

SCHEDULE

(Click on the highlighted links below to go directly to materials for specific session)

- 8:00am: Check-In
- 8:20am: Welcome
- 8:30am: [Cases and Rules Update](#)
[Judge Salvador Mendoza and Staff Attorneys](#)
- 9:15am: [Whistleblower Actions](#)
Moderated by Professor Lillard, with Alex Higgins, Sandra Kent, and Aviva Kamm
- 10:15am: Break
- 10:30am: [Selecting and Effectively Using Expert Witnesses](#)
Moderated by Judge Shea, with attorneys Chad Mitchell and David Smith
- 11:30am: **LUNCH:** Travel to Red Lion Richland Hanford House 802
George Washington Way, Richland, WA
- 12:15pm: Lunch Presentation
Ninth Circuit/Federal Bar
Shea Meehan and Erika Hartliep
- 12:45pm: Return to Federal Courthouse
- 12:50pm: [Ethics Key Note Presentation](#)
[Professor Hugh Spitzer](#)
- 2:00pm: Swearing In of New Attorneys
- 2:15pm: [Persuasive Trial Technology](#)
[Attorney Karen Koehler](#)
- 3:15pm "Ask the Judges" Panel
Moderated by Erika Hartliep, with Judge Whaley, Judge Suko, Magistrate Judge Dimke
- 4:15pm: Adjournment

IMMEDIATELY FOLLOWING THE CLE, PLEASE JOIN US FOR A RECEPTION HOSTED BY TELQUIST MCMILLEN CLARE, PLLC AND WALKER HEYE MEEHAN & EISINGER, PLLC IN THE LOUNGE AREA AT THE RED LION HOTEL RICHLAND HANFORD HOUSE.

Sali v. Corona
2018 WL 2049680
__ F.3d __ (9th Cir. 2018)

Holding

A district court may not reject evidence submitted in support of class certification on the basis of admissibility alone.

Summary

Marylin Sali and Deborah Spriggs are registered nurses who were formerly employed by Corona Regional Medical Center. They filed a putative class action against Corona and sought certification of seven classes of RNs they allege were underpaid by Corona as a result of certain employment policies and practices.

The district court denied certification on the basis that (1) Federal Rule of Civil Procedure 23(a)'s typicality requirement is not satisfied for any of the proposed classes because Sali and Spriggs failed to submit admissible evidence of their injuries; (2) Plaintiff Spriggs and proposed class counsel have not demonstrated they will adequately represent the proposed classes; and (3) several proposed classes fail to satisfy Rule 23(b)(3)'s predominance requirement. The Ninth Circuit held that each of these reasons was an abuse of discretion and reversed. This summary addresses only the typicality analysis, which may have significant implications beyond this case.

A representative plaintiff may sue on behalf of a class when the plaintiff affirmatively demonstrates the proposed class meets the four threshold requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. The district court concluded that Sali and Spriggs "have not carried their burden of demonstrating that the injuries allegedly inflicted by Defendants on Plaintiffs are similar to the

Class Certification

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Evidence

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Practice Pointers

- ⇒ Evidentiary proof submitted in support of class certification is not limited to admissible evidence
- ⇒ Evidence in support of class certification nevertheless should be reliable

Courts must conduct a rigorous analysis of whether plaintiff has demonstrated the Rule 23 requirements are met and may consider admissibility of evidence in that analysis

- ⇒ Expert evidence may be subject to *Daubert* analysis, although ultimate admissibility under that standard is not dispositive

injuries of the putative class members because [they] do not offer any admissible evidence of [their] injuries in their motion for class certification.” The district court reached this decision after striking the declaration of Javier Ruiz—upon which Sali and Spriggs relied to demonstrate their individual injuries—on the basis that the declaration contained inadmissible evidence.

The Ninth Circuit held that the district court abused its discretion by rejecting the Ruiz declaration solely on the basis of admissibility. The court explained that because of the preliminary nature of class certification, a district court need only consider “material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement.” While a trial court must conduct a “rigorous analysis” to determine whether the party seeking certification has met the prerequisites of Rule 23, and that analysis may include consideration of admissibility, “admissibility should go to the weight that evidence is given at the class certification stage” and should not be dispositive.

The court noted that the facts of this case illustrate the need for this rule:

“By relying on formalistic evidentiary objections, the district court unnecessarily excluded proof that tended to support class certification. Corona did not dispute the authenticity of the payroll data underlying Ruiz’s analysis, nor did it directly dispute the accuracy of his calculations. Instead, Corona argued that Ruiz’s declaration and spreadsheet were inadmissible because Ruiz extracted data without explaining his methods, and the district court agreed. But by relying on admissibility alone as a basis to strike the Ruiz declaration, the district court rejected evidence that likely could have been presented in an admissible form at trial.”

D.C. v. Wesby,
138 S. Ct. 577 (2018)

§ 1983
-
Civil Rights
-
Probable Cause

Holding

Officers had probable cause to make arrests for unlawful entry, and even if they lacked probable cause, they had qualified immunity from arrestees' § 1983 false arrest claims.

Summary

In March 2008, police responded to a complaint about a disruptive party in the northeast section of Washington D.C. When they arrived, police found a nearly empty house strewn with beer and liquor bottles and a makeshift strip club in the living room. Police questioned the partygoers and received inconsistent stories. Two women stated that a woman named "Peaches" had given them permission to have the party. Police later determined that Peaches did not have permission to use the house and that the owner had not given anyone permission to be there. Police arrested the partygoers for unlawful entry.

Several partygoers, including Wesby, sued for false arrest under the Fourth Amendment. The District Court held that officers lacked probable cause to arrest the partygoers for unlawful entry and that two of the officers were not entitled to qualified immunity. The D.C. Circuit affirmed, and the Supreme Court granted certiorari.

The Court held that (1) the officers had probable cause to arrest the partygoers, and (2) even if they did not, the officers were entitled to qualified immunity. First, the Court explained that "the condition of the house and the conduct of the partygoers" combined with the partygoer's "vague and implausible" answers to police inquiries suggested that the partygoers knew their party was unauthorized. Second, the Court stated that it was not "clearly established" that the police conduct was wrong. The Court emphasized that there are no cases suggesting that the police lacked probable cause if the partygoers had a good-faith belief that they were permitted to be in the house. Justices Sotomayor and Ginsburg both filed concurring opinions.

Practice Pointers

- ⇒ The facts of the case are important! Use them to argue the law is not clearly established. Or to show that it is.
- ⇒ The precedential value of this case is limited because it is highly fact-specific.

Hall v. Hall

138 S. Ct. 1118 (2018)

Holding

When one of several cases consolidated under Rule 42(a) is decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases are pending.

Summary

Elsa Hall sued her brother, Samuel Hall, over the handling of their mother's affairs in her capacity as trustee for her mother's property (the trust case). Samuel then filed a separate complaint against Elsa in her individual capacity (the individual case). The trial court consolidated the trust case with the individual case under Federal Rule of Civil Procedure 42(a). In the trust case, the jury returned a verdict against Elsa, and Elsa appealed.

The Court of Appeals for the Third Circuit dismissed Elsa's appeal on the basis that the judgment in the trust case was not final and appealable because Samuel's claims against Elsa remained pending in the individual case.

In an 9-0 opinion authored by Chief Justice John Roberts, the Court concluded that "consolidation" under Rule 42(a)(2) and its predecessor statute have long been understood "not as completely merging the constituent cases into one, but as enabling more efficient case management while preservice the distinct identities of the cases and rights of the separate parties in them." Accordingly, the Court reversed.

Civil Procedure
-
Jurisdiction
-
Complex Litigation
-
Appeals

Practice Pointers

- ⇒ As soon as a final judgment is entered in an individual case, appeal as soon as possible. If you wait for resolution of the other consolidated cases, your appeal could be jurisdictionally barred.
- ⇒ The Court observed that district courts could consolidate cases for "all purposes" in some circumstances but did not define what those might be. If you want to tie the fates of two cases, try arguing for "all purposes" consolidation.

Kisela v. Hughes, 138 S. Ct. 1148 (2018)

Holding

Police officer Andrew Kisela is entitled to qualified immunity because his actions did not violate clearly established statutory or constitutional rights of which a reasonable officer would have known.

Summary

Police Officer Andrew Kisela shot and wounded Amy Hughes in 2010. Kisela had responded to reports that Hughes was in the street with a large knife screaming and crying loudly. When Kisela arrived, he saw Hughes approaching another woman. After Hughes ignored orders to drop the knife and continued to move toward the woman, Kisela fired at Hughes several times. The shots struck Hughes several times and injured her, though none of the injuries were life-threatening. The entire incident lasted less than one minute.

Hughes sued Kisela under § 1983 for excessive use of force. The district court granted summary judgment to Kisela holding Kisela was entitled to qualified immunity, and the Ninth Circuit reversed. Kisela appealed, and the Supreme Court granted certiorari.

The majority opinion reasoned that, even if Kisela violated the Fourth Amendment, he did not violate a clearly established right. The Court explained that it was “far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.” The Court also reprimanded the Ninth Circuit for construing qualified immunity too narrowly.

Justice Sotomayor, joined by Justice Ginsburg, dissented from the majority opinion. Sotomayor emphasized that Hughes was suspected of no crime, presented no immediate threat, and may not have heard or understood the officers’ commands. Sotomayor criticized the majority opinion as “symptomatic of a disturbing trend” condoning “shoot first, think later” policing.

§ 1983

–
Civil Rights

–
Excessive Use of Force

Practice Pointers

- ⇒ When arguing in favor of qualified immunity, emphasize that the law is not clearly established on the specific facts of the case. Distinguish using details unique to the case.
- ⇒ When arguing against qualified immunity, focus on the favorable burden on summary judgment. The court must view the facts in the light most favorable to the nonmoving party. Emphasize how those facts track clearly established law.

Patterson v. Van Arsdel

883 F.3d 826 (9th Cir. 2018)

§ 1983

-
Absolute Immunity

-
Civil Rights

Holding

A pretrial release officer who presented an arrest warrant to a judge was not entitled to absolute prosecutorial immunity.

Summary

Sarah Patterson was arrested for domestic violence while on pretrial release for separate charges. At Patterson's arraignment on the domestic violence charges, the judge denied pretrial release officer James Van Arsdel's motion for revocation of release. Van Arsdel then presented an arrest warrant to another judge with whom he was close. Van Arsdel frequently socialized with the judge, and his wife was the judge's judicial assistant. The second judge signed the warrant, and Patterson was jailed for two days before it was determined that the warrant was defective.

Patterson then brought suit under § 1983 for violation of her Fourth Amendment § rights. The trial court dismissed Patterson's complaint under rule 12(b)(6). The court held that Van Arsdel was entitled to absolute prosecutorial immunity. Patterson appealed, and the Ninth Circuit reversed.

The court explained that prosecutorial immunity extends only to acts of advocacy "intimately associated with the judicial phase of the criminal process." The court uses a functional approach when determine whether a particular action is entitled to absolute immunity. A prosecutor's motion for a warrant is entitled to immunity, but a police officer's recommendation that a judge sign a warrant is not. Here, Van Arsdel's job was to verify release criteria information and make recommendations to a judge, but he had no power to make release decisions himself. The Court therefore concluded that Van Arsdel was not entitled to absolute immunity because he was not acting in a prosecutorial capacity.

Practice Pointers

- ⇒ To determine whether absolute immunity applies to a given action, the action itself matters more than the person's job title.
- ⇒ A person's job duties may still be relevant in determining the purpose of their actions (to investigate, to recommend, or to initiate prosecution).
- ⇒ When crafting arguments about the application of absolute immunity, focus on analogizing the action at issue to a protected/ unprotected action.

S&H Packing & Sales Co. v. Tanimura Distributing, Inc., 883 F.3d 797 (9th Cir. 2018)

Holding

Before considering the commercial reasonableness of a factoring agreement removing accounts receivable from a PACA trust, a court must first apply a threshold test to determine whether the factoring agreement was a true sale of the accounts receivable.

Summary

When a perishable produce grower sells products on credit to a distributor, the Perishable Agricultural Commodities Act creates a trust in which the distributor is the trustee and the grower is the beneficiary. The trustee has a duty to sell the produce and collect on any accounts in a commercially reasonable way.

Here, produce growers sold their goods on credit to Tanimura. Tanimura then sold the produce to a third party, generating accounts receivable held by the trust. Tanimura then transferred the accounts receivable to a factoring company, AgriCap. Tanimura went bankrupt, leaving the growers unpaid. The growers then sued AgriCap, arguing they were entitled to first priority on the funds recovered on the accounts receivable.

In an en banc opinion reversing a prior case, the Ninth Circuit Court of Appeals established a two-part test for determining when an asset remains in a PACA trust. First, the court must determine whether the transfer of accounts receivables was a “true sale” or merely a secured lending agreement. A true sale occurs when the recipient of the accounts bears the risk of nonpayment. If the transaction was a secured agreement, the assets remain in the trust subject to the growers’ priority right to payment. If, however, the transaction was a sale, the court must next analyze whether the sale was commercially reasonable. If so, the buyers own the assets free and clear of the trust. If not, the buyer’s rights are subject to the growers’ rights.

Bankruptcy
–
Secured Transactions
–
Agriculture

Practice Pointers

- ⇒ A commercially reasonable purchase of accounts receivable from a PACA trust will result in the least exposure for the purchaser to the trustee beneficiaries.
- ⇒ When structuring a purchase of accounts receivable, make clear that the purchaser bears the ultimate risk of nonpayment.

Sali v. Corona

884 F.3d 1218 (2018)

Holding

Under Rule 37's discovery enforcement provisions, a court may order a party to produce a nonparty expert witness for deposition and may sanction the party if it fails to make reasonable efforts to produce the expert.

Summary

Marylin Sali and Deborah Spriggs are registered nurses who filed a putative class action against their former employer, Corona Regional Medical Center.

The defendants sought to depose the plaintiffs' expert economist, Mark Falkenhagen, prior to the deadline for filing its opposition to class certification. The plaintiffs refused and defendants subpoenaed Falkenhagen to be deposed pursuant to Rule 45. Plaintiffs objected to the scheduled deposition and neither Counsel nor Falkenhagen appeared for the scheduled deposition.

After an unsuccessful attempt to agree on a new deposition date, Defendants moved to compel Falkenhagen's deposition. The magistrate judge denied Defendants' request to set a deposition on the date Defendants preferred because of Plaintiffs' counsel's unavailability but ordered Plaintiffs to produce Falkenhagen for deposition three days before the class-certification opposition deadline. On that date, Falkenhagen and plaintiffs' counsel again failed to appear.

Defendants moved for sanctions under Rule 37. The magistrate judge granted the motion and sanctioned counsel \$15,112. Plaintiffs appealed, arguing that the district court lacked authority to compel Falkenhagen's deposition or impose sanctions.

Discovery

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Sanctions

-

Practice Pointers

- ⇒ Produce your witnesses for depositions!
- ⇒
- ⇒ If you have an objection to a deposition or discovery request, and you cannot reach an agreement with opposing counsel, move for a protective order, don't simply ignore a subpoena.
- ⇒
- ⇒ If the court orders you to do something, but you think the court lacked authority, appeal, don't ignore the order.
- ⇒

The Ninth Circuit concluded that while Rule 37 does not empower a court to compel a nonparty to appear for deposition, it does empower the court to compel a party to use its best efforts to produce a nonparty. In this case, Plaintiff failed to do so.

Importantly, the court acknowledges that a party generally lacks authority to require a nonparty to appear. The court notes that “[t]he party can avoid sanctions by showing that it attempted in good faith to comply with the order but was unable to produce the nonparty.” Per Rule 37, the party can also avoid sanctions if it “was substantially justified or other circumstances make an award of expenses unjust.”

Murphy v. Smith

138 S. Ct. 784 (2018)

Holding

When a prisoner prevails in a civil rights action, the District Court must pay as much of the attorney's fee award as possible from the judgment, up to 25% of the judgment.

Summary

Plaintiff Charles Murphy prevailed in a civil rights action against two prison guards. The District court entered judgment in the amount of \$307,733.82 and awarded \$108,446.54 in attorney's fees.

Section 1997e(d)(2) of the Prison Litigation Reform Act (PLRA) provides that when a prisoner prevails in a civil rights action "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant."

The district court interpreted this provision as providing discretion to apply up to 25% of the judgment toward the fee award. The court therefore ordered 10% of the fee to be paid from Murphy's judgment and the remainder to be paid by the defendants.

The Supreme Court, in a 5-4 decision, reversed. The Court held that § 1997e(d)(2) required a district court to pay as much of the fee award as possible from the judgment, up to 25%. The Court reasoned that the statute uses the word "satisfy" and "when you purposefully seek or aim to satisfy an obligation, especially a financial one, that usually means you intend to discharge the obligation in full." Accordingly,

Prisoner litigation
-
Statutory interpretation
-
Attorney's fees
-

Practice Pointers

- ⇒ It is unclear whether this case has broader implications
- ⇒
- ⇒ It seems to open the door to pretty tenuous textual arguments
- ⇒

the Court concluded, to meet its duty under the statute, “a district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap.” The dissent argues that the statute plainly provides discretion to the district court in setting the amount as long as it does not exceed 25%.



Perez v. City of Roseville

882 F.3d 843 (9th Cir. 2018)

Holding

The Constitutional guarantees of privacy and free association prohibit a public-sector employer from taking adverse action against an employee based in part upon that employee's private sexual conduct unless it demonstrates that such conduct negatively affects on-the-job performance.

Summary

In January 2012, the City of Roseville Police department hired Janelle Perez to serve as a police officer. Several months into her probationary term of employment, she and a fellow officer, Shad Begley, began a romantic relationship. Perez and Begley were both separated from their spouses, but not divorced. In June 2012, Begley's wife filed a citizen complaint alleging that Perez and Begley were having an extramarital affair and engaging in inappropriate sexual conduct while on duty.

An internal investigation found no evidence of on-duty sexual contact between Perez and Begley, but nevertheless recommended finding that Perez and Begley's conduct violated Department policies concerning "Unsatisfactory Work Performance" and "Conduct unbecoming." Both officers were ultimately reprimanded. Perez filed a written rebuttal of the investigation findings and a hearing was held in September 2012, at the conclusion of which, she was terminated.

Perez sued, alleging § 1983 claims for violation of her

§ 1983

-

Employment

-

Right to privacy and intimate association

-

Practice Pointers

- ⇒ Public sector employers cannot rely on an employees' off-work consensual relationship with a coworker as a sole basis to take adverse employment action
- ⇒ An employer will need to have non-pretextual evidence of another basis for the adverse action or be able to show that the sexual conduct negatively affected on the job performance
- ⇒ Consider whether workplace policies regarding employee relationships should be updated

rights to privacy and freedom of association and her right to due process, as well as sex discrimination under Title VII and state law. The district court granted summary judgment to the defendants, concluding that qualified immunity barred her right to privacy and intimate association claims and that she failed to present sufficient evidence supporting her due process and sex discrimination claims.

The Ninth Circuit reversed on the right to privacy and freedom of association claims. The court explained that “officers and employees of a police department enjoy a ‘right of privacy in private, off-duty sexual behavior,’” and that “this right protects public employees from adverse employment action based ‘*in part*’ on their private sexual activities,” unless the department demonstrates that such conduct negatively affects on-the-job performance or violates a narrowly-tailored, constitutionally-permissible regulation.

The court concluded that genuine issues of fact precluded summary judgment on whether the Department terminated Perez at least in part based on her affair. The court also held that this law was clearly established by *Thorne v. City of El Segundo*, 726 F.2d 459, 471 (9th Cir. 1983), which held that a police department violated an internal job applicant’s right to privacy and free association by refusing to hire her based upon her private, non-job-related sexual conduct. Accordingly, the court held that the officers involved in Perez’s termination were not entitled to qualified immunity.

The court affirmed the district court’s decision on Perez’s due process and discrimination claims.

Rizo v. Yovino

887 F.3d 453 (9th Cir. 2018) (en banc)

Employment
–
Equal Pay Act

Holding

An employer may not rely on an employee's prior salary to assert a "factor other than sex" affirmative defense to an Equal Pay Act claim.

Summary

The Fresno County Office of Education hired Aileen Rizo as a math consultant in 2009. She was previously employed as a middle and high school math teacher in Maricopa County, Arizona.

The County used a pay schedule consisting of 10 salary levels, each containing 10 steps. County policy dictated that a new hire's salary would be determined by taking the individual's prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. The County followed this policy in setting Rizo's starting salary.

Several years after she was hired, Rizo learned that her male colleagues had been subsequently hired as math consultants at higher salary steps. Based on this information she sued the County alleging violation of the Equal Pay Act and sex discrimination under state and federal law.

The Equal Pay Act prohibits an employer from paying employees wages at a rate less than the rate at which it pays wages to employees of the opposite sex for substantially equal work. 29 U.S.C. § 206(d)(1). The Act includes four statutory exceptions for payment based upon: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Id.*

Practice Pointers

- ⇒ Prior salary cannot be relied on as a defense to an Equal Pay Act Claim
- ⇒
- ⇒ A policy that automatically sets starting salary based on past pay will violate the Equal Pay Act if there is any gender pay disparity.
- ⇒
- ⇒ This case expressly does not bar use of prior salary in individual salary negotiation.
- ⇒
- ⇒ But any use of prior salary in an employment application or negotiation process has some risk and should be carefully scrutinized if not eliminated

The County did not dispute that Rizo was paid less than her male counterparts, that she had established a prima facie case, or that the three specific statutory exceptions did not apply. Instead, the County moved for summary judgment contending that Rizo's salary differential was based on a factor other than sex—her prior salary. The district court denied the County's motion, and a three judge panel reversed on the basis that *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982) permitted prior salary alone to constitute a factor other than sex. The Ninth Circuit granted rehearing en banc.

The en banc court overruled *Kouba*, holding that the “factor other than sex” exception to the Equal Pay Act is “limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance” and does not include prior salary. The court explained that “[p]rior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. It may bear a rough relationship to legitimate factors . . . but the relationship is attenuated. More important, it may well operate to perpetuate the wage disparities prohibited under the act.”

The court concluded that the statutory text, statutory history, and purpose of the Act all support this holding. Importantly, the court noted that “[a]t the time of the passage of the Act, an employee's prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other. Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials.”

Recent Eastern District of Washington Cases Addressing Attorney Fees and/or Sanctions

Tabbert v. Howmedica Osteonics Corp

No. 2:15-CV-00039-SMJ

Renfroe v. Citibank National Association et al

No. 2:17-CV-00194-SMJ

Rockwood Retirement Communities v. Insinkerator et al

No. 2:15-CV-00346-SMJ

Langley v. GEICO General Insurance Company

No. 1:14-CV-03069-SMJ

Masonry Industry Trust Administration Inc v. D/J Masonry LLC

No. 2:15-CV-00185-SMJ

Riggs v. Life Care Centers of America Inc.

No. 2:17-CV-00342-TOR

Zhu v. North Central Educational Service District ESD 171

No. 2:15-CV-00183-JLQ

3123 SMB LLC v. Horn

880 F.3d 461 (9th Cir. 2018)

Subject Matter Jurisdiction

–
Principal Place of Business

–
Corporate Citizenship

Holding

For purposes of diversity jurisdiction, a holding company's principal place of business may be where its board meetings are held, even if the business has few other contacts with that state.

Summary

Plaintiff, a holding company incorporated in Missouri, was formed exclusively for the purpose of managing a subsidiary company, also incorporated in Missouri, whose sole purpose was to manage a condemned property in California. Plaintiff sued Horn, a California citizen, in federal court for malpractice based on Horn's legal representation in a dispute regarding the property.

Horn moved to dismiss the suit, alleging Plaintiff was in fact a California citizen and therefore complete diversity did not exist. The district court agreed with Horn and dismissed the suit, concluding that Plaintiff's principal place of business was California, where its sole asset was held.

The Ninth Circuit panel reversed, holding that Plaintiff was a citizen of Missouri because what little corporate activity did occur – the company's sole purpose being to hold the California property – occurred in Missouri. Plaintiff was incorporated and held board meetings in Missouri, which the panel reasoned made Missouri its principal place of business; thus, Plaintiff was a citizen of Missouri for purposes of diversity jurisdiction. Judge Hurwitz dissented, noting that Plaintiff had done no business whatsoever in Missouri, that the shareholders and directors resided in California, and that the building – the company's sole asset – was in California; thus, in Judge Hurwitz's view, Plaintiff's principal place of business was in California. The case was remanded to determine if either company was a sham corporation designed to manipulate federal jurisdiction.

Practice Pointers

- ⇒ The “nerve center” test for determining a corporation's principal place of business should include an analysis of where the corporation's board meetings are held.
- ⇒ A corporation's “principal place of business” may focus more on where decisions are made rather than where assets are held or “business” is done.

Artis v. D.C.

138 S. Ct. 594 (2018)

Statute of Limitations
–
Supplemental Jurisdiction
–
Tolling

Holding

The federal supplemental jurisdiction statute “pauses the clock” on a statute of limitations until 30 days after a state-law claim is dismissed by the federal court; the state statute of limitations then continues to run once the 30-day period is up.

Summary

Plaintiff was a municipal employee for the District of Columbia but was fired in 2010. Plaintiff sued in federal court, claiming violations of federal and state employment statutes and state common law.

The district court dismissed Plaintiff’s federal claims in 2014 and declined to exercise supplemental jurisdiction over her remaining state-law claims. Under the supplemental jurisdiction statute, the statute of limitation for Plaintiff’s state law claims was to “be tolled while the claim [was] pending” in federal court “and for a period of 30 days after it is dismissed” Plaintiff did not file her state law claims in D.C. Superior Court until 59 days after dismissal. That court dismissed her claims as time-barred, reasoning that the supplemental jurisdiction statute’s 30-day period was a “grace-period” rather than a “stop-the-clock” provision. The D.C. Court of Appeals affirmed.

In a 5-4 decision written by Justice Ginsburg, Supreme Court reversed the lower court and held that the statute served to “stop the clock,” meaning the statute of limitations period would continue to run 30 days after the federal suit was dismissed. Justice Gorsuch dissented, reasoning that “tolling” has two historical meanings, both to “stop the clock” and serve as a grace period; he argued that the statute’s text and context better supported the grace period interpretation.

Practice Pointers

- ⇒ Look to state law to determine the applicable statute of limitations for state law claims.
- ⇒ If your client has mixed state/federal claims, don’t hesitate to file in federal court; even if the federal claims are dismissed, the statute of limitations will be tolled on the state law claims.

Bristol-Myers Squibb Company v. Superior Court of California

137 S. Ct. 1773 (2017)

Holding

In a suit between two nonresidents, a state court may not exercise personal jurisdiction over the defendant unless the defendant has made significant contacts with the state that relate to the plaintiff's claims.

Summary

Plaintiffs, residents of multiple states, sued Defendant pharmaceutical company in California state court, alleging one of the company's products damaged their health and asserting multiple state law claims. Defendant was neither incorporated nor headquartered in California, nor did it manufacture or develop the drug in California.

At the trial court, Defendant moved to dismiss for lack of personal jurisdiction, but the trial court held that California courts had general jurisdiction over Defendant because of its "extensive activities in California." The state appellate court found general jurisdiction did not exist but that California courts had specific jurisdiction over the nonresident plaintiffs' claims because Defendant had significant, unrelated contacts with California; the California Supreme Court affirmed.

In an 8-1 opinion written by Justice Alito, the Supreme Court reversed and held that California state courts could not exercise personal jurisdiction over the nonresident plaintiffs' because no link existed between California and the nonresidents' claims. The nonresidents were not prescribed the drug in California, nor did they ingest it or suffer any harm in California. Although California courts had specific jurisdiction over the California residents' claims, convenience alone was not enough to extend jurisdiction over the nonresidents' claims as well; the nonresidents' claims against Defendant had no relation to California. Notably, the Court suggested that a federal court in California may have had specific jurisdiction over the nonresident plaintiffs' claims.

Personal Jurisdiction
–
Long-Arm Statute
–
Specific Jurisdiction

Practice Pointers

- ⇒ For a state court to exercise specific jurisdiction, the claim must arise out of or relate to a defendant's contacts with the forum state; the contacts must be affiliated with the underlying controversy.
- ⇒ For personal jurisdiction purposes, the safest place to sue a corporation is where it is subject to general jurisdiction – either its state of incorporation or where it is otherwise "at home."

Corral v. Select Portfolio Servicing, Inc.

878 F.3d 770, 776 (9th Cir. 2017)

Holding

When a plaintiff merely seeks to temporarily enjoin a foreclosure, the amount in controversy for subject matter jurisdiction purposes is the harm or benefit caused by delaying the foreclosure, not the amount of indebtedness or the value of the property.

Summary

Plaintiff Corral received a notice of default on her residential mortgage. Defendant Select Portfolio Servicing (SPS) scheduled a trustee sale, and Corral then filed a lawsuit in California Superior Court, seeking to enjoin the sale of the residence while her loan modification application was under review. SPS removed the lawsuit to the federal district court, stating diversity jurisdiction existed because the parties were diverse and more than \$75,000 was in controversy. After the district court denied her motion to remand and dismissed the action, Corral appealed.

A divided panel for the Ninth Circuit reversed the district court, distinguishing this case from others where plaintiffs had sought to enjoin foreclosure indefinitely as part of an effort to quiet title to the property or rescind their loan agreements. It stated that “to satisfy its burden of establishing the amount in controversy related to the temporary delay in foreclosure sought by the complaint, SPS was required to establish, by a preponderance of the evidence, that the benefit to Corral of the delay would exceed \$75,000, or that the cost to SPS from the delay would exceed \$75,000.” Senior Judge Kleinfeld dissented, taking the view that a “long-established general rule” provides that “in a suit to enjoin foreclosure, the amount in controversy is the value of the property sought to be foreclosed.”

Foreclosure
–
Temporary Injunctions
–
Amount in Controversy
–
Subject Matter Jurisdiction

Practice Pointers

- ⇒ Don't rely on cursory, perfunctory jurisdictional statements when seeking to remove a case to federal court; remember, it's your burden to prove the basis for subject matter jurisdiction.
- ⇒ To determine the amount in controversy for a “quiet-title action,” you still look to the property's market value.

Elhouty v. Lincoln Benefit Life Co.

886 F.3d 752 (9th Cir. 2018)

Holding

In cases addressing whether an insurance policy has lapsed, the amount in controversy for purposes of diversity jurisdiction is the face value of the policy.

Summary

Mr. Elhouty owned a \$2 million life insurance policy issued by Lincoln Benefit Life Company (Lincoln). Mr. Elhouty missed payments, and Lincoln informed him that the policy had lapsed. Mr. Elhouty then sued Lincoln for a declaratory judgment that the policy remained in full force. Following removal, the federal district court granted summary judgment to Lincoln, and Mr. Elhouty appealed.

In affirming the district court's opinion, the Ninth Circuit panel independently assessed whether subject matter jurisdiction existed, and it noted that this case differed from many insurance suits in that neither party claimed that the other owed a sum of money. Instead, the case was limited to whether the policy remained in force or was instead properly terminated. The panel said that when a case is about ownership of a policy, the validity of a policy, or whether a policy is in effect, "the amount in controversy is necessarily the face amount of the policy in addition to the benefits due." Conversely, if the issue is whether certain installments should be paid under a policy, the policy's face amount does not contribute to the amount in controversy. There, the "value of the object of the litigation" is the amount of the unpaid installments allegedly due.

Insurance

—

Amount in Controversy

—

Subject Matter Jurisdiction

Practice Pointers

- ⇒ If a case relates to the existence, ownership, or validity of the policy itself, the face value qualifies as the amount in controversy.
- ⇒ If a case is limited to whether a sum is owed under the policy, the amount in controversy is similarly limited to that sum.
- ⇒ When challenging amounts owed under a discontinued policy, by either conceding or contesting that the policy was properly terminated, you may be able to dictate whether the case is removable.

Encino Motorcars, LLC v.

Navarro

138 S. Ct. 1134 (2018)

Holding

Car dealership service advisors are exempt from the Fair Labor Standards Act's overtime-pay requirement.

Summary

Plaintiffs were former and current service advisors for Encino Motorcars, an auto dealership in California. They sued Encino, alleging violations of the FLSA's requirement that covered employees receive time-and-a-half compensation for working more than 40 hours per week. Although there is an exception to this requirement for any "salesman, partsman, or mechanical primarily engaged in selling or servicing" automobiles, Plaintiffs argued that service advisors neither sell nor service automobiles; rather, they meet with customers and suggest and quote repair services.

The district court dismissed the suit, holding that service advisors were exempted from the overtime-pay requirement. The Court of Appeals for the Ninth Circuit reversed, giving *Chevron* deference to a 2011 Department of Labor rule.

In a 5-4 decision written by Justice Thomas, the Supreme Court reversed the Ninth Circuit and held that service advisors are exempt from the overtime-pay requirement. The Court applied statutory interpretation canons to reason that a service advisor is "obviously a 'salesman'" who is engaged in both selling and servicing automobiles; accordingly, the Court held that the exemption did apply. Justice Ginsburg dissented, reasoning that the advisors neither strictly sold nor serviced automobiles and thus the exemption did not apply.

Fair Labor Standards Act

–
Employee Overtime

–
Statutory Interpretation

Practice Pointers

- ⇒ Review administrative regulations when advising clients, but remember that they are subject to change by both the agency and the courts.
- ⇒ In classic statutory-interpretation cases, interpretive canons can make powerful arguments.

In re Gilman

No. 16-55436, 2018 WL 1769088
(9th Cir. Apr. 13, 2018)

Bankruptcy
–
Appellate Jurisdiction
–
Final, Appealable Order

Holding

Because it determines and seriously affects substantial rights, an order denying a claim of exemption constitutes a final appealable order.

Summary

Debtor filed Chapter 7 bankruptcy, claiming a homestead exemption for one of his properties. The bankruptcy court denied Creditor's motion objecting to the exemption, and the district court affirmed. Creditor appealed.

As a threshold matter, the Ninth Circuit panel held it had jurisdiction over the matter. The panel acknowledged that a recent Supreme Court case clarified the standard for appealability of orders granting or denying homestead exemptions, but it held that it remained bound by existing Ninth Circuit precedent.

An order denying an exemption claim “determines and seriously affects substantial rights and can cause irreparable harm if the losing party must wait until bankruptcy proceedings terminate before appealing.” Accordingly, such an order is final and may be appealed immediately. The panel went on to affirm the district court on the merits.

Practice Pointers

⇒ If an exemption claim is denied, that order is final; consequently, be aware of appellate filing deadlines.

In re Zappos.com, Inc.
No. 16-16860, 2018 WL 1883212
(9th Cir. Apr. 20, 2018)

Article III Standing
–
Identity Theft
–
Pleading Standards

Holding

Where hackers breach a business' servers and steal customers' personal information, customers may have Article III standing to sue the business if they allege the existence of a credible threat of future identity theft.

Summary

In 2012, hackers breached Zappos' servers, stealing the names, account numbers, addresses, and credit/debit card information of more than 24 million customers. Plaintiffs filed putative class actions across the country, which were consolidated in the District of Nevada.

Some plaintiffs alleged the hackers had used the stolen information to conduct fraudulent financial transactions; others alleged they were harmed by the data theft itself. The district court dismissed the latter plaintiffs' claims and held that the data breach – absent subsequent identity theft – did not constitute an injury-in-fact to support Article III standing.

The Ninth Circuit reversed and held that the second group of plaintiffs had sufficiently alleged an injury-in-fact based on a substantial risk that the Zappos hackers would commit identity theft or fraud using the stolen data. Specifically, the panel cited the theft of credit/debit card information, which Congress has historically treated as sensitive, and that other plaintiffs had been actual victims of fraud. The panel acknowledged that the Supreme Court had recently held harm must be "certainly impending" to constitute an injury-in-fact, but it ultimately relied on other Supreme Court precedent indicating that a "substantial risk" of future harm was sufficient to support standing.

Practice Pointers

- ⇒ Reminder: Art. III standing requires (1) an injury-in-fact (2) that is fairly traceable to the defendant's conduct and is (3) likely to be redressed by a favorable decision.

- ⇒ If the injury-in-fact is a risk of future harm, focus on the imminence and likelihood.

Melendres v. Maricopa County

878 F.3d 1214 (9th Cir. 2018)

§ 1983 Actions
-
Attorney Fees
-
Civil Contempt

Holding

A plaintiff that is successful at the trial court remains the “prevailing party” for purposes of 42 U.S.C. § 1988 if successful on appeal and is entitled to attorney fees, even if the defendant’s appeal was merely dismissed for lack of standing.

Summary

A group of Latinos brought a class action against the Maricopa County sheriff’s office, alleging it had an unconstitutional policy of using race as a factor in suspecting Latino drivers of being in the U.S. illegally and detaining them even absent any basis to suspect the commission of a state crime.

At the district court, Plaintiffs succeeded in obtaining an injunction under 42 U.S.C. § 1983. The district court later found a county employee in civil contempt for disobeying the injunction, and the employee appealed. After the Ninth Circuit dismissed the employee’s appeal for lack of standing, Plaintiffs moved for the attorney fees incurred in relation to the appeal.

In awarding Plaintiffs their attorney fees, the Ninth Circuit panel explained: “That we dismissed [the employee’s] appeal for lack of standing rather than on the merits does not . . . divest Plaintiffs of prevailing party status.” The panel further observed that non-party contemnors may also be held liable for attorney fees in other situations. However, the panel denied Plaintiff’s request for fees incurred in preparing an answering brief that they never filed, saying fees may only be awarded for work “expended in pursuit of the ultimate result achieved.”

Practice Pointers

- ⇒ When successful in a § 1983 case, always move for attorney fees, even if the court’s decision wasn’t based on the merits of the case.
- ⇒ If you’ve taken the time to prepare a responsive brief — *file it without delay*. This will increase the likelihood you will be able to recover the associated fees.
- ⇒ Be cautious when challenging findings of contempt; even non-party contemnors may be held liable for the resulting fees.

Ziglar v. Abbasi

137 S. Ct. 1843 (2017)

Relating to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*
403 U.S. 388 (1971)

Holdings

Before allowing a claim for money damages under *Bivens*, courts must first ask if the case arises in a new context. If it does, courts must then determine if “special factors” counsel against extending *Bivens* to that case.

Claims that challenge a detention policy cannot be brought as a *Bivens* action.

Officials that are members of the same executive entity will generally be entitled to qualified immunity with regard to claims brought under 42 U.S.C. § 1985(3) alleging a civil-rights conspiracy.

Summary

Following the September 11 attacks, six men of Arab or South Asian descent – who were in the country without authorization – were arrested and detained in special housing unit for up to eight months before being released and removed from the U.S. Those men brought a class action suit against federal executive officials and wardens for violations of the Fourth and Fifth Amendments.

The plaintiffs alleged that because of their race, religion, or national origin, they were physically abused, subjected to arbitrary strip searches, and subjected to prolonged detention. Some of the plaintiffs alleged that they were denied any meaningful access to the outside world for months, including access to attorneys and the courts. The plaintiffs further asserted that the Government had no reason to suspect them of any connection to terrorism, and thus had no legitimate reason to hold them for so long in these harsh conditions. They therefore sought compensatory and punitive damages under *Bivens*. The plaintiffs also brought a claim under 42 U.S.C. § 1985(3), alleging a conspiracy to violate equal protection rights.

Bivens Actions

Federal-Officer Liability

Constitutional Law

Practice Pointers

- ⇒ In general, the U.S. Constitution – by itself – does not provide for damages; you must point to Congressional approval of such relief.
- ⇒ When asking for damages arising from constitutional violations, try to connect your claims to any state officials that were involved rather than federal officials.
- ⇒ If you are suing federal officers for damages, emphasize why your case does not require an extension of *Bivens*, *i.e.*, why it does not arise in a new context.

The district court dismissed the claims against the executive officials but allowed the claims against the wardens to go forward. The Second Circuit reversed as to the executive officials but affirmed in most respects as to the wardens.

The Supreme Court, in an opinion authored by Justice Kennedy, reversed the Second Circuit as to all claims except for a prisoner abuse claim against a particular warden. As to that claim, the Court vacated the Second Circuit's decision and remanded it for the Second Circuit to determine whether special factors existed that prohibited the expansion of *Bivens*. The Court emphasized that because of separation-of-powers concerns, it "has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity."

Justice Kennedy stated that the first question a court must ask is whether the claim arises in a new *Bivens* context. "The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new."

Justice Kennedy further wrote that if the claim does arise in a new context, the evaluating court must ask whether there are any special factors counselling hesitation before authorizing a new kind of federal litigation. "[T]o be a 'special factor counselling hesitation,' a factor must cause a court to hesitate before answering that question in the affirmative."

Justice Brennan, joined by Justice Ginsburg, dissented, saying that the context of this case was not "new" or "fundamentally different." They further disagreed that the applicable factors weighed against recognizing this particular cause of action, saying, "Neither a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have *already* suffered."

⇒ When bringing an action under *Bivens*, explain why alternative methods of relief were not available.

⇒ You cannot bring a *Bivens* action to challenge or alter an executive entity's policy.

⇒ *Bivens* actions can only be brought against individual officers for their own acts, not the acts of others.

Judge Edward F. Shea

Born in Massachusetts where he attended school and college.

Received his law degree from Georgetown University Law School in 1970.

Practiced trial law in the Tri-Cities from 1971 until his confirmation as a United States District Court Judge in 1998. His chambers and courtroom are in the court wing of the U.S. Courthouse and Federal Building in Richland.

He is a past president of the Washington State Bar Association and of the Benton-Franklin Bar Association, a member of the American College of Trial Lawyers, a former member of the House of Delegates of the American Bar Association for both the Young Lawyers Division of the ABA and also for the Washington State Bar Association. Judge Shea was named National Chapter Counsel of the Year by the March of Dimes in 1994 and ABOTA Trial Judge of the Year in 2015. He is the father of four children; one attorney, Ed Jr., practicing in Tri-Cities, and one Benton-Franklin County Superior Court Judge, Jackie Shea-Brown. His wife Marge is retired, having worked as a Certified Diabetes Educator.

Asti Gallina

Asti Gallina is a term law clerk for the Honorable Salvador Mendoza, Jr. An Eastern Washington native, Asti received her undergraduate degree from Washington State University. Before law school, Asti taught high school science in Phoenix, Arizona, as a member of Teach for America. Asti graduated Order of the Coif from University of Washington School of Law in 2017, where she served as a managing editor on the Washington Law Review and as a member of the Moot Court Honor Board. After this term, Asti will begin a clerkship for the Honorable Ronald M. Gould in the Ninth Circuit. In her free time, Asti enjoys listening to podcasts, frequenting local coffee shops, and watching Cougar football.

Jeremy Lieb

Jeremy graduated from the University of Washington School of Law in 2013, and he earned a B.A. in Geography from Central Washington University in 2006. Prior to joining Judge Mendoza's chambers as a career law clerk, Jeremy was an associate at Meyer Fluegge & Tenney in Yakima. He also previously clerked for Judge Morgan Christen of the U.S. Court of Appeals for the Ninth Circuit and Chief Justice Craig Stowers of the Alaska Supreme Court.

Ben Robbins

Ben is a term law clerk for the Honorable Edward F. Shea. In 2017, Ben graduated with honors from the University of Washington School of Law, where he was a member of the Washington Law Review, Moot Court Honor Board, and Student Bar Association. During law school, Ben also enjoyed interning with several private firms and the King County Prosecuting Attorney's Office as well as representing and advising UW students as part of the university's Student Legal Services program. After completing his clerkship, Ben plans on practicing commercial litigation in Seattle. When not doing legal work, Ben enjoys sailing on the Puget Sound, backpacking, and riding motorcycles.

John Schroeder

John grew up in Yakima before attending Arizona State University and earning a B.S. in Justice Studies. In 2014, John graduated with honors from the Sandra Day O'Connor College of Law and went on to clerk for the Honorable Margaret H. Downie at the Arizona Court of Appeals, Division One. John currently lives in Richland and serves as a two-year term law clerk to Senior Judge Edward F. Shea.

Common Law Protection for Whistleblowers in Washington:
Wrongful Discharge in Violation of Public Policy

Presented by

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ALEX J. HIGGINS has successfully represented both employees and employers in discrimination, retaliation and reasonable accommodation cases. His practice currently focuses on representing individuals. In addition to his litigation and trial work, he drafts and negotiates employment agreements and severance agreements. He served as Chair of the King County Bar Association, Labor & Employment Section in 2004. From 2003-2006, he was selected for inclusion in *The Best Lawyers in America*. Alex was elected to serve on the Executive Board of the Labor & Employment Section of the Washington State Bar Association from 2014-2016. In other lives, Alex has also worked as a U.S. Park Ranger in Montana and a high school history teacher in Mexico.

A. Recent “whistleblower” awards from Eastern Washington.

Clem/Spencer v. Computer Sciences Corp. (2016): An administrative law judge awarded two Hanford nuclear site whistleblowers \$216,080 in back pay and compensatory damages (plus attorneys’ fees). The compensatory damages totaled \$40,000 total to the plaintiffs.

Kirtley Clem and Matthew Spencer were employed as computer professionals at Hanford’s medical clinic, operated at the time by a contractor called Computer Sciences Corporation, or “CSC.” They were removed from the workplace in September 2012 after reporting numerous failures with a new Electronic Medical Records system (called “OHM”) to their supervisors and the U.S. Department of Energy. They alleged that the system could put worker health and safety at risk, but their concerns were brushed aside by management and the system was deployed over their objections.

Riggs v. Life Care Centers of America (2017): A federal jury awarded Irene Riggs \$1,533,932 million in a retaliation case in the U.S. District Court for the Eastern District of Washington. (2:17-cv-0342-TOR).

Ms. Riggs complained to her supervisor and to HR regarding an inappropriate relationship between her supervisor, a regional vice-president, and a nurse. Plaintiff was terminated two months later for allegedly abusing a resident of the skilled-nursing facility for unplugging his television. Claims of retaliation under WLAD and wrongful termination in violation of public policy. Damages Awarded: past wage loss of \$232,356, future wage loss of \$801,576 and emotional distress in the amount of \$500,000.

B. The Public Policy Tort in Washington: Why Bother to Assert?

This tort serves as one important cause of action for whistleblowers in Washington who have been terminated or constructively terminated for engaging in protected activity. This tort cause of action differs from statutory claims in the following ways:

- (a) a tort claim has a 3-year statute of limitations;
- (b) the remedies include emotional distress damages;
- (c) a Notice of Tort Claim is required when pursuing claims against governmental entities; and
- (d) the U.S.A. has not waived sovereign immunity from liability on this claim. (The issue of whether sovereign immunity applies to this particular tort has not been addressed in any published decision to my knowledge; however, it is doubtful that such a claim exists under the Federal Tort Claims Act, which is the exclusive avenue for a tort claim against the federal government. 28 U.S.C. § 1346(b)(1)).

C. Creation, Death and Re-Birth of the Public Policy Tort.

The tort of wrongful discharge in violation of public policy was born in 1984, nearly died in 2011, and then rose from the ashes in a trilogy of opinions by the Washington Supreme Court in 2015. Recently, however, the cause of action has suffered another setback in a decision from Division III, which the Washington Supreme Court has agreed to review and which is discussed extensively below.

In *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219,232 (1984), Washington recognized the viability of the tort of wrongful discharge in violation of public policy under the following circumstances:

(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

In short, the plaintiff is required to identify the recognized public policy and demonstrate that the employer contravened that policy by terminating the employee. *Rose v. Anderson Hay & Grain Co.*, 184 Wash. 2d 268, 276 (2015). In *Thompson*, the employee reported possible violations of the Foreign Corrupt Practices Act to his boss and was subsequently fired.

The Supreme Court added some complexity when presented with a unique, but compelling, fact pattern in *Gardner v. Loomis*. An armored truck driver left his vehicle to rescue a woman from a knife-wielding assailant. He was fired for violating a strict policy not to leave the vehicle unattended. Faced with these facts, the court utilized a four-part framework from Professor Henry Perritt. Under this “Perritt framework,” the Supreme Court explained that liability could be based on these factors: (1) the existence of a “clear public policy” (clarity element), (2) whether “discouraging the conduct in which [the employee] engaged would jeopardize the public policy” (jeopardy element), (3) whether the “public-policy-linked conduct caused the dismissal” (causation element), and (4) whether the employer is “able to offer an overriding justification for the dismissal” (absence of justification element). *Gardner*, 128 Wash.2d at 941.

To establish the third element under the Perritt test (jeopardy), plaintiffs must show they engaged in particular conduct and the conduct directly relates to the public policy or was necessary for the effective enforcement of the public policy. This requires a showing that “other means for promoting the policy ... are inadequate.” *Gardner*, 128 Wash.2d at 945, 913 P.2d 377. This history is recounted by the Supreme Court in *Rose v. Anderson Hay & Grain Co.*, 184 Wash. 2d 268, 276 (2015).

The jeopardy element caused an existential crisis for the tort from 2005- 2011. In *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168 (2005), a Hanford employee was terminated after reporting safety violations, mismanagement, and fraud at the Hanford site. A federal statute, the Energy Reorganization Act of 1974(ERA), 42 U.S.C. § 5851, established a comprehensive and robust administrative process for adjudicating whistle blower claims. In that

case, the Washington Supreme Court held that because the wrongful discharge tort is a narrow exception to the at-will doctrine, we were unwilling to extend it to the wrongfully terminated employee when there were other adequate remedial means to protect the public policy.

In *Cudney v. ALSCO, Inc.*, 172 Wash.2d 524, 259 P.3d 244 (2011), the court adopted a strict requirement that plaintiffs show that alternative remedies to effectuate the public policy were otherwise wholly inadequate to protect the public policy and that the only way to protect the public policy was through a wrongful termination lawsuit. For instance, in the *Cudney* case, the drunk driving by a manager could have been addressed by the police; thus, reporting the conduct to the employer was not necessary to protect the public policy. (Author's note: In almost every situation, there is an enforcement agency which could adequately protect the public policy at issue.)

The tort was resurrected by the Washington Supreme Court in 2015 with the trilogy of cases: *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268 (2015), *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252 (2015); and *Rickman v. Premera Blue Cross*, 184 Wn.2d 300 (2015). These cases overturned *Cudney* and *Korshund*. The Court specifically clarified that a claimant is not required to establish that the public policy could not have been protected in some other way. The court explained: “[W]e disavow the requirement that a plaintiff establish inadequacy of alternative remedies and overrule our cases to the extent they hold otherwise.” *Rose*, 184 Wn.2d at 282.

Therefore, as of 2015, Washington law returned to the commonly-understood situations where the tort of wrongful discharge in violation of public policy may apply:

- (1) where an employee is fired for refusing to commit an illegal act;
- (2) where an employee is fired for performing a public duty or obligation, such as serving jury duty;
- (3) where an employee is fired for exercising a legal right or privilege; and
- (4) where an employee is fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

Rose at 276 (citing, *Gardner v. Loomis Armored Inc.*, 128 Wn.2d at 936 (1996)).

Where a case does not fit into one of these four categories, then (and only then) a court should use the four-part Perritt analysis articulated in *Gardner*. *Rose* at 287 (“We note that in other instances, when the facts do not fit neatly into one of the four above-described categories, . . . the courts should look to the four-part Perritt framework for guidance.”).

The Supreme Court retained the principle that a statute with expressly stated “exclusive remedies” could preclude a tort claim. *Rose* at 285 (“though we reject this adequacy requirement, courts still must consider whether a statutory remedy is intended to be exclusive.”)

Once an employee has demonstrated that his/her discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee. *Id.* at 275, 289. However, the employee's conduct protecting a public policy need only be a substantial factor motivating her discharge, not necessarily the sole factor. *Rickman*, 184 Wn.2d at 314.

It is important to note that an employee need not establish an actual violation of law by the employer, only that she had a reasonable, good faith belief that the law was violated. *Rickman* at 312.

D. The Supreme Court has Accepted Review of a Recent Appellate Court Decision.

Earlier this year, the Washington Supreme Court has accepted review of *Martin v. Gonzaga*, 200 Wn.App. 332 (2017) (Div. III), in which the Court of Appeals affirmed dismissal of public policy tort claim based on the "overriding justification" defense. In the case, David Martin alleged that Gonzaga terminated his employment in violation of public policy because he raised safety concerns about the lack of wall padding for the basketball court. Martin had advocated for the padding and spoke to the Gonzaga University student press about accidents resulting from the lack of padding. Martin identifies student safety as the public policy, citing RCW 49.17.010 and RCW 49.12.010, which require safe and healthy working conditions. The plaintiff also claimed to be advancing WAC 296-823-100, which seeks to protect workers from exposure to blood and blood-borne pathogens.

The trial court granted Gonzaga's motion for summary judgment, based on the following:

- (a) that Martin advocated for his own selfish interests, not to advance public policy;
- (b) that Gonzaga did not terminate Martin because of any protected activity but for legitimate, non-retaliatory reasons; and
- (c) that Gonzaga had an overriding justification for Martin's termination due to his inappropriate conduct.

The Court of Appeals rejected the first two arguments, but affirmed on the third argument – "overriding justification." Each of defendant's arguments is addressed below.

1. Martin's Motivation: Selfish or Advancing Public Policy?

The Court of Appeals observes that "Washington law distinguishes between employee conduct motivated by purely private interests and conduct motivated by a concern for the welfare of the general public." *Id.*, at 355. The court acknowledged that Martin had also complained repeatedly about on a proposal concerning a swimming pool more often than he had advocated for student safety. The law, however, "does not preclude recovery under the tort of wrongful discharge when the employee sought to further his own welfare in addition to the public welfare." *Id.* (emphasis added). According to the court, at least some of Martin's concerns "directly related to the public policy of safety of university students." *Id.* That was sufficient.

2. Gonzaga's Motive in Firing Martin: Legitimate or Retaliatory?

The Court of Appeals aptly notes: “Causation in a wrongful discharge claim is not an all or nothing proposition.” *Id.*, at 357 (citing, *Rickman v. Premera Blue Cross*, 184 Wn.2d at 314 (2015)). An employee need only prove that the protected activity was a cause, not the sole cause, of the employer’s termination, and the employee may do so by circumstantial evidence. *Id.* This causation element asks whether the employee's conduct in furthering a public policy was a substantial factor motivating the employer to discharge the employee. *Id.*

The court goes on to explain that circumstantial evidence of causation may exist from close proximity in time between the public-policy-linked conduct and the firing. *Martin*, 200 Wn.App. at 357 (citing, *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d at 69).

The Court of Appeals found an issue of fact regarding causation. Martin testified that a Gonzaga manager admitted that one reason for the firing was the rumor that Martin gave information to the student newspaper about student injuries. Accordingly, “reasonable inferences from the evidence support a finding that the university fired Martin not simply for speaking to the press, but also because the content of his leak concerned padding in the fieldhouse.” *Martin*, 200 Wn.App. at 358.

3. Gonzaga's “Ace Card”: Overriding Justification

Next, the Court of Appeals set out to evaluate Gonzaga’s defense that it had an overriding justification to fire Martin – that he was insubordinate in several respects. To determine whether the overriding justification defense precluded Martin’s claim, the court attempted to answer the following eight questions:

First, which party carries the burden of showing overriding justification?

Second, must the overriding justification motivate the employer in firing the employee for the employer to avoid liability?

Third, if the answer to the second question is affirmative, must the overriding justification supersede the unlawful reason for firing in regards to what motivated the employer? Stated differently, must the employer be more motivated by the overriding justification than the public policy violating reason for termination?

Fourth, what reasons for termination from employment qualify as an overriding justification? In this appeal, we ask whether insubordination qualifies as an overriding justification.

Fifth, must the overriding justification supersede the unlawful reason for the firing in importance under the law or under public policy? This fifth question asks if the court measures and weighs the relative strengths of the overriding justification and the violated public policy.

Sixth, if the answer to the fifth question is in the affirmative, does the court compare the public policy with the employer justification in the abstract or does the court consider the importance of the public policy and employer justification within the context of the facts in the case?

Seventh, is the element of overriding justification an element for the court as a matter of law to resolve or for the trier of fact to decide?

Eighth and the ultimate question, does David Martin present an issue of fact with regard to the overriding justification element that survives Gonzaga University's summary judgment motion?

Martin, 200 Wn.App. at 359-60. The Court of Appeals acknowledged its unease with these questions and invited the Supreme Court to review its decision: “We find no easy answer to most of our eight questions such that the Supreme Court may wish to accept review to clarify the overriding justification element.” *Id.* at 360.

The court reviewed the overriding justification defense, explaining that it hinges on whether the employer has an overriding reason for terminating the employee despite the employee's public-policy-linked conduct. According to the court, “some public policies, even if clearly mandated, are not strong enough to warrant interfering with an employer's personnel management.” *Id.*, at 361 (citing, *Gardner*, 128 Wn.2d at 947).

The first question posed by the court, about which party has the burden of proof, has no easy answer because of a conflict in the case law. Ultimately, the court concluded that Gonzaga was entitled to summary judgment under either standard of proof.

Second, the court held that an employer may use the defense even where it was not motivated by the overriding justification when discharging the employee: “The university may avoid liability if insubordination constitutes a justifying reason under the law and overrides the advocacy of safety concerns regardless of whether insubordination motivated the firing.” *Id.*, at 362-63 (emphasis added)

In justifying this analysis, the court relies on the “after-acquired evidence” doctrine, which “precludes or limits an employee from receiving remedies for wrongful discharge if the employer later discovers evidence of wrongdoing that would have led to the employee's termination had the employer known of the misconduct.” *Id.*, at 363 (citing, *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 60 (2015), *review denied*, 185 Wn.2d 1038, (2016); *Janson v. North Valley Hospital*, 93 Wn. App. 892, 900 (1999)).

Author’s note: The after-acquired evidence doctrine only affects damages, not liability. Courts use such evidence to cut off damages from the date the misconduct was discovered. It does not negate liability. Additionally, after-acquired evidence requires the employer to prove – by reference to its policy and/or practice – that it would have fired the employee had it known of the later-discovered misconduct. The second part is impossible for Gonzaga to prove in this case because it knew of the employee’s misconduct. Further, the court already recognized that

sufficient evidence exists to conclude that unlawful retaliation was one of the motives in firing Martin. The Court of Appeals seems to recognize this inconsistency in the following passage: “[a]bsolving the employer from showing the alternative justification to be a motivating factor may conflict with the causation element.” Indeed. Trying to avoid the conflict, the court enters a blind alley, explaining:

Under our holding, the employer still prevails even if the public policy was a substantial factor in the firing, and the third element only requires proof that the employee's furtherance of public policy constituted a substantial factor in the discharge. The overriding justification element assumes that an unlawful reason for the firing was a substantial factor, but another predominant reason also justified the termination.

Since the overriding justification element must be met in addition to the element of causation, even if advocating a public policy was a substantial cause of the termination, the employer avoids liability if another reason justified termination from employment. The employee showing retaliation as a substantial factor may not suffice. Otherwise, Washington would not insist on the fourth discrete element of overriding justification. Since we conclude that the overriding justification need not motivate the employer's firing of the employee, we do not answer the third question regarding whether the employer must be more motivated by the overriding justification than the public policy violating reason for termination to prevail.

Id., at 363-64.

The most glaring flaw is that the Perritt analysis, which includes overriding justification, does not apply to the ordinary case. It only applies to the kind of unusual case (such as *Gardner*) that does not fit the traditional analysis.

The court ultimately held that Martin's insubordination did not advance any public policy (as it was related to the swimming pool issue) and that insubordination is a qualifying justification for purposes of element four of the tort of wrongful discharge in violation of public policy.” *Id.*

The Washington Supreme Court is likely to reverse this decision for the reasons explained above. That being said, the weaknesses in the plaintiff's case cannot be overlooked. The plaintiff does not present a very compelling case and engaged in numerous acts that were both obnoxious and unrelated to the public policy. The facts of the case create a strong risk that bad law would be created for other employees seeking justice. (I have been guilty of that myself.)

E. Preparing Whistleblower Cases for Trial: Miscellaneous Considerations.

1. Focus Group/Mock Trial to Develop Theme and Theory.

Recently, I have starting using focus groups early in cases. I advertise for potential jurors for a mock trial and then I present them with a very truncated presentation of both my client's case

and the employer's response. My client and I then listen to "the deliberations." It can help both lawyer and client see a new perspective and to avoid litigation a case that has bad facts.

2. Deposition Preparation of the Plaintiff.

Most cases are won or lost in the deposition. This is because most cases settle before trial and the deposition is chance for both sides to assess the risks at trial. Before the plaintiff's deposition, you should develop your case theme. Consider hiring an expert consultant to help plaintiff prepare. Invest in a video deposition preparation tool. Practice cross-examination.

The most important questions to discuss and prepare for:

- (a) what do you most want to talk about? (Your strengths and your theme.)
- (b) what do you hope you are not asked? (Your weak points.)

Other general rules for the plaintiff (and perhaps any witness):

- Avoid being defensive, irritated or uncooperative (or generally unlikeable).
- Avoid being clever and playing word games with the lawyer.
- Be polite even when a rude question is asked.
- Control your emotions about the questions you're being asked (as opposed to your emotions when asked to re-live the trauma of the events in question).
- Start your answer with "yes" or "no" to a question that asks for such a response; then, continue to explain briefly.
- "I don't remember" is better than a wrong guess.

Possible themes for retaliation cases:

1. "Do the right thing." This is about an employee who did exactly that and paid the price.
2. "See something, say something." That's what we teach children.
3. This is how a powerful corporation deals with anyone who dares to speak up. Speaking truth to power is dangerous.

Sandra Kent

Ms. Sandra Kent is an in-house lawyer with the U.S. Department of Energy Hanford Contractor, Mission Support Alliance. Through her career at various U.S. Department of Energy facilities, she has extensive background and experience with regulatory issues, compliance negotiations and management of complex hazardous / toxic waste clean-up projects. She holds a Bachelor's degree in Urban Affairs from the University of Missouri-Kansas and a Juris Doctor from the University of Kansas. She is licensed to practice law in Washington and Colorado.



Sarah Wixson

Sarah is a Shareholder with Stokes Lawrence Velikanje Moore & Shore. She works with closely held private companies, particularly in agriculture, on complex employment litigation matters, including defense of Equal Employment Opportunity Commission and Department of Labor claims. Before joining the firm, Sarah was a shareholder with Velikanje, Moore & Shore, P.S. in Yakima. She served as law clerk to the Hon. John R. Stegner in the District Court of Latah County, Idaho in 1997, and as law clerk to the Hon. Lonny R. Suko, U.S. Magistrate Judge for the Eastern District of Washington, from 1997 to 2000. Sarah graduated from the University of Idaho Law School.



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“SELECTING AND EFFECTIVELY USING EXPERT WITNESSES”

**Finding, Vetting, Retaining, and Disclosing
Expert Witnesses in Federal Court**

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May 18, 2018
10:30-11:30 a.m.

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Brief Background: Mr. Mitchell has been a partner and executive board member at Summit Law Group PLLC since he joined in 2008. Prior to that, he worked at Kirkland & Ellis LLP in Chicago where he was a partner in the litigation group. Chad has extensive experience handling complex commercial disputes, and advises on environmental matters both foreign and domestic. Chad has tried cases in state and federal courts, and before international tribunals. For a fuller explanation of Mr. Mitchell's experience, please visit Summit's website (www.summitlaw.com) or review his resume, which is included with these materials.

These written materials and the items included in the appendices provide more detailed information about the topic that Mr. Mitchell was asked to discuss: selecting and retaining expert witnesses in federal court.

One of the first things on your list of things to do on a case should be determining whether you need expert testimony. Before you can even begin searching for an expert, you need to be able to answer some fundamental questions, for example: (1) what opinions would I like the arbitrator, judge or jury to hear; (2) what subject matter expertise is needed to provide such opinions; (3) how many experts might I need; or (4) how might the applicable law impact these expert opinions. Once you have a sense of what you are looking for, then you can begin the process of finding potential experts, vetting potential experts, retaining the experts, and satisfying disclosure requirements.¹

1. How do you find potential experts?

- Referrals from attorneys, other experts and clients
- Broad internet search / Google
- Expert services / directories
- Verdict reports
- Cases with similar subject matter
- Professional associations / organizations

2. Vetting your potential experts

Once you have a list of potential experts, then the narrowing begins. The list can be narrowed for any number of reasons (e.g., hourly rate too high, does not have appropriate credentials). It is critical, though, that you understand and verify the credentials and background of your potential expert. Otherwise, the results could be damning for you and your client:

- federal judge threw out a jury verdict in favor of pharmaceutical giant after an expert cardiologist was found to have misrepresented his credentials
- a computer forensics “expert” in California pleaded guilty to federal perjury charges

¹ See generally *Appendix A, Michael Brennan, David Dilenschneider, Myles Levin, and Jim Robinson, Selecting and Retaining an Expert; searching for an expert Witness, in Litigators on Experts: Strategies for Managing Expert Witnesses from Retention through Trial* (Wendy Couture and Allyson Haynes, 2011).

- a Toronto psychiatrist had his license suspended for lying about his credentials while serving as an expert witness in two trials.²

The following are various sources that you should carefully consider checking as part of the vetting process of a potential expert:

- Posts / blogs
- Social media
- Publications
- Podcasts
- Prior testimony / depositions
- Licensing / discipline
- Broad internet search / Google
- Names of law firms for which expert has previously been engaged

3. Retaining your chosen expert

Once you and your client have determined which expert or experts you would like to hire, then you enter into a written agreement with them. Attached as Appendix C is Summit Law Group's template for an expert engagement letter. Here are some of the key aspects:

- Confidentiality, during and after engagement, as well as an understanding of what is required of the expert under the applicable rules, here the Federal Rules of Civil Procedure.
- Run a conflict check and then confirm in the engagement letter that there are no conflicts.
- Expert will devote sufficient time to matter.
- Expert will return or destroy provided materials at end of case in accordance with protective order.

² See *Appendix B, How to Vet an Expert*, findlaw.com (originally published in BullsEye, a newsletter distributed by IMS Expert Services.)

- Compensation should be clearly spelled out and all inclusive. This is very important! The Fifth Circuit recently ordered a new trial overturning a \$502 million jury verdict against Johnson & Johnson over allegedly faulty hip implants. The reason—the lead plaintiff’s lawyer Mark Lanier, told jurors repeatedly the expert witnesses were unpaid but made “unequivocally deceptive” payments to these experts.³

4. Disclosing experts

- FRCP 26(a)(2)(A) – as part of the initial disclosures, must disclose identity of experts: “[A] party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.”⁴

³ See *Appendix D, Opinion, In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 16-11051, 2018 WL 1954759 (5th Cir. Apr. 25, 2018).

⁴ FRE 702, Testimony by Expert Witnesses:

“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.”

FRE 703, Bases of an Expert’s Opinion Testimony:

“An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”

FRE 705, Disclosing the Facts or Data Underlying an Expert:

“Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.”

This is usually done within 14 days after 26(f) conference.⁵

- FRCP 26(a)(2)(B) – written report, deadlines usually in scheduling order. Otherwise, “at least 90 days before the date set for trial” or if it is a rebuttal expert witness “within 30 days after the other party’s disclosure.”⁶

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

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
 - (ii) the facts or data considered by the witness in forming them;
 - (iii) any exhibits that will be used to summarize or support them;
 - (iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years;
 - (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
 - (vi) a statement of the compensation to be paid for the study and testimony in the case.”
- FRCP 26(a)(2)(C) – disclosure if no written report required; timing is same as above under FRCP 26(a)(1)(D)(i) & (ii).

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

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

⁵ FRCP 26(a)(1)(C).

⁶ FRCP 26(a)(1)(D)(i) & (ii).

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

Attached as Appendix E is an example of a FRCP 26(a)(2)(C) disclosure.

- The hammer for not timely disclosing: “If a party fails to provide information or identify a witness as required by Rule 26(a) . . . the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”⁷
- Must supplement under FRCP 26(e):

“(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party’s duty to supplement extends both to information included in the report and to information given during the expert’s deposition. Any additions or changes to this information must be disclosed by the time the party’s pretrial disclosures under Rule 26(a)(3) are due.”⁸

⁷ FRCP 37(c)(1) (emphasis added).

⁸ This is generally 30 days before trial. FRPC 26(a)(3)(B).



J. Chad Mitchell

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Profile Introduction

Chad has extensive experience handling complex commercial disputes, and advises on environmental matters both foreign and domestic. Chad has tried cases in state and federal courts, and before international tribunals. He joined Summit Law Group from Kirkland & Ellis LLP in Chicago.

Representative Cases/Matters

International Engagements:

- Defending Taiwanese company in \$80 million toxic tort class-action lawsuit, the first of its kind in Taiwan.
- Defended Greek company in \$85 million International Chamber of Commerce (ICC) arbitration in London regarding privatization of satellite imaging.
- Represented one of the world's leading manufacturers of household products in a post-closing purchase price adjustment before a German arbitral tribunal (ICC).
- Represented auto-industry OEM in post-closing purchase price adjustment dispute against French company in ICC arbitration seated in Toronto.
- Represented client in challenges and response to cleanup orders from Taiwan's regulators and oversight of cleanup of former manufacturing facility in Taiwan.
- Drafting and negotiating arbitration provisions in commercial agreements.
- Advising on the recognition and enforcement of foreign judgments.

Domestic Engagements:

- **Hanford Challenge, et al. v. Perry, et al., 218 F.Supp.3d 1171 (E.D. Wash. 2016):** Successfully defended



Washington River Protection Solutions in a preliminary injunction brought by the State of Washington, Hanford Challenge and Local Union 598 pursuant to RCRA's citizen-suit provisions regarding Hanford Tank Farms and chemical vapors.

- *Columbia Energy & Environmental Services v. Washington River Protection Solutions, et al.* (Benton County Superior Court): Representing defendants WRPS, AECOM, and Atkins in defense of Plaintiff's breach of contract, tortious interference, and trade secrets claims related to clean-up of the Hanford Tank Farms.
- *EFT Holdings, Inc., et al. v. Meifu Development Co., Ltd., et al.* (Los Angeles County Superior Court): Represented two foreign defendants who challenged the court's jurisdiction and also moved to have the case tried in Taiwan per *forum non-conveniens*. After filing those pleadings, the case was dismissed by plaintiffs who sought approximately \$22 million in damages.
- *Plymouth Grain Terminals, LLC, et al. v. Lansing Grain Company, LLC, et al.* (E.D. Wash.): Two-week jury trial that settled mid-trial. Represented defendants in a multi-million dollar breach of contract action regarding corn merchandising.
- *EnergySolutions, LLC v. ABW Technologies, Inc.* (Benton Co. Superior Court, Wash.): Representing EnergySolutions in contract dispute involving fabrication of gloveboxes for remediation of Savannah River Site in South Carolina.
- *Heckler and Koch, Inc. v. Precision Airsoft, Inc.* (E.D. Wash.): Represented plaintiff in trademark and trade dress dispute, which was favorably settled.
- *Numbers Licensing, LLC v. bVisual USA, Inc.* (E.D. Wash.): Defeated motion for preliminary injunction (reported at 643 F. Supp. 2d 1245) and successfully settled matter for defendants.
- *Winthrop Construction Inc. v. Terra Blanca Vintners, Inc.* (Wash.): Using streamlined arbitration proceeding, obtained favorable award for plaintiff, including nearly \$250,000 in attorneys' fees and costs.
- *International Game Technology v. Casino Data Systems, Inc.* (D. Nev.): Counsel for plaintiff electronic gaming manufacturer in lawsuit for patent infringement claims and defended against anti-trust counterclaims.
- *Shapo v. Engle* (N.D. Ill.): Defended client against \$200 million RICO claims in connection with liquidation of Illinois insurance company. Successfully had complaint against client dismissed.
- *Independent Trust Corp. v. Capriotti* (Ill.): Represented plaintiff as receiver for Illinois trust company. Obtained \$68 million summary judgment rulings for fraud, breach-of-contract, and breach-of fiduciary-duty claims.
- *In re Exide Technologies, Inc.* (Bank. D. Del.): Represented debtor at Bankruptcy Confirmation Hearing for public company with over \$2.5 billion in revenues.
- *Miller v. Material Sciences Corporation* (N.D. Ill.): Defended public company in securities fraud class action.
- Represented multiple clients in connection with post-closing purchase price adjustment disputes.

Environmental Matters:

- Advised client on response to cleanup orders from Taiwan's regulators (EPA and EPB) and remediation of former manufacturing facility in Taiwan.



- *W.R. Grace & Co. v. Goodyear Tire and Rubber Co.* (W.D. Mich.): Successfully obtained summary judgment for plaintiff seeking contribution for responding to an EPA emergency administrative order under the Safe Drinking Water Act.
- Represented client in federal (C.D. Ill.) and state (Ill.) cost recovery lawsuits and federal grand jury investigation (C.D. Ill.) in connection with environmental incident resulting in a fish kill.
- Represented multiple clients in connection with CERCLA actions and environmental regulatory matters.

Publications & Speaking Engagements

- "[Significant Proposed Changes to the Local Rules of the United States District Court for the Eastern District of Washington](#)," November 2017
- "[Creating Opportunities for Early Resolution of Lawsuits](#)," Desert Bar, November 2017
- "Recognition and Enforcement of Foreign-Country Judgments in the United States," [International Aspects of U.S. Litigation](#), American Bar Association, 2017, pp. 607-47
- "Proposed Amendments to the FRCP," Benton Franklin Counties Bar Association 9th Annual Federal Civil Trial Practice Seminar, May 2015
- "Alternative Fee Structures," Washington State Bar Association's Legal Lunchbox, February 2015
- "A Cougar, a Lawyer and a Dinosