful to a jury. “As we so often reiterate: ‘An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.’” *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419-20 (7th Cir. 2005). “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.” *Id.*

As described by the advisory committee, you should anticipate a preliminary or in limine hearing to determine the reliability of novel scientific evidence. See *Cornett v. State*, 450 N.E.2d 498 (Ind. 1983). Indiana Rule of Evidence 104 provides for preliminary determinations of admissibility in this context. At this hearing, you should consider the necessity of calling neutral experts to establish the reliability of the scientific evidence being proffered. See J. Tanford, *Indiana Trial Evidence Manual*, § 43.06, p. 253 (3rd ed. 1993). In *Daubert*, the United States Supreme Court described a similar preliminary determination of the admissibility of expert scientific testimony under Rule 104 of the FRE. 509 U.S. at 592-93.

Ultimately, once the court has determined that expert testimony will assist trier of fact (see Part I *supra*) and that the expert’s general methodology is based on reliable scientific principles, any other challenges to the expert’s testimony may be left to cross examination,

³ The Court noted that publication in a peer-reviewed journal is not scientific validity per se and that the focus of the test “must remain on the methodology of the theory or technique, not on the conclusions generated.” *Ollis v.*

contrary evidence, counsel’s argument, and resolution by the trier of fact. *Sears*, 742 N.E.2d at 461.

C. Bases of Opinion

The “bases” of opinion testimony by experts is a legal term that means more than just the facts or data upon which the expert relies. Instead, an inquiry about the bases of an expert opinion is an inquiry of the admissibility of the facts or data which support the expert’s opinion. Rule 703 of the Indiana Rules of Evidence addresses the appropriate bases of opinion testimony and provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

Ind. R. Evid. 703.⁴

Under this rule, there are four categories of facts or data that can properly be the bases for an expert’s opinions:

- (1) facts or data that are admissible through the expert because he or she has first-hand knowledge;
- (2) facts or data that are hearsay but are admissible through the expert witness because of an available exception to the rule against hearsay—e.g., Ind. R. Evid. 803(4) (patient’s history) or Ind. R. Evid. 803(18) (learned treatises);⁵

Knecht, 751 N.E.2d 825, 829 (Ind. Ct. App. 2001) (citing *Daubert*, 509 U.S. at 594-95).

⁴ Under Federal Rule 703, “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”

⁵ If an expert bases his or her opinion on facts or data that are inadmissible hearsay, the trial court should consider, pursuant to Ind. R. Evid. 104, whether the underlying facts and data are of a type reasonably relied upon by experts in the field in forming opinions. A useful collection of cases on this inquiry can be found at 3 J. Weinstein & M. Berger, *Weinstein’s Evidence*, ¶ 1703[03], pp. 703-20 through 43 (1994).

- (3) facts or data that are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject; and
- (4) facts or data provided to the expert witness at trial, often by means of hypothetical question.⁶

A litigator should never presume that the bases underlying an expert's opinion are themselves admissible.

D. Legal Conclusions

An expert opinion is generally not objectionable even though it embraces an ultimate issue to be decided by the jury; however, there are limitations. Rule 704 of the Indiana Rules of Evidence provides:

- (a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.
- (b) Witnesses may not testify to opinions concerning . . . legal conclusions.

Ind. R. Evid. 704.⁷

Indiana courts have recently addressed expert opinions on ultimate issues and excluded those that call for legal conclusions. In *Kelly v. Levandoski*, 825 N.E.2d 850 (Ind. Ct. App. 2005), the court explained that it was aware of the trend to allow expert testimony on the ultimate issues, but to allow legal conclusions would “violate the spirit of Evidence Rule 704(b).” 825 N.E.2d at 864 (quoting *Vaugh v. Daniels Co. (West Virginia), Inc.*, 777 N.E.2d

⁶ Before an expert witness can offer an opinion in response to a hypothetical, (1) he or she must have the requisite, skill, education, or experience and (2) there must be a proper evidentiary foundation supporting the facts that are included in the hypothetical question. *Lasater v. Lasater*, 809 N.E.2d 380, 394 (Ind. Ct. App. 2004).

⁷ Federal Rule 704 provides,

- (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
- (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

1110, 1122-23 (Ind. Ct. App. 2002)). In *Vaugh*, the court found that the trial court had erred in admitting portions of an affidavit that constituted legal conclusions relating to proximate cause and reasonable care. 777 N.E.2d at 1122. There, the affiant had concluded, among other things, that a failure to use safety engineering had proximately resulted in injuries and that the defendant had failed to use reasonable care by not applying the safety engineering. *Id.* at 1119. Similarly, in *Kelly*, the court affirmed the trial court exclusion of expert testimony that would have dealt with (1) the elements of a contract, (2) case law regarding contracts, (3) the legal concept of agency, (4) an opinion as to whether a contract existed, (5) an opinion that damages had not been mitigated, (6) an opinion as to whether the right party had been sued, and (7) an opinion about the contingency fee arrangement. 825 N.E.2d at 863-64.

E. Relevancy

Under Indiana Rule 402, “Evidence which is not relevant is not admissible.” Thus, the court must determine that the expert testimony is relevant in order for the testimony to be admissible. *Armstrong v. Cerestar USA, Inc.*, 775 N.E.2d 360, 366 (Ind. Ct. App. 2002). For example, in *Armstrong*, the court excluded the plaintiff’s expert’s testimony regarding whether the defendant’s conduct complied with OSHA regulations. *Id.* at 368. The court found that although the expert was qualified as an expert in OSHA regulations, the testimony was irrelevant because an OSHA standard would not expand the defendant’s duty under common law. This basis for challenge is analogous to the requirement of Rule 702(a)—i.e., if the use of expert testimony will not assist, or be helpful to, the judge or jurors, then the testimony is unlikely to be considered relevant.

F. Reliance Upon Unreliable Hearsay

At least one Indiana court has found an expert’s testimony to be inadmissible where the expert relied upon unreliable hearsay testimony. As further explained in Part VI.C *supra*,

pursuant to Rule 703 of the Indiana Rules of Evidence, an expert can rely upon inadmissible evidence; however, the evidence must be of the “type reasonably relied upon by experts in the field.”⁸ Indiana courts have set forth three factors to be considered when the opinion of an expert relying upon inadmissible evidence is offered:

- (1) The expert must have sufficient expertise to evaluate the reliability and accuracy of the report;
- (2) The report must be of the type normally found reliable; and
- (3) The report must be of a type customarily relied by the expert in the practice of his profession or expertise.

Indiana and Michigan Electric Co. v. Hurm, 422 N.E.2d 371, 375 (Ind. Ct. App. 1981).

In *Hurm*, the court refused to allow an expert real estate evaluation witness to testify on the fair market value of the plaintiff’s property. Although counsel stipulated that the expert was qualified as an expert real estate evaluation witness, his testimony was objected to due to his reliance upon hearsay opinions of loan officers. The court found that the expert did not remember the names of the loan officers he consulted; therefore, the plaintiffs could not cross examine him regarding the reliability and credibility of the basis of his opinion. The court found that the information given to the expert by the loan officers was not of a type normally found to be reliable because he could not identify some of his sources of information. The court excluded the expert’s testimony that was based upon the unreliable hearsay. *Id.*

G. Undue Prejudice

Expert testimony may also be challenged as unduly prejudicial under Indiana Rule 403. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

⁸ The hearsay evidence relied upon is not admissible for the truth of the matter asserted. *Faulkner v. Makkay of Indiana*, 663 N.E.2d 798, 800-801 (Ind. Ct. App. 1996).

considerations of undue delay, or needless presentation of cumulative evidence.” Ind. R. Evid. 403. Unfair prejudice refers to the propensity of the evidence to evoke undue bias, horror, anger, or sympathy in the jury. Robert L. Miller, Jr., 13 Indiana Practice Series § 403.102(a) (2003). It focuses on the tendency of the evidence to result in a decision based on an improper basis—emotion. *Id.*

Although courts should sparingly invoke Rule 403 to exclude evidence, *id.* (citing numerous federal appellate court opinions), under some circumstances it is appropriate to exclude expert testimony as unduly prejudicial. For example, in *Buzzard v. State*, 669 N.E.2d 996 (Ind. Ct. App. 1996), the Indiana Court of Appeals reversed a conviction for child molestation on Rule 403 grounds. In that case, the State offered and the trial court permitted the testimony of a psychologist. Although the psychologist had never examined the defendant, she stated that he fell into a category of individuals inflicted with the generally incurable affliction of “pedophilia.” The psychologist speculated that, under her broad definition of the term (“not only those who act on their sexual desires for children but also those who do not act but are nonetheless sexually aroused by children”), a single pedophile could molest up to 800 children in his lifetime. The Court of Appeals accepted the defendant’s argument that the psychologist’s testimony (and the prosecutor’s argument based thereon) inflamed the passions of the jury and prejudiced his case to the extent necessitating a new trial, and held that the trial court should have excluded the testimony. *Id.* at 999-1000.

VII. DISCOVERY DEPOSITIONS

In almost all cases, you should take a discovery deposition of the opponent’s expert witness. Benefits to be gained by taking the deposition include: (i) the ability to observe the appearance and demeanor of the expert and assess his or her strength as a trial witness; (ii) the

ability to fully explore the expert's opinions and the bases of those opinions far in excess of interrogatory answers or an expert's report; (iii) the ability to lay the ground work for cross-examination by seeking admissions and impeachment material; and (iv) an expert's deposition can serve to facilitate settlement discussions.

