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NBF PRACTICAL GUIDANCE SERIES[1]

FOLLOW THESE NINE GUIDELINES TO SUCCEED AS A LITIGATION CONSULTANT (AND EXPERT WITNESS)

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INTRODUCTION

This article provides guidance to prospective consulting experts.[3] My practice involves a variety of civil disputes that often require the retention of consulting experts. I prepared this document for several purposes: (1) to provide guidance to new experts (or experts that are new to my practice) to help them understand my expectations; (2) as an exercise to consider how, as an attorney, I can improve the results I obtain from experts; and (3) to foster a discussion with experts and other attorneys regarding the effective use of experts in litigation.

The advice below is my own.[4] I primarily rely on Washington authority from both federal and state courts, but also employ cases from other jurisdictions where instructive. The issues discussed below are relevant for experts on either side of a dispute and to experts involved in a broad array of disputes. The article is lengthy but peppered with anecdotes to add flavor and context to the topics discussed. The reader can browse the bookmarked chapter headings and navigate via the bookmarks to locate particular Guidelines of interest.

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[1] This article contains guidance, not legal advice. This article includes information about legal issues and legal developments that are for informational purposes only and may not reflect the most current legal developments. This information is not intended, and should not be taken, as legal advice on any particular set of facts or circumstances. Readers should contact an attorney for advice on specific legal problems. Further, these Guidelines are not intended to set the minimum standards for expert performance. Every dispute is different. Consulting experts, hiring attorneys and clients must work together and exercise discretion and judgment in determining the scope of any particular consultation. Further, the expert should exercise his or her professional judgment in carrying out the consultation.

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[3] I will use the term "expert" throughout to describe the consultants who are hired to assist attorneys and clients to better understand the substantive issues in a dispute or potential dispute and to answer questions related to the dispute. I often hire consultants after an incident when it is not apparent that a potential dispute is headed to litigation or that the consultant will become a testifying expert in the litigation. This article covers such pre-litigation consultant work as well as the work of consultants or experts hired during litigation.

[4] While this article is primarily based on my experience, I have also incorporated information from the several cases cited and from the professional literature identified in the Bibliography located at the end of the article.

FOLLOW THESE NINE GUIDELINES TO SUCCEED AS A LITIGATION CONSULTANT (AND EXPERT WITNESS)

A WORD OF ENCOURAGEMENT TO PROSPECTIVE CONSULTING EXPERTS

We live in a litigious society. Many disputes involve technical issues. Without input from reliable and knowledgeable experts about those technical issues, obtaining fair and informed results may prove to be elusive. Failure to obtain quality expert advice can lead to lawsuits that should not have been filed or result in a lack of action when a case is actually meritorious. It can result in parties being unable to make their best possible case for or against the claims in a lawsuit.

It is common even in a simple injury case to need an engineer to explain what happened and the forces involved; a biomechanical expert to explain how the forces were imparted on the injured person[5] and what the injured person did or didn't do that contributed to the injury; a medical doctor or two to explain the medical treatment, future prognosis and potential disability; a vocational rehabilitation expert to explain what sort of work the injured person might be capable of performing in the future and how much it pays; and an economist to consider the issue of the present value of lost future wages and lost services. In almost every case, an attorney is going to need some advice from experts in order to competently carry out his or her responsibility to advocate for his or her client. If our legal system is to achieve just results and fair and informed decisions, the decision makers very often need the input of qualified and reliable experts.

I realize that there's some reluctance by many professionals with specialized knowledge to get involved in litigation. Being an expert takes time. Sure, it comes with compensation, but for many potential experts, time is their most precious commodity. Many prospective experts have their hands full with current professional responsibilities. Many of them already have enough stress in their lives and don't want to take on the stress that a litigation consultation can involve.[6] Nevertheless, it is important work that provides a valuable service to our justice system. I encourage those with the requisite specialized knowledge to make themselves available for such assignments if they can make the commitment of time and energy to perform the assignments well (see below Guidelines for my advice on that). It is challenging and meaningful work.

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[5] There have been some recent opinions that exclude such biomechanical testimony in Washington. *See, e.g., Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 495-96, 415 P.3d 212, 219 (2018) (upholding decision to exclude biomechanical testimony regarding forces in low impact collision, but noting: "Understanding that the admissibility of such testimony could vary from case to case, … it is not remarkable that trial judges have sometimes allowed biomechanical engineering testimony … where sometimes trial judges have excluded it." (internal quotes and citations omitted)).

[6] Some lawyers can come across as antagonistic at times. For an entertaining excerpt from an expert deposition taken in Texas years ago, see https://www.youtube.com/watch?v=td-KKmcYtrM. Thankfully, such aggressive conduct is rare in Washington cases.

FOLLOW THESE NINE GUIDELINES TO SUCCEED AS A LITIGATION CONSULTANT (AND EXPERT WITNESS)

THE ROLE OF EXPERTS IN COURT

Under both federal and (most) state evidence rules, a witness "who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) 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;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and,
(d) the expert has reliably applied the principles and methods to the facts of the case."

Federal Rule of Evidence ("FRE") 702. There are parallel state rules of evidence, many of which mirror the federal rule.[7]

For our purposes, think of an expert in a matter in litigation as somebody whose specialized knowledge, skill, or experience[8] will help the trier of fact understand the evidence or determine a fact in issue.[9] The term "trier of fact" means the jury, or in the case of a bench trial, the judge.

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[7] Washington's Evidence Rule 702 differs from the federal rule:

> 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.

The different rules in different jurisdictions yield different admissibility tests. Washington applies the *Frye* "general acceptance" standard to the admissibility of expert opinions (see *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). In contrast, the federal standard is the *Daubert* standard (see *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)). This article does not further distinguish between the federal and state rules. The guidelines set forth below are intended to apply regardless of jurisdiction. This article also does not delve into how an expert (or the hiring attorney) ensures that his or her specialized knowledge is admissible pursuant to the applicable admissibility standard. That is a separate topic that will be covered in a separate article in this series.

[8] The specialized knowledge, skill, experience and/or education of an expert can involve an extraordinarily broad array of scientific, engineering, mechanical, geological, medical, economic, vocational, technical, computer, investigative, and other fields or topics. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) ("As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise."). For brevity, I will use the term "specialized knowledge" to describe generically the knowledge/training/expertise/education that the expert brings to a dispute when hired.

[9] Not all disputes requiring an expert's opinion end up in court and the need for an expert often arises long before a lawsuit is filed. Many disputes are resolved either early in the litigation process or even before litigation commences. The key to such early and efficient dispute resolution is an understanding by the parties involved of their respective risks. In any large potential exposure, parties usually seek to understand the potential risks early. Many times, such an analysis requires the assistance of experts to evaluate the evidence and answer the preliminary questions, "what happened," "why did it happen," "how did it happen" and "who is at fault?"

So, at the most basic level according to these evidence rules, the purpose of an expert who is testifying in court is to help the trier of fact understand the evidence and reach an informed decision. Depending on the case and its issues, the opinion of a consulting expert can play a very prominent role in the case disposition.

Experts offer opinions regarding issues in the litigation (e.g., "how fast was the vehicle going?"; "what was the cause of the injury?"; "but for her injury, how long would the plaintiff have been employed?"; etc.). Generally, an expert opinion in civil litigation must be stated "on a more probable than not" basis. *Dasho v. City of Fed. Way*, 101 F. Supp. 3d 1025, 1035 (W.D. Wash. 2015) (in a use of force case, testimony was relevant only if it suggested that the force used was more likely than not excessive, while testimony that suggested only that the force used "could possibly have" been excessive was irrelevant and inadmissible); *State v. Terry*, 10 Wn. App. 874, 884, 520 P.2d 1397 (1974) (testimony of pathologist was admissible when he testified that he could not give his opinion as to the cause of death with "reasonable medical certainty," but that he could indicate a cause of death that was "more probable than not."). Opinions that do not meet the "more likely than not" threshold will not be admissible and will lack any potential to be persuasive as a result. Knowing this standard will help an expert ensure that the opinions offered are legally sufficient.[10]

Some experts with a scientific background may be confused by a confidence standard of "more likely than not." The civil litigation standard is much less exacting than the scientific threshold for proving causation, as explained in this excerpt from an opinion written by Justice Chambers of the Washington Supreme Court:

> In order to establish a causal connection in most civil matters, the standard of confidence required is a "preponderance," or more likely than not, or more than 50 percent. By contrast, "[f]or a scientific finding to be accepted, it is customary to require a 95 percent probability that it is not due to chance alone." … To require the exacting level of scientific certainty to support opinions on causation would, in effect, change the standard for opinion testimony in civil cases.

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn. 2d 593, 608, 260 P.3d 857 (2011) (citations omitted). A litigation expert needs to understand the standard that the offered opinions must meet.

While an expert is hired by a litigant and is part of a trial team, the expert's role is distinct from the advocacy role of an attorney. Judge Feess of the U.S. District Court for the Central District of California explains the distinction in this excerpt from an opinion he wrote in 2000:

[10] I discuss below in Guideline No. 7 what to do if preliminary opinions do not meet this threshold.

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> Attorneys are advocates, charged with selflessly serving their client's interests. Expert witnesses, on the other hand, are employed to assist the parties in their pretrial preparation, and if called to testify, to give their unbiased opinion in order to assist the trier of fact in understanding the relevant evidence.
>
> This distinction is inherent in the very nomenclature that describes the parties. A witness is one who has engaged in the activity of "witnessing," and is called to testify, truthfully and under oath, as to what he observed or what he knows. An expert witness is merely a witness with additional knowledge beyond the ken of the layman, who helps the trier of fact understand scientific, technical or other specialized topics…. [T]he expert witness, like all other witnesses, is beholden to the truth first, and the party second, if at all.
>
> In contrast, an advocate is one who engages in the activity of advocating. To advocate does not mean to offer facts; it means to characterize and sculpt the facts. This may involve emphasizing certain facts, drawing attention away from others and keeping confidential additional facts. … It is argument that is the bailiwick of the advocate, and duty compels her to characterize the facts in the manner best able to assist her client. Thus, the advocate is beholden to her client as much as she is to the truth.

Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080, 1085-86 (C.D. Cal. 2000) (citations omitted). When a consulting expert becomes an advocate, he risks his opinion being ignored. *See Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984) (disregarding opinion of treating physician who had taken on role of "advocate for plaintiff"). An expert should avoid advocacy and add value based on his or her independent assessment and application of specialized knowledge to help the client and/or the trier of fact understand the issues better.

So, without further ado, here are my "Nine Guidelines To Succeed" humbly offered to consulting experts:

GUIDELINE NO. 1 GET PRECISE INSTRUCTIONS ABOUT THE ASSIGNMENT AND THE AGREED TERMS

"Great ability develops and reveals itself increasingly with every new assignment." - Baltasar Gracián

From a practical perspective, having a clear understanding of the scope of the assignment and the terms at the commencement of the consultancy is beneficial to both the expert and the hiring attorney. If the expert is new to consultation or has never worked with a particular attorney, the expert should want answers to the following questions before commencing work on the assignment:

- What is the dispute?
- Is there the potential for a conflict of interest to arise in this matter (who are the parties and interests involved in the dispute)?
- Who is the client?
- Who is the person/entity hiring the expert?
- What does the initial phase of the consultation involve?
- Is there a particular question the expert is being asked to answer?[11]
- What is the purpose of the expert's involvement?
- Is there an upcoming deadline? Will the expert have to prepare a report in the initial phase of the consultation? When are discovery / reporting deadlines?
- To whom does the expert report? What are the expectations regarding frequency of reporting?
- Will there be documents to review? How many? What type?
- Is there a scene to be investigated? Evidence to be examined? What is the ability to access it? Was the scene or incident documented with photographs or notes?
- What is the budget for the initial phase of consultation? Is there room in the budget for research? What is the approved hourly rate?
- Who gets the invoice for services rendered and how often should the expert send an invoice?
- Who is paying the invoices?
- Will the hiring attorney wait for someone else to pay her before paying the expert's invoice?
- Is a trial scheduled? Is the expert available for trial? [12]

Many experienced experts employ "engagement agreements" or have a standard set of terms and conditions that they present to the hiring attorney. Whatever methods are employed, having a "meeting of the minds" between the expert and hiring attorney from the outset prevents misunderstandings down the road during the consultation.

The expert and hiring attorney must reach an agreement on the scope of the initial phase of the

[11] It is preferable for the hiring attorney to ask the expert to answer certain questions based on the expert's review of the available evidence and associated research. There is usually no need for the expert to be briefed on the respective party theories before reaching his or her preliminary opinions. *See* Guideline No. 3.

[12] I recall in one case (early in my career) when I found out three months before trial (and after discovery had closed) that my testifying expert planned to be on an African safari during the trial. The costly and unnecessary motion practice that followed to arrange for an untimely deposition of the expert could have easily been avoided by better communication by both of us regarding the case schedule.

assignment.[13] The initial phase of work is particularly important, because it is during this phase that the expert will typically develop a fuller understanding of the issues, identify gaps in information, and develop preliminary opinions.

GUIDELINE NO. 2 STAY IN YOUR LANE

"If you want to remain the best, you have to keep on doing what you are good at." – Edwin Soeryadjaya

Ideally, attorneys select experts based on the expert's specialized knowledge,[14] which defines the scope of that individual's expertise. If a consulting expert is being asked to opine on something that is outside his or her area of expertise, he or she must let the hiring attorney know as soon as possible. An orthopedic surgeon who has made a career of fixing shoulders may not have the specialized knowledge to qualify as an "expert" in a case about lower back pain; a civil engineer who is at the top of his field in designing steel structures may not have the necessary expertise to opine about the failure of composite materials; a fire cause-and-origin expert may not be qualified to discuss the mechanical aspects of a product identified as a possible source of a fire. Expert testimony well-founded in the expert's specialized knowledge is very helpful to a court; speculation is not. It is good for neither the expert's reputation[15] nor the client's case for an attorney to hire an expert who does not have the requisite specialized knowledge needed for the dispute.

Assigning work to an unqualified expert nevertheless happens from time to time in at least three circumstances:[16]

1. The initial assignment has evolved over time (perhaps during the litigation "discovery" process), and the new questions to be answered are outside of the expert's specialized knowledge;
2. The hiring attorney knows that the expert testifies well and estimates that the

[13] I use the term "initial" in recognition that a litigation consultation often involves several phases. The transition between phases offers an occasion for the expert and hiring attorney to discuss the status of the current phase and expectations regarding the upcoming phase.

[14] Sometimes experts are chosen because they not only have the requisite credentials, but they are very good at testifying (*i.e.*, they present well).

[15] Consider the impact of the following published finding from a judge on an expert's professional practice:

> The Court finds that [expert] is unqualified as an expert in the field of [insert area of practice here].

Ouch.

[16] There are a couple of additional possibilities that are less common and involve unsavory behavior that must be avoided by all legitimate experts: (1) the expert has oversold her credentials; and (2) the expert is a charlatan who will offer to give an opinion on anything.

expert "comes close" on expertise; or,

3. A party runs out of time to meet a disclosure deadline and the party's attorney finds that it needs an expert on short notice.

If an expert finds herself in a case where her expertise is likely to be questioned, she should let the attorney know early so a replacement (or supplemental expert)[17] can be found. The expert may be the first to recognize that his specialized knowledge is not a good fit for the case. When that happens, the expert must bring the issue to the attention of the hiring attorney.

Bad results follow from a mismatch between the expert's specialized knowledge and the needs of the case. Here is a case in which a Dr. Kelley was hired as a forensic document analyst:

> The federal court concluded that Dr. Kelley has no training or education in the area, his experience is extremely limited, and the sources of his knowledge are mostly unidentified...
>
> A second federal district court concluded that Dr. Kelley had "no education or training in handwriting analysis or forensic document examination," that "none of his prior work experience involved document examination," and that he was "not qualified to testify as an expert" … The court also concluded that even if Dr. Kelley could be qualified as an expert witness, there was no evidence that his methodology was reliable or accepted in the scientific community. Dr. Kelley admitted in a deposition in that case that "his methods are new and that he is the only expert in this field that he is aware [of]."

Alexander v. Capital One, NA, 2015 Wn. App. LEXIS 2941, at *5-6 (2015). A proposed litigation expert without training or education in a particular field or specialty is likely out of his or her lane.

Here is insurance attorney (also named Kelley) offering an opinion critiquing a medical opinion:

> The lion's share of Mr. Kelley's expert opinion consists of his critique of Dr. Shapland's medical opinion and her review of the medical literature underpinning her opinion and his analysis of Dr. Cowan's prognosis … But Mr. Kelley is not a medical doctor and asserts no medical expertise. Instead, he is an attorney who specializes in insurance matters. … Mr. Kelley has no medical qualifications. Mr. Kelley is, therefore, unqualified to opine on the adequacy of

[17] Depending on the circumstances, the suddenly underqualified expert may be able to rely on another consulting expert (*i.e.*, non-testifying expert) to fill in the gaps in the testifying expert's knowledge. *See* FRE 703; *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 646, 658 (N.D. Ill. 2006) ("experts are entitled to use assistance in formulating expert opinion, and the aiders need not themselves testify").

> either Dr. Shapland's or Dr. Cowan's medical opinions …

Bancroft v. Minn. Life Ins. Co., 329 F. Supp. 3d 1236, 1249 (W.D. Wash. 2018) (citations omitted). Mr. Kelley found himself out of his lane. That was an avoidable error.

For credentialed professionals, qualification to testify may include the proper set of credentials (which likely depends on the jurisdiction and the scope of the testimony). Here is an example when the lack of qualification was disclosed during trial testimony:

> During the trial, in an offer of proof, Soper sought to introduce foundation evidence that Dr. Dodge was a physician … In response to a question about whether he possessed a medical license …, Dr. Dodge stated, "I was a--that was a temporary license." Dr. Dodge explained, "Well, I decided not to get a Washington license, because between this job, covering Oregon, I thought one state was enough. Basically that's it. And I didn't go through the full application for the Washington license, but I have a good standing license in Oregon …"

State v. Soper, 135 Wn. App. 89, 99, 143 P.3d 335, 340 (2006). Medical malpractice is an area where the state requirements vary significantly; some states require that a standard of care expert must be licensed, trained and experienced in the same or directly related field as the defendant, and be appropriately board-certified.[18] If an expert does not have the relevant credentials or experience for the task at hand, the assignment should be declined. In any event, the expert should be candid about the scope of his or her expertise with the hiring attorney and keep his or her opinions within the scope of that expertise.[19]

GUIDELINE NO. 3 HOLD OFF ON FORMING OPINIONS UNTIL YOU KNOW THE FACTS (DON'T BE A RUBBER STAMP)

"Your mind will answer most questions if you learn to relax and wait for the answer." – William S. Burroughs

An expert who parrots the hiring attorney's theory of the dispute is doing no one a favor. Parties to a dispute usually do not expend the resources to litigate a matter if the issues involved are crystal clear and easily resolved. Disputes benefit from the involvement of experts

[18] The prospective expert must keep his C.V./resume up to date with relevant licenses, certifications, and publications so that the hiring attorney can be confident that the expert has the requisite qualifications needed for the particular dispute.

[19] This rule is important because any opinion outside of an expert's area of expertise may be otherwise excluded by a judge. *See O'Neill v. City of Port Orchard*, 194 Wn. App. 759 (2016) (a bicycle technician/cycling coach's opinions regarding the cause of a bicycle accident were ruled inadmissible because they were beyond his area(s) of expertise.)

because experts have specialized knowledge that the hiring attorney and client do not have.[20]

Experts add value by applying specialized knowledge to a dispute. Such value can only really occur upon reviewing the case documents and conducting appropriate research and investigation.[21] The hiring attorney's theory of the case (or desired opinion) is just a data point that must yield to facts and reasoned analysis provided by an expert. The facts will often be modified or supplemented throughout the discovery process, sometimes even up to and including at trial.[22]

Here is a telling excerpt from the deposition of an expert who I suspected to be parroting the hiring attorney's analysis rather than considering the facts and providing an independent assessment:

> Q. You read [the defendant's] deposition?
> A. I perused it. Yes.
> Q. You say you perused it. What --
> A. I quickly read through it.[23]

In the overall context of the case, the foregoing testimony tended to show that the expert did not trouble himself with a close review of the key facts that would be found in the testimony of one of the parties. It is a rare case when an expert should fail to carefully consider a party's deposition. Such independent analysis of key testimony, which can be good news or bad news

[20] By way of example, we had a case in which a longshoreman had fallen through a deck grate, breaking his leg. Upon visual inspection, the grate was significantly corroded and appeared to have been poorly maintained. Nevertheless, we secured the grate brackets and sent them to a metallurgist to examine. The metallurgist was able to measure the cross-sectional area of the 4 brackets that simultaneously gave way. He calculated the force required to cause the 4 brackets to fail simultaneously and confidently concluded that the longshoreman could not have fallen through the grate while simply walking on it, but instead, the grate likely gave way when the longshoreman jumped onto it from a hatch cover, in violation of the collectively bargained safety rules. A favorable case resolution resulted because of the expert's independent analysis.

[21] Experienced litigation experts realize that case facts are often subject to change or dispute and include a statement in all reports to allow the expert to reconsider opinions in the event new facts are discovered or disclosed. A disclaimer such as "I reserve the right to amend or supplement any of the findings and conclusions presented in this report if new data becomes available or additional work is performed" will suffice.

[22] If new facts are disclosed at trial, an expert in Washington state courts can typically update his opinion to incorporate the new information. *See generally Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352 (2014) ("ER 703 allows an expert to base his or her opinion on … facts or data perceived by or made known to the expert at or before the hearing."). The opinion disclosure rules in federal court are more restrictive, but allow rebuttal opinions based on new information from the other party.

[23] Interestingly, the word "peruse" can mean both "to examine or consider with attention and in detail" or "to look over or through in a casual or cursory manner." As the deposing attorney, I was familiar only with the latter definition. Thankfully, the testifying expert's follow-up response set the record straight that he did not examine the party's deposition with "attention and detail."

for the client's position, assists the hiring attorney and his client to better understand the issues in the dispute and to be better prepared to resolve the dispute by way of settlement or to prepare for resolution at trial. A better answer, if truthful, would have been, "Yes."

An expert who merely parrots the hiring attorney's position can do serious damage to the client's case. I recently had a case in which the plaintiff's biomechanical expert assumed his client's deposition testimony[24] was truthful/accurate in reporting a fall down a ladder (which was caught on video-tape). The expert did not watch the videotape carefully enough to notice the errors in the client's reporting. In failing to conduct a careful and independent analysis, the expert missed the opportunity to accurately report what happened and explain it in a manner that could have helped the plaintiff (which was the expert's apparent intent). Instead, the expert doubled down on the provably mistaken aspects of the plaintiff's testimony and left his client is a perilous position as discovery closed and a mediation loomed.

A litigation expert should always follow the ethical requirements of his or her field. For instance, the American Medical Association has promulgated a series of ethics rules applicable to physicians providing consulting services in matters in litigation (see https://www.ama-assn.org/delivering-care/ethics/medical-testimony). A relevant excerpt is:

> Physicians who testify as expert witnesses must:
>
> (h) Testify only in areas in which they have appropriate training and recent, substantive experience and knowledge.
> (i) Evaluate cases objectively and provide an independent opinion.
> (j) Ensure that their testimony:
>
> (1) Reflects current scientific thought and standards of care that have gained acceptance among peers in the relevant field.
>
> (2) Appropriately characterizes the theory on which testimony is based if the theory is not widely accepted in the profession.
>
> …

The National Society of Professional Engineers also has a Code of Ethics (see https://www.nspe.org/sites/default/files/resources/pdfs/Ethics/CodeofEthics/NSPECodeofEthicsforEngineers.pdf). While not specifically mentioning litigation, it discusses numerous issues relevant to work performed by an engineer hired as a litigation expert. Every expert should be familiar with and comply with the ethical requirements of his respective professional accrediting organization.

[24] Ideally, a litigation expert should be hired before the key depositions to review the evidence and provide advice to the hiring attorney. Here, the expert apparently was hired after the plaintiff's deposition, and the timing of such a hiring is the fault of the hiring attorney and/or client.

No professional ethical code would approve of rubber-stamping a litigant's position in a dispute. Such opinions are likely going to be exposed and inadmissible in litigation. *See BP Amoco v. Flint Hills Res.*, 2009 U.S. Dist. LEXIS 131283, at *18 (N.D. Ill. 2009) (court finding opinions of experts who "rubber-stamped" client's damage calculations to be inadmissible); *See also Bruce v. Byrne-Stevens & Assocs. Eng'rs*, 113 Wn.2d 123, 129-130 (1989) ("While it may be that many expert witnesses are retained with the expectation that they will perform as hired guns for their employer, as a matter of law the expert serves the court."). When a client's case proceeds to litigation relying on an opinion that is determined to be inadmissible, a bad result is sure to follow. Clients are much better served when experts give a fresh look at the evidence and issues.

GUIDELINE NO. 4 RESEARCH, REVIEW AND APPLY (OR DISTINGUISH) RELEVANT PUBLISHED STANDARDS, PROTOCOLS, TREATISES AND ARTICLES

"Assumptions aren't facts; they're opportunities for research and testing." – Laurie Buchanan, PhD

A good expert has impressive specialized knowledge and relies on it when carrying out her consultative duties. A better expert also relies on and references the specialized knowledge of the best of her colleagues that are found in the published standards, protocols, treatises and articles that relate to the expert's field or profession. *See Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606 (2011) ("In our courts, scientific evidence must satisfy the *Fyre* requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community."). Engineers build structures to code to ensure safety; doctors employ the most relevant studies to give their patients the best chance at a successful outcome; economists use appropriate actuarial tables and properly-sourced financial data; and fire inspectors rely on the relevant NFPA[25] guidance publications to ensure their investigation methods are valid. Ideally, the expert brings to their legal consultation the same reliance on professional standards that they use in their professional practice.

Reliance on published standards, protocols, treatises, and articles is important because an expert must expect that the opposing consulting expert will also be relying on such publications when providing the opposing opinion, and the opposing counsel will likely refer to relevant publications when cross-examining. Consider the following theoretical exchange at a deposition:

> Q: Dr., do you recognize Netter's Atlas of Human Anatomy as an authoritative reference text on the subject of human anatomy?

[25] National Fire Protection Association (https://www.nfpa.org/).

A: Of course.
Q: In your report, you stated [x].
A: Yes.
Q: Referring to Netter's Atlas of Human Anatomy at p. __, it states [not x].

At this point, the mind of the unprepared expert is racing to distinguish his opinion from the Netter's excerpt. There may be something unique about the facts and circumstances of the particular case at hand that explains why the expert's opinion varies from the referenced text.[26] Such an argument may be difficult to fully consider, frame and articulate in the middle of a deposition. The prepared expert has already considered the issue and knows how to distinguish the excerpt and where to find support for the distinction she draws. Research and review of the appropriate professional publications and references ideally occurs before reaching conclusions in a particular matter. The investment of time researching, reviewing, and applying the existing knowledge in the field will ensure the conclusions the expert reaches are in line with generally accepted knowledge in the field of inquiry and based on reliable principles and methods.

It is a rare circumstance when litigants need to consult with someone whose practice or views stray far afield from his or her colleagues' specialized knowledge of the field. If the expert anticipates employing a novel process or relying on cutting-edge theories or information in order to carry out the assignment, the expert needs to discuss these issues in detail with the hiring attorney. Most cases are comfortably decided based on mainstream science, engineering, medicine and other specialties. Departure from generally accepted procedures/knowledge and recognizable methodology risks the work being unacceptable to the court.

Not all experts have the typical "professional" background. *See Harris v. Robert C. Groth, M.D., P.S.*, 99 Wn.2d 438, 439 (1983) ("The witness need not possess the academic credentials of an expert; practical experience may suffice.") (citing 5A K. Tegland, Wash. Prac., Evidence § 289 (1982)) and *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 360 (2015) ("[Defendant] fails to recognize that a witness qualifies as an expert in more ways than education."). In the appropriate case and on a particular issue, the best expert might be a car mechanic or a plumber. As the U.S. Supreme Court explained, the expert's qualifications can be based primarily on knowledge gained through practical experience:

> Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called "general truths derived from . . . specialized experience." And whether the specific expert testimony focuses upon specialized

[26] For instance, the referenced text cited by the opposing party may be obsolete or dated and the expert's information is newer and relies on valid studies that call into question the cited text. An expert will only know that by mastering the professional references that relate to the issue under consideration in the dispute and remaining up-to-date on any new research in his/her particular field of expertise.

> observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own." The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

Kumho Tire Co., 526 U.S. at 148-49 (citations omitted). Experts relying on practical experience frequently rely on training materials, user manuals, manufacturer's instructions, and other sources of information in carrying out their work. Such an expert must also endeavor to master such information when carrying out an analysis.

Not every expert is necessarily up-to-speed on the latest literature concerning his or her specialty. In such cases, it is often appropriate and efficient for the hiring attorney to provide the expert targeted literature to review and consider. Here is a brief excerpt from the book "Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability," by attorneys Rick Friedman and Patrick Malone:

> Literature searches should never be delegated to a testifying expert. They are too busy and their hourly rates are too high. The plaintiff's lawyer, or a trusted designee, must do the heavy lifting. That means an actual trip to a real library to find all the relevant textbooks that do not appear in any online format. That means repeated and layered searches. Sometimes the best nuggets appear in an article that was found only because it was referenced in a footnote in another article.

Rules of the Road at p. 67. The bottom line is whether the literature was located by the hiring attorney or the expert, the expert's opinion must rely on and reference the appropriate published standards, protocols, treatises and professional articles that relate to the expert's field or profession.

GUIDELINE NO. 5 WRITE IT OUT BEFORE REACHING OPINIONS (EVEN IF YOU WEREN'T ASKED FOR A REPORT)

"What writing does is to reveal." – Rita Dove

As I stated in the introduction, one of the purposes of these Guidelines is to improve the results I obtain from the experts with whom I work. This Guideline urges experts to employ the writing

process when conducting their analysis.[27] **Before committing a draft analysis to writing, the expert should check with her hiring attorney, who may have a different idea than mine about the utility and wisdom of committing a draft analysis to writing.** I do not hire experts to give me "seat of the pants" advice. The questions I ask experts require consideration of a lot of facts, research to ensure the specialized knowledge being offered is up-to-date, and thoughtful application of the knowledge to the facts. From my own experience with legal motions and reports, I know that the research and drafting process yields its own insights that are critical in case analysis and strategy. My experience has been that when thinking through a complex idea and trying to answer a multi-faceted question, it is best to write it out. Read and edit. Repeat until satisfied.[28]

The form of the writing will vary based on the application. Medical experts routinely dictate their medical record review in chronological order, and work on their analysis once they have captured all of the key treatment issues from the records. In a similar way, a timeline of key developments is often important in the liability analysis to understand the sequence of events. Economists and others employ data tables to render information more understandable for their analysis. Outlines are particularly crucial in framing an analysis to ensure it is organized, comprehensive, and logical. In expert work, the devil is often in the details and any significant case is bound to have quite a few details. For most people, capturing such details in notes or a draft analysis is better than trying to commit them to memory. The expert should use the right tool(s) for the task at hand.

The process of writing helps ensure that conclusions follow from the facts. The process may reveal unwanted or unwarranted assumptions. An expert writing out an analysis is better able to identify gaps in logic or evidence than one merely thinking through an issue. The opinion arising from a written analysis will typically be better organized. Importantly, a written product is one that can be reviewed and critiqued by the hiring lawyer.

An expert who has not thoroughly thought through his opinion will be ill-prepared to defend that opinion when it is challenged. It is best to prepare for such a challenge before reaching an opinion by using a process that will yield a well-reasoned and thoughtful opinion. That process

[27] In some jurisdictions, earlier drafts of an expert's opinions may be discoverable which, of course, presents its own challenges. Check with the hiring attorney on this point.

[28] Here are a couple of professional communicators who are believers in the process of writing as a tool for the analysis and dissemination of complicated ideas: Ameet Ranadive, https://medium.com/lessons-from-mckinsey/writing-clarifies-thinking-988b8064268e ("Writing is a forcing function to enable to structure the ideas that you want to sell."); Rachael Cayley, https://explorationsofstyle.com/2011/01/12/using-writing-to-clarify-your-own-thinking/ ("Rather than postponing writing until you know what you want to say, use writing to figure out what you want to say."); Jordan Peterson, https://medium.com/practicecomesfirst/dr-jordan-b-petersons-10-step-guide-to-clearer-thinking-through-essay-writing-1ab79a94937 ("The primary reason to write an essay is so that the writer can formulate and organize an informed, coherent and sophisticated set of ideas about something important.").

involves writing and editing.[29]

Holding off on expressing a preliminary opinion until it has withstood the writing process ensures that the expert does not create inflated expectations with the hiring attorney or client. The attorney's evaluation of the case may be significantly influenced by the expert's opinions on key issues. Rather than set and later disappoint expectations, the better practice is to hold off expressing preliminary opinions until the expert has had enough time to consider all of the issues, and, as I suggest, to write and refine the opinion during the analysis.[30]

Under the civil rules in federal court and in Washington, experts are allowed to maintain the confidentiality of their draft reports. *See* Fed.R.Civ.P. 26(b)(4)(B); *Estate of Dempsey v. Spokane Wash. Hosp. Co.*, 1 Wn. App. 2d 628, 632, 406 P.3d 1162 (2017) ("The second issue concerns whether a testifying expert's draft opinions are discoverable or whether they are protected by expert witness work product protections. We answer that draft opinions are subject to testifying expert work product protections and are not discoverable."). Additionally, communications with the hiring attorney are also confidential except to the extent they discuss compensation or facts/data/assumptions on which the expert relied in preparing the opinion(s). *See* Fed.R.Civ.P. 26(b)(4)(C); *Estate of Dempsey*, 1 Wn. App. 2d at 631-32 ("The first issue is whether an attorney may assert attorney work product protections over documents the attorney prepared and sent to a testifying expert. We answer that the attorney may, but that attorney work product protections are waived to the extent the attorney provided facts to the testifying expert to serve as the bases for that expert's opinions.").[31] Because of how the federal courts and Washington courts treat draft expert reports and communications between counsel and experts, some of the concerns that in the past drove lawyers to tell experts not to commit anything to writing no longer exist (at least in Washington). This allows lawyers and experts to work closely together to put together a tight and thorough end product with minimal concern that early drafts showing the development of the opinions will be revealed. Consequently, having an expert express her opinion in writing is a key task in building an organized, coherent, precise, defensible and persuasive opinion.

[29] Hopefully, the expert and hiring attorney have budgeted enough time to review and consider the case information as well as to write out the draft bases for the expert's opinion(s).

[30] It is worth noting that on many scientific and technical issues, there is an uncertainty involved in measurements and related calculations. In "soft" sciences, there is an inherent uncertainty in predicting certain issues that arise in litigation, such as calculating earnings capacity, characterizing emotional damage, and anticipating the impact of a subtle cognitive deficit. That uncertainty may impact the utility of the expert's opinions. Any expression of such an opinion should always be accompanied by an explanation of the associated uncertainty.

[31] It is the hiring attorney's responsibility to provide the facts to the expert. The facts can be conveyed in the form of documents and raw data, a summary of facts, or direction to assume certain facts to be true. Such communications are going to be discoverable when sent to a testifying expert because the opponent is entitled to know the bases upon which the expert's opinions rest, which includes the source of any facts considered in the expert's analysis.

GUIDELINE NO. 6 MINIMIZE ASSUMPTIONS AND UNKNOWN INFORMATION

"The solution often turns out more beautiful than the puzzle." – Richard Dawkins

Even the simplest dispute headed toward or already immersed in litigation is like a puzzle with missing pieces. Each piece of the puzzle represents missing information that the parties need to find in order to better understand their risks in the dispute. Finding as many of the missing pieces as possible will narrow the issues in the dispute and perhaps force resolution of the dispute. We want to fill the empty spaces with factual information rather than assumptions if at all possible. In more complex cases, there are more pieces missing and there may be multiple puzzles involved.

One of the most important roles an expert can fill is advising the hiring attorney and client where to find the missing pieces before and during the discovery process. The expert, hired for his specialized knowledge, will almost certainly be able to suggest ways of obtaining at least some of the missing pieces. Sometimes, the client has some important missing pieces of information, but may not know or appreciate it. By way of example, I recall advice from an industrial hygienist that we brought onboard a vessel to consider a claim of inhalation injury. After witnessing the significant volume of air being pumped into the room in which the injury allegedly took place through huge blowers (which would tend to diffuse any accumulation of harmful fumes), she advised the client to collect evidence confirming the operational status of the space's ventilation equipment at the time of the alleged injury. This information, along with other information she provided regarding inhalation of the substance at issue, helped us conclusively demonstrate that there could not have been a dangerous level of fumes in the space at the time of the employee's claimed exposure.

Sometimes, the opponent or third party has or should have the missing pieces of information. By way of example, in a recent shipyard vessel construction dispute, an accounting expert was brought on to consider the issue of economic losses. He had experience in auditing shipyard construction projects and knew where all of the key evidence was (or should have been) in the shipyard record system. He was instrumental in positioning the client to obtain the key documents from the shipyard by way of demanding a contractual audit and later in discovery by identifying the types of documents that related to the specific potential losses. Such insight is invaluable in finding pieces of the puzzle. In this sense, a good expert not only helps the hiring counsel better understand the information at hand in any given dispute, she can supply critical insights in helping locate additional relevant information to reach a better understanding of the dispute.

GUIDELINE NO. 7 AVOID JARGON/USE DEMONSTRATIVE AIDS WHEN STATING OPINIONS

"[A well-known engineering school] has a reputation for turning out Dilberts. They may be brilliant in what they do, but no one can understand what they say." – Steven Pinker

Of course, reaching thoughtful opinions, writing a careful, thorough and cohesive report, and helping locate missing puzzle pieces are only part of an expert's job. Reports are typically inadmissible, and the expert's insights that lead to discovery of key evidence are typically irrelevant at trial. Successful participation at trial means the expert's specialized knowledge is credited (*i.e.*, believed/accepted) by the trier of fact (judge or jury).

So, how does the expert increase the likelihood that his testimony will be credited? First, the testimony must be understood. To ensure the testimony is understood, the expert should express his opinions in ways that are easily understood by the lay persons to whom it will be communicated. The two best ways of doing this are: (1) avoid technical jargon; and (2) develop ways to explain the opinions using analogies to common life experiences, visual aids, models, images, charts, or multi-media. These extra steps are essential to effectively communicating the expert's opinions.

Experience has shown that juries (and judges) appreciate and better understand testimony concerning specialized knowledge when it is delivered in a conversational style without technical jargon. The expert's goal is to make the specialized knowledge easily understood (or as easily understood as possible) by the jury or judge, while avoiding insult or condescension.

Technical jargon is best understood as words and terms that are easily understood by a specific audience, but not usually understood by the general public. For example, medical specialists, military members, and law enforcement all use jargon when communicating amongst themselves. Here's a good example of a jargon-laden report prepared in a fruit damage claim we pursued. The expert was at the top of his field (food science) and, without a doubt, understood what caused the damage to the fruit. Here are a couple of summarized conclusions he reached:

> Postharvest studies are lacking with regard to determining the balance between the beneficial and injurious effects of O3 on apple quality and safety. Defensible, applied postharvest scientific research dealing with the incidence of LB as effected by specific ozone levels, times of exposure and other variables has been wanting.
> …
> It is highly implausible that the O3 levels monitored by a single [manufacturer] intake tube could possibly be representative of the family of actual O3 levels

> throughout the CA room. Even a partial blockage or failure of the single uptake air delivery system or non-representative sensed O3 levels could potentially result in the delivery of excessive levels of O3 delivered to the apples and serious phytotoxicity (LB) damage to the apples.

There is nothing wrong with the substantive science being expressed here. In fact, it persuasively addressed key issues and helped resolve the case favorably for the client. The language used was precise and I concede that precision is important when addressing technical issues. If you are not a food science expert or apple expert, however, the above jargon is difficult to follow.[32]

When communicating in writing or testifying as a litigation expert, the message needs to be translated into language lay persons can easily follow. If it cannot be translated (*i.e.*, there is no other word or phrase to describe the thing or the concept), then some effort should be taken to add an explanation so the laypersons who want to understand are able to do so. By way of example, in the above passages, the food scientist could have added a brief explanation such as:

> "What this means is that the amount of ozone applied to the fruit exceeded the levels justified by valid scientific studies"; and
> "In layman's terms, the monitoring equipment could not ensure only uniform and safe levels of ozone were delivered to the apples"

Such non-technical explanations assist comprehension by the reader or listener.[33]

Here's a better summarized conclusion from a biomechanical expert opining about a seaman's fall from a pier vertical ladder (which was only marginally functional). After conducting a technical review of the case evidence, employing the expected technical language of the biomechanical field, the key opinions were communicated in simpler and less technical language (though some jargon remains):

> Mr. X fell during a vertical ladder descent because he did not mount the ladder using a standard and safe manner, did not maintain a proper three-point-of-contact prior to the fall event, descended the ladder with excessive speed that, combined with an unusual descent posture, promoted improper and failed foot

[32] Remember Charlie Brown in class when the teacher's voice was heard: "wah-wah … wah-wah" (*see* https://www.youtube.com/watch?v=ss2hULhXf04)? That's the sound of communicating, but not getting through to the intended audience. That is what this Guideline is trying to avoid.

[33] To be fair to the expert who wrote the quoted report, the timeline for the consultation was limited for litigation-related reasons. Had the deadline for the report been more generous, it is quite likely that non-jargon conclusions would have been properly included with the detailed and persuasive report received.

> placement on the ladder's rungs. His method did not allow for visual targeting of foot-rung placement and, thereby, created substantial opportunity for a misstep, disruption of his three-point-of contact, and resultant fall ….

After summarizing the key opinions, the expert tied together the issues he addressed and rendered his conclusion using non-technical terms:

> Mr. X's accident occurred because of his unsafe behavior. That behavior would result in a fall even with an ideally designed, installed and maintained fixed vertical ladder.…

Comprehensive … strong … direct. This particular expert boiled down the accident to a simple explanation that, as it turns out, excused the condition of the ladder that the plaintiff blamed for the fall. If valid and persuasive, this type of opinion can change the course of a dispute. It's one thing to have the "facts" on your side. It is quite another to have an expert on hand to explain the facts in the context of his or her specialized knowledge and to render a strong opinion in readily understandable language. That is formidable.

Here's a succinct, simple and direct opinion from a physician regarding a claim of illness caused by mold:

> In summary, using evidence-based medicine, there is little to support her contention that she has any mold-related disease, either allergic or toxin related.

Here's an excerpt from an experienced ocean engineer who, after 65 grueling pages of formulas, charts, data and discussion about the relationship between ship movement and weather (which was necessary to establish the scientific validity of his opinions), offered this concluding opinion:

> It is concluded that the motions of the [vessel] at the subject date, time, and location were modest, and suitable for deck work at the location of the port forecastle ladder. The actions of the officers directing that deck work be performed at the location of the port forecastle ladder seem entirely reasonable and consistent with the applicable and most appropriate recognized criterion.

The expert was able to synthesize very complex ideas into a simple and easily understood opinion.

It's not just the expert's final opinions that will need to be simplified when communicated in the report and in testimony. The expert should expect to provide some basic tutorials (*i.e.*, teach) in order to provide the jury or judge with the foundational information needed to follow

along as the expert explains the methodology used. In addition to walking the jury through the expert's methodology (how did the expert reach the conclusions he reached?), the expert needs to be able to distinguish that methodology and the resulting opinions from the opposing opinions (which may rely on inappropriate methodology, factual inaccuracies, and/or false assumptions). To communicate these potentially complex ideas to a lay person, the expert must take a 360-degree view of the issue and ask, "if I was just learning about this for the first time, what would I want to know?" Those questions need to be considered and answered without jargon.

Since grade school, we have all enjoyed "show and tell" more than lectures. Studies have demonstrated the importance of visual aids in maintaining an audience's attention. When it comes to explaining complex issues, use of visual aids is the key to keeping the audience's attention. The expert's report should include visual aids to address important portions of the analysis. I have selected several visual aids from reports I have seen in litigation in the past decade. They are reproduced below along with a brief explanation of why the aid was helpful:

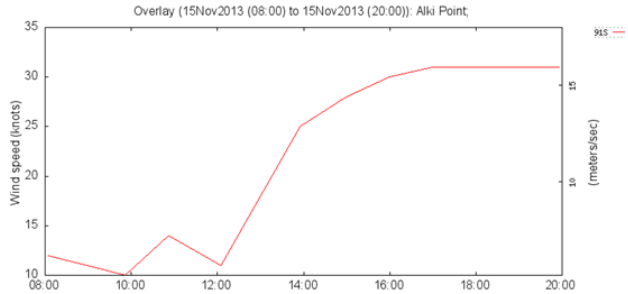
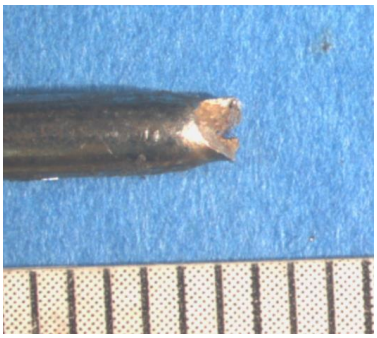


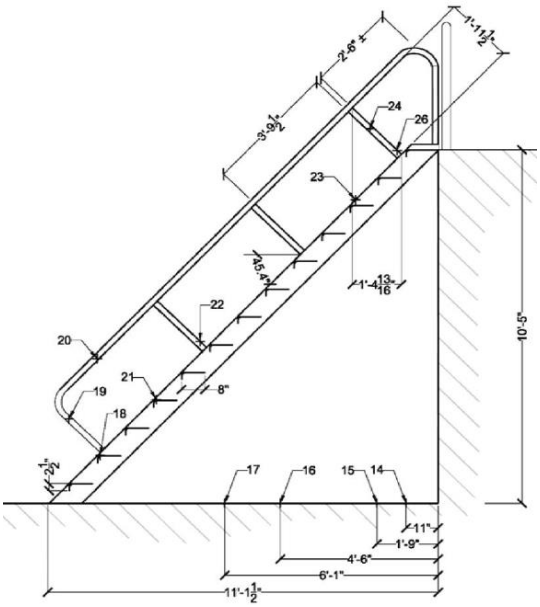
Figure 1. Sustained wind speeds at Alki Point (K91S) during 15 November 2013. The wind was out of the south during this period.

Here is a weather plot that takes the place of ten pages of National Weather Service bulletins, which are difficult to decipher.



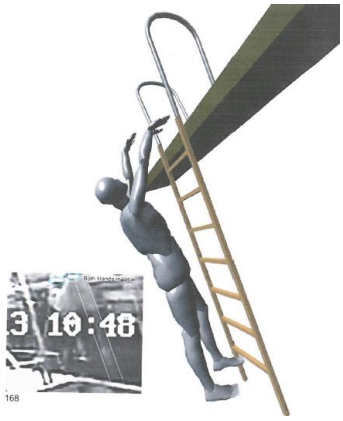
In a case that required explanation for why a wire rope parted, a metallurgist used this image (a microscopic image of a strand of wire rope that tends to show the rope parted due to excessive tensile forces) to help the reader visualize the explanation he provided regarding the cause of the failure.

In a case involving a seaman's fall on a merchant vessel, a mechanical engineer used the above images to show the relative size of the seaman (represented by a chief mate who was of similar size and build) to explain that the seaman did not fall from a ship's ladder in the manner he claimed.



These true dimensions of the ladder in a seaman fall case also displayed the relative positions of evidence (paint that purportedly was spilled as a result of the fall).

Sometimes the image needs to be annotated to communicate the simply-understood idea (about an engine fire).



Sometimes the image lacks detail and can be supplemented by a computer simulation (concerning a different fall case).

A meaningful picture can be worth well more than 1,000 words when the picture allows the expert to effectively explain a complex issue in simple terms. Each key opinion needs to be considered to determine the best way to use simple language and visual/demonstrative aids to explain it.

The work of crafting a simplified and understandable version of an opinion should be performed before the preliminary opinions are reported. Doing so allows the expert to communicate the opinion(s) to the hiring attorney and client in terminology they are bound to understand.[34]

It is also worth mentioning that when practicing in federal court, the disclosure rules require that the expert consider the issue of trial testimony in advance of the expert report deadline. Fed.R.Civ.P. 26(b)(2)(B)(iii) requires, among other things, that the expert preparing a report include in the report "any exhibits that will be used to summarize or support [the opinions]." Disclosing a simplified and understandable opinion along with necessary visual aids will also have the added benefit of ensuring the expert's opinion is understood by the opposing attorney and opposing party as well.

GUIDELINE NO. 8 BE PREPARED WHEN IT COMES TIME TO DEFEND YOUR OPINIONS

"We shall defend our island,
whatever the cost may be,
we shall fight on the beaches,
we shall fight on the landing grounds,
we shall fight in the fields and in the streets,
we shall fight in the hills;
we shall never surrender." – Winston Churchill

This guideline focuses specifically on the preparation process in advance of testifying at deposition or trial. An expert who has followed all of the above Guidelines will inevitably have given the hiring attorney and client a strong report based on sound specialized knowledge. Such an expert has an excellent handle on the case facts and the application of his specialized knowledge on which his testimony relies. Will that be enough to ensure the expert will be successful when providing testimony (at deposition or trial)? No.

[34] Many hiring attorneys and clients may not have a technical background and may not initially understand the expert's opinion. Many experts have experience in explaining their opinions to the hiring attorney in more understandable and less-technical terms (and perhaps by employing analogies). Such communications are good practice for finding the best lay explanation for an opinion.

FOLLOW THESE NINE GUIDELINES TO SUCCEED AS A LITIGATION CONSULTANT (AND EXPERT WITNESS)

Studies have shown that credible expert testimony is "characterized by knowledge, confidence, trustworthiness, and likeability." (Neal, 2009, pp. 44-52). It is not only what the expert knows, but how well she communicates it that renders the testimony credible. My experience bears this out. Only one (knowledge) or maybe two (trustworthiness) of those traits is knotted to the expert's substantive opinions. Just about every attorney can regale an audience with tales of cases in which the superior science or engineering or medical opinions did not win the day. Sad, but true. Such a result may have nothing to do with the expert: it's a simple fact that someone is going to lose at trial – even if both sides have the best experts, the best lawyers, and make outstanding presentations, one of those sides is going to lose. Nevertheless, an expert with a tenuous opinion, but superior confidence and likeability may be deemed by the judge or jury to be more credible. This Guideline discusses how thoughtful and thorough preparation in advance of testifying helps an expert anticipate the tough lines of inquiry and display her natural confidence and likeability when responding. Additionally, the Guideline explains that preparation plays a key role in ensuring the expert's testimony is credited.

Few events are as satisfying to an attorney as defending the deposition of a well-prepared expert. Combine a strong report with well-researched and considered opinions, adequate preparation, and an appropriate focus and temperament during the deposition and you have the recipe for significantly improving the case result. The opposing counsel conducting the deposition will realize how formidable the consulting expert is as a witness. On more than one occasion, I have left such a deposition and settled the case within a week on much better terms than were on the table before the deposition.

Our preparation will be framed below as preparation for deposition testimony. The issues will be no different for trial testimony. Preparation for the deposition should be treated with no less urgency or importance than preparation for trial testimony.

Building from the comprehensive understanding of the facts and applicable specialized knowledge reflected in a report, preparation for testimony includes consideration of the methods of inquiry/attack that the opposing attorney will employ during the deposition. The opposing attorney is likely trying to accomplish several goals during an expert deposition, including: (1) determine the expert's qualifications, (2) ascertain all of the expert's opinions, (3) learn the factual bases for the opinions, and (4) discover the methods the expert employed to reach the opinions. (*see* Radnor, 2000, pp. 37-55). Ultimately, the opposing attorney wants to develop information to undermine the influence of the expert's opinions on the dispute, which sometimes also involves undermining the expert herself. There are a lot of variables, but broadly speaking, I can describe at least 6 common modes of inquiry/attack that an expert should anticipate and prepare for in advance of the deposition (*see* McElhaney, 1989):

1. Constructive Cross-examination – the opposing attorney uses the expert to bolster the opposing theory of case

Before the opposing counsel questions the expert about the issues in dispute, she may try to enlist the expert's support or affirmation of key portions of the opposing case, such as:

- Qualifications/reputation of opposing expert
- Authoritative character of relevant articles/treatises relied upon by opposing expert
- Correctness of opposing expert's methodology and calculations
- Affirming facts related to aspects of opposing theory on liability/damages

To the extent the expert confirms the qualifications of the opposing expert or the correctness of the expert's methodology, the opposing position is strengthened. When testifying, the expert must always be truthful. But the expert is not required to reach new opinions or express opinions on issues that he has not previously considered. If asked for an opinion about an issue that is outside of the scope of the expert's analysis, a good answer may be, "I have not considered that issue."

2. Bias - prior relationship with counsel or client, or always on same side of similar disputes

The opposing attorney may inquire about prior disputes in which the expert worked with the hiring attorney or client and imply that the expert's opinions are biased because of those prior matters (or the promise of future work). It may diffuse such an assertion of bias to point out that the expert has also had cases on the opposite side from the hiring attorney or client. It may be relevant that the expert's prior work with the hiring attorney or client represents a very small portion of her work or income.

In a similar fashion, the opposing attorney may ask about the proportion of the expert's caseload that involves him on one side of the aisle (always plaintiff or always defendant expert). This sort of *ad hominem* attack usually fails,[35] but may succeed when combined with (1) evidence that the expert's livelihood largely depends on representing the same interests over and over again, or (2) a report that is substantively below par. Successful experts are sought out by varied interests. Successful experts do not sign bad reports. As I stated above, several of the experts I have used were first introduced to me when I received their report in a disclosure from the opposing party or when I met them in conjunction with a pre-suit investigation when they were working on behalf of another party. The best experts don't have a dog in the fight

[35] Sometimes, the nature of the work or the expert's expertise naturally puts that expert on one side of a frequently disputed issue. Take, for example, someone such a psychologist who has widely studied and written about the lack of reliability with eyewitness testimony. One would naturally expect that the psychologist would be called upon more frequently by criminal defendants than by criminal prosecutors. Merely showing up on one side of disputes, by itself and without more, is a pretty weak argument for bias (in my humble opinion).

and are happy to provide honest advice to any hiring attorney who comes knocking at his or her door.

3. Qualifications - lacks specialized knowledge, experience, training, certifications, skill, education

This issue cuts to the core of the expert's credibility. If the opposing party successfully calls the expert's qualifications into question, there may be a question of admissibility of the expert's opinions.

Anticipating an inquiry regarding qualification, the testifying expert should ensure the resume or curriculum vitae ("C.V.") is up-to-date and includes all of the training, education, writing, seminars, etc. that relate to the field of study on which the expert will rely in the dispute. The expert must ensure the resume or C.V. is scrupulously accurate. One of my partners was involved in a case where it came out at trial in cross-examination that the opposing party's expert had deliberately lied about his credentials. Needless to say, the testimony devastated the opponent's case. Experts should know – particularly in our information age – that before they testify, the opposing counsel will carefully "vet" them with online searches, review of prior deposition testimony, etc.

Even if admissibility of an opinion is not at issue, there is always the potential issue of the relative qualifications of the respective experts. The expert should review the opposing expert's resume/C.V. and consider how to respond to some tough questions on this issue:

Q. You are familiar with Dr. Smith's resume?
A. Yes.
Q. She is a Diplomat with the American Board of Psychiatry and Neurology.
A. Yes.
Q. You are not.
A. Correct.
Q. She is Board Certified.
A. Yes.
Q. You are not.
A. Correct.

Testimony like that tends to put competing expert opinions in perspective to the disadvantage of the expert with inferior credentials. If an expert anticipates such an attack, he should discuss the issue with the hiring attorney and consider the best responses to that line of questioning.

4. Substantive attack on methodology/substantive basis for opinions

Even well-qualified experts can be mistaken.[36] *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("*Daubert II*") ("Something doesn't become scientific knowledge just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were derived by the scientific method be deemed conclusive."). "[T]he expert's bald assurance of validity is not enough. Rather, the party presenting the expert must show the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology." *Id.*, at 1316. An expert must be prepared for probing questions about the methodologies and reasoning behind his opinions (and rebuttal opinions). If the expert has followed Guideline No. 4 above, he or she is already up to speed on the relevant literature that relates to the methodologies at issue.

A review of the opposing expert opinions should provide some fertile ground for identifying the gaps (or chasm) between the respective expert opinions. The opposing attorney will likely focus on the reasons for these differences.

The general line of inquiry regarding the methodologies at issue may be addressed along these lines: (1) establish the proper procedure/method/test (hereinafter, "the method"), (2) establish that the expert knows how to do the method properly, (3) show the method used, and (4) confirm that the expert witness did not follow the proper method. *See* Pozner, Dodd (2014, pp. 330-331). A careful attorney can go methodically through each step in a procedure using this general line of inquiry. Demonstrating the proper method (step 1 above) can be accomplished by showing: (1) the expert agrees that a particular text or other well-known expert in the field is authoritative, (2) the method at issue is established in the text or an article written by the acknowledged expert. *Id*.

An expert should be very cautious about agreeing that a particular text or author is authoritative unless he has considered the content of the respective writings and understands the implications vis-à-vis the opinion at issue. I refer back to Guideline No. 4, which directs the expert to be familiar with the key documents in the respective field when forming the opinion. Sitting in a deposition is not a good time to first be considering the issue of the application of a particular authoritative statement in the field to the issues in the dispute.

5. Substantive attack on the application of the facts

One area of vulnerability that I have seen exposed in many expert depositions is unfamiliarity with key facts in the dispute. This is the legal equivalent of an "own goal" and is entirely preventable. Lack of command of the case facts is understandable in the sense that many

[36] For a great TED talk about an expert who changed her mind on shaken-baby syndrome, see https://www.overlawyered.com/2019/01/a-shaken-baby-syndrome-researcher-reconsiders/.

litigated cases involve thousands of pages of documents and numerous depositions and deposition exhibits. Further, an expert's involvement in a matter and initial review of documents may have started a year before the deposition. New documents and new depositions are frequently being disclosed and shared with the experts in the months and weeks before the report is due. It is very difficult for an expert to efficiently stay on top of the many new, changing, and contested facts in a dispute. Nevertheless, the expert's opinion is most often an application of case facts to the expert's specialized knowledge. Uncertainty or misunderstandings of case facts undermine the validity and persuasiveness of the expert's opinions. The expert must have frequent discussions with the hiring attorney (who should have an excellent handle on case facts and the locations of key information in the documents and testimony). Before the deposition, the expert must devote the necessary time to gain a command of the case facts.

6. Hypothetical questions

A hypothetical is a suppositional inquiry along the lines of, "Please assume the following facts [x, y, z] are true; how does that impact your opinion?[37] The questions will tease out whether if any of the facts as the expert understands them (based on his review of the record) were changed, the expert would change his opinions. Many experts are very familiar with hypotheticals as the use of hypotheticals is integral to the scientific process. Whether or not an expert is familiar with the use of hypothetical inquiries, they must be approached with caution during testimony.

Oftentimes opposing experts rely on different facts (or assumptions, which take a fact for granted in the absence of proof of the fact) to support the opinions and conclusions that are disclosed. Hypothetical questions are a tool that can assist the attorney deposing an expert to tease out whether, on the same or altered facts, the conclusions of the respective experts would be the same. If an expert's opinion hinges on a disputed fact, it is only as strong as the proof of the disputed fact. If the jury or judge does not agree that the disputed fact was proven, the expert's opinion is rendered moot.

With awareness of the opposing expert's opinions and the opposing case theory (to the extent it is apparent from demand letters, the opposing discovery inquiries and responses, and questions posed by the opposing attorney in depositions), the expert should carefully consider in advance of testimony how the different facts promoted by the opposing expert and party would change or influence the expert's opinions. Would a wholesale revision be necessary?

[37] The hypothetical asks the expert to consider that if something, which the evidence shows didn't happen, actually happened, how might the hypothetical occurrence impact the expert's opinion? The problem is that it is difficult to know how, if that one isolated fact had been different, it would have impacted the other facts on which the expert's opinion are also based. Many times, the "correct" answer is, "it didn't happen that way, so it is impossible to know."

Would the changed fact(s) make no difference? The expert should be prepared to articulate how varying the facts would influence the opinions and why. The expert should discuss with the hiring attorney which disputed facts can be conceded in the context of the hypothetical and which cannot.

When asked a hypothetical, the expert should take her time before responding. Doing so allows the hiring attorney to object to the hypothetical as incomplete, ambiguous, inaccurate, irrelevant, and/or unreasonable. The expert should avoid answering a hypothetical if the answer can be misunderstood. "Yes" or "no" answers to hypotheticals are rarely the best answer. If the question is sufficiently clear that an answer is appropriate, the answer can be started with a disclaimer that sets forth the understood conditions in the hypothetical. For instance, "You have posed a hypothetical asking me to assume all the facts in the case are as I set forth in my report with the exception that the shackle weighed 5 lbs. instead of 2 lbs. as I stated in my report. You are asking me if it would change my opinions if the weight of the shackle was 5 lbs. and not 2 lbs. My answer to that hypothetical is ____." Such a statement in advance of the answer prevents misinterpretation of the answer. Alternatively, if the hypothetical is too objectionable to try to answer, an appropriate response might be, "You have assumed facts in the question that are inconsistent with the record that I reviewed. I cannot answer a question based on such false premises because it is incomplete and misleading."

The goal of preparation is to assist the expert to effectively communicate and defend his opinions. In addition to the six modes of inquiry/lines of attack discussed above, preparation for testimony involves:

- The expert should sit down with the hiring attorney to discuss what to expect in the deposition;
- The expert should bring his file to the meeting with the hiring attorney and the file should be well organized so that information related to the opinion(s) is readily retrievable and so that any protected information is identified and removed prior to sharing the file with the opposing party;
- The expert should remember to abide by the following testimony protocols:
    - The deposition/trial is not a conversation with the opposing attorney (avoid conversational approach);
    - Always testify truthfully;
    - Listen to questions carefully;
    - Answer the questions asked directly if possible;
    - If you do not understand the question, don't answer based on an assumption about what you think the attorney meant to ask … just say, "I do not understand the question";
    - If you need information to respond to a question, don't remember the information, but know the information is in the

report, the expert could respond: "That information is in my report … may I refer to my report?";
    - Leave the emotions at home … emotions cloud thought.[38] A clear mind is necessary for the focus on listening and thinking that is required when testifying; and,
    - Defend the opinion and set the record straight as needed … "That is not what the report says" … "You misstate my opinion …" … "You did not cite to the applicable paragraph of the treatise …"
- The expert is not an advocate … excessive advocating undermines the expert's credibility.
- The expert should cooperate with the hiring attorney in setting up and attending follow-up preparation and mock testimony sessions (that's a whole separate article worth of material) as needed.

GUIDELINE NO. 9 TO THE EXPERT, THE EXPERT'S REPUTATION IS MORE IMPORTANT THAN THE RESULT IN A PARTICULAR CASE

"Along with success comes a reputation for wisdom." – Euripides

When I originally considered this guideline, I was focused on the concept of "credibility" instead of reputation. But, after thinking it through, credibility, which I define as integrity and fealty to the truth, is just a portion of the Guideline I want to convey. It takes more than fidelity to the truth to succeed as an expert.

The stakes can be high for both the expert and the client when a consultant takes on the role of expert in a dispute. From the client's perspective, the disputes that are brought to court may involve someone's liberty (in criminal cases), life's work, reputation, wealth and/or property. All are important issues for the client and deserve a thoughtful approach. To the rest of us, providing a competent justice system for dispute resolution is a defining characteristic of our civil society. The expert is an important cog in the machine providing that competent justice system. He or she must approach the task with appropriate dedication and seriousness.

The expert should also realize that no matter the issues in the dispute, the expert's work in a particular case could resonate and have repercussions beyond the resolution of the immediate dispute. I think back to a psychology professor I hired to help suppress an exculpatory polygraph early in my career. The professor was initially apprehensive about taking on the case because, if he did so, he would be working with a green (*i.e.*, new) prosecutor. He knew the

[38] This is easier said than done. No one likes receiving criticism and that's what being grilled feels like at times. When the testifying expert starts thinking about verbally jousting with the opposing attorney (rather than answering the pending question), it is probably best to take a break in the testimony if possible.

defense already had retained a renowned polygraph advocate as its expert. He did not want to put his public reputation (as a polygraph skeptic) on the line and lose. He would not take the case until I convinced him that we would do what it took to properly present the scientific issue to the military judge and be prepared to cross-examine the opposing expert. He was concerned that our court-martial was not a competent forum for what he saw as a public debate about whether a polygraph was a valid measure of truth-telling.[39] He did not need any convincing about the need to prepare for testifying. When it came time to testify, that expert brought his "A" game - he was ready, and his testimony was well-informed and persuasive.

It was apparent to the psychologist in the polygraph case that his performance during court-martial was meaningful beyond the dispute in the case.[40] Such meaning includes the observations regarding the expert's effort, expertise, competence, temperament, and credibility that will leave an impression with at least the hiring attorney, the client and the opposing attorney … and maybe the judge and jury … and maybe, the public and the expert's professional colleagues (depending on the dispute).[41] An expert who credibly and effectively communicates specialized knowledge to help resolve a dispute will enhance her reputation no matter the outcome. I have hired several experts whom I first met across the deposition table because they impressed me with their grasp of the science/technical issues, knowledge of the case facts, communication skills, and candor. An expert should act like her reputation is at stake in the performance of every consultation. It is.

Because an expert's reputation matters, he should only take on an assignment to which he can devote adequate time and attention. Once the assignment is accepted, it should be undertaken with the focus and consideration needed to timely reach legally sufficient answers to the questions presented. At all times, the expert must be honest and truthful in providing advice, rendering opinions, and testifying. By doing so, the expert preserves his reputation, no matter the outcome of the dispute.

[39] The astute reader may recognize that polygraph results are not admissible in most courts. The current military rules of evidence also exclude polygraph results. However, there was a brief period in the mid-1990s when the prior polygraph evidence exclusion rule was voided, and polygraphs were not *per se* excluded. This case was presented during that window.

[40] The psychologist had no opinion about the outcome of the case. His opinion was confined to whether the exculpatory polygraph result was scientifically valid.

[41] Whether the expert was hired by the "winning" or "losing" side (if there is one) does not impact my reputational assessment. The result of the dispute is almost always out of the immediate control of the expert and therefore it is improper to weigh any particular result in considering the expert's reputation.

Conclusion

"If you're going to do something, then do it right." – Our Parents

I hope the reader found the above information useful. If you have ideas to add (or amend) to the above, I would love to hear them. You can contact me at creilly@nicollblack.com or on my office phone (206) 838-7553.

Bibliography

In my own research when preparing this article, I read/reviewed the below articles and books as well as my own professional notes from my past case work. Several of the documents are specifically cited in the article:

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