There are reasons, however, to consider not deposing an opponent's expert, including: (i) the cost and expense of preparing for and deposing expert witnesses; (ii) informal discovery and interrogatory answers or an expert's report provide sufficient material for cross examination; (iii) the deposition may be used by the opponent at trial with counsel having no additional right of cross examination; and (iv) asking to depose an opponent's expert may cause opposing counsel to seek to depose your expert witness. The scheduling of expert witness depositions and assigning the responsibility for compensating the expert can often be accomplished by stipulation of counsel. Where stipulation is not possible, the assistance of the court should be sought under Trial Rule 26(B)(4)(a).

Prior to taking an expert's deposition, conduct all "informal" discovery that may be available regarding the expert. Discuss the expert with your expert and the pool of expert candidates developed at the outset of the case. Professional directories and associations can provide valuable information. Computerized searches for articles authored by the expert should be conducted. Finally, you should employ your expert in developing a deposition strategy.

Also, prior to the deposition, you should seek to obtain and review all materials received by the expert, all written communications with the expert, notes of all oral communications with the expert, and all opinions, reports or communications prepared by the expert. You should devise a deposition strategy with the help of your expert and consider having the expert attend the deposition.

Areas of inquiry at the deposition should include:

- Carefully review the credentials, qualifications and employment history of the expert, both generally and with emphasis on the pertinent circumstances of the case—e.g., publications, honors and awards, lectures and panel discussions, seminars attended, and board or association memberships.
- Identify areas in which the expert is not qualified to give expert opinion testimony.
- Review all past writings and testimony by the expert.
- Review all cases (litigation, arbitration or mediation) in which the expert was retained, even though no testimony may have been provided. (Was the expert qualified? In what areas? For plaintiff or defendant?)
- Review the terms of the expert's engagement in this case, including the terms of the retainer letter, compensation, and specified activities.
- Review whether the expert has any prior dealings with the parties, the counsel, or the court.
- Review all meetings and communications that the expert has participated in with respect to the case.
- Review all documents reviewed or created by the expert.
- Review all activities undertaken by the expert in forming his or her opinion.
- Review all activities undertaken by others for the benefit of the expert in forming his or her opinion.
- Review the bases for the expert's opinion.
- Review the expert's opinions.
- Confirm whether the expert has concluded work and whether the opinions are subject to change.
- Seek admission from the expert that will be helpful to your case—e.g., the expertise of your expert, the validity of treatises and other materials that you intend to use at trial, and whether other theories or methodologies contrary to the expert's opinion are also reasonable.

VIII. DIRECT EXAMINATION CONSIDERATIONS

Direct examination is the opportunity for you and the expert to present the expert's opinion in an organized, succinct and entertaining manner. Care should be taken that the testimony in the direct examination be intended to assist the jury.

When planning the direct examination, you should consider: (i) the extent it will be necessary to educate the judge or jurors; (ii) ways to get the expert witness out of the witness stand using demonstrative exhibits; (iii) the length of the examination and the timing of offering the opinions; (iv) emphasizing strengths and avoiding weaknesses in the expert's testimony; and (v) avoiding or mitigating the areas of harmful cross examination. The jury should not be left with the impression that the expert has been arrogant or patronizing in his or her presentation.

Rule 705 of the Indiana Rules of Evidence offers much flexibility regarding when an expert may disclose the facts or data underlying his or her opinion:

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Ind. R. Evid. 705.⁹ Under this rule, an expert may testify as to his or her opinion without first testifying to the underlying facts or being asked a hypothetical question. *See Krumm v. State*, 793 N.E.2d 1170, 1180 (Ind. Ct. App. 2003). During direct examination, you have the discretion, with the trial court's permission, to disclose (1) the facts that form the basis for the opinion and then the opinion, (2) the opinion and then the facts that form the basis, or (3) only the opinion.

Given the flexibility offered by Rule 705, you should give serious consideration to the manner and timing of disclosing on direct examination the bases of an expert's opinions. You

⁹ Indiana Rule 705 is patterned word-for-word after Federal Rule 705.

should prepare the evidentiary grounds for admissibility of facts and data relied upon by the expert. By anticipating and preparing for possible objections, you can make the direct examination as efficient as possible. Remember that it is important that jurors receive a clear and timely statement of the expert's opinions. Unanticipated evidentiary shortfalls or objections often reduce the effectiveness of an expert's testimony. It is important to note that the expert need not disclose each and every fact that might bear some relevance to the opinion. The only facts needed to be disclosed are those sufficient to form a reliable basis for the expert's opinion. *See Henson v. State*, 535 N.E.2d 1189 (Ind. 1989)

An appropriate format for direct examination of an expert witness follows.

A. Credentials and Qualifications (Qualifying the Expert)

You should routinely decline opposing counsel's offer to stipulate to the qualifications of an expert. Nevertheless, in presenting an expert's credentials and qualifications, you should succinctly emphasize those aspects of an expert's credentials that are most impressive and most pertinent, without dwelling on less important details. Consider whether there will be a battle of experts that will require that the judge or jurors weight the qualifications and testimony of competing experts. If so, structure and rehearse the examination with care. You should consider offering the resume of the expert as an exhibit for the reference of the judge or jurors. In reviewing an expert's education and work experiences, it is usually most helpful to begin with the most recent activity and proceed in reverse chronological order.

B. The Science (Qualifying the Science)

When required under Rule 702(b), or to inform the judge or jurors of scientific principles and methodologies with which they may not be familiar, interrogation as described above should be employed.

C. Terms of Engagement Preparation and Analysis

The expert should openly explain to the judge or jurors the terms of his or her engagement, how he or she came to be employed, instructions from counsel and the activities and investigations conducted.

D. The Bases for the Expert's Opinions

Either before or after expressing his or her opinions, it is advisable for the expert to explain the bases for the opinion.

E. Opinion

The expert should state his or her opinions as succinctly and simply as possible. If a hypothetical question is used, you should carefully prepare the question and make certain that all facts contained in the hypothetical are in the record or will be introduced in the record.

F. Anticipate Cross-Examination

You should consider, anticipate and diffuse issues that may come up during cross examination, including criticisms of the expert's theories, competing theories, and inconsistent or contradictory texts or treatises.

IX. CROSS-EXAMINATION CONSIDERATIONS

When approaching cross examination of an expert witness, you should consider these three rules. First, prepare, prepare and prepare. It is often said that one cannot effectively cross examine an expert without first becoming an expert himself or herself. Make use of your own expert to develop a cross-examination strategy. Be certain to have reviewed all pertinent materials in the technical area. Study the qualifications, writings and prior testimony of the expert. Finally, investigate the validity/reputability of the expert's professional affiliations and

the nature of his or her testimony for past clients. Through the use of carefully crafted hypotheticals and other narrowly-focused questions, identify weaknesses in the expert's position.

Second, set realistic goals for the cross examination that are consistent with your themes in the case. Be wary of strategies that permit the expert an opportunity to appear to control the cross examination or to repeat harmful testimony offered on direct examination.

Third, where appropriate, be certain to establish the evidentiary record necessary to challenge the admissibility of expert opinion testimony on appeal. Attention should be given to the admissibility of the bases of opinion testimony under Rule 703 and the admissibility of novel scientific evidence.

The following areas can provide fruitful avenues for cross examination:

- Review the expert's resume for fraud or for puffery, stress missing credentials and contrast the expert's credentials with those of your own expert.
- Challenge the relevance of the witness's qualifications or competence to the issues presented in that case. *See Part II supra.*
- Establish through the witness those areas in which he or she is not an expert—i.e., attempt to limit the scope of his or her area of expertise.
- Expose the expert as an "opinion for hire"—e.g., that he or she has repeatedly testified for your opponent's law firm or that he or she is plaintiff- or defendant-oriented.
- Reveal the amount of money earned by the expert as a professional witness.
- Attack the disputed facts relied upon by the expert—remember it is the judge or jurors who finds the facts and the expert should acknowledge as much in cross examination.
- Attack the testimony of other witnesses on which the expert depends to reach his or her opinion.
- Consider the extent of the expert's personal involvement in establishing the opinion.

- Scrutinize the accuracy and admissibility of the expert's bases for opinion. *See* Parts I, II and V *supra* (discussing the helpfulness, reliability, prejudicial effect of expert testimony).
- Challenge the assumptions made by the expert in reaching his or her opinion or, in some instances, ask the expert to change a key assumption in a way that would yield an opinion more favorable to your client.
- Obtain admissions from the expert that may be helpful to your theory of the case—e.g., facts not explained by the expert's theory, the failure of the expert to conduct essential tests or procedures, or the validity of the opinion of your own expert.
- Use learned treatises where helpful.
- Explore whether the expert will admit that your expert is qualified and that your expert's opinion amounts to a reasonable difference in judgment among professionals.
- Draw the expert into behavior that will be viewed as hostile, pompous, or unnecessarily antagonistic.

Moreover, the Advisory Committee Notes to the Federal Rules of Evidence suggest the following may provide pertinent areas of inquiry:

- Whether the expert is testifying about a theory that grows naturally out of ongoing research they conducted independent of the litigation or instead if opinions were formed merely for litigation.
- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
- Whether the expert has adequately accounted for obvious alternative explanations.
- Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting."
- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

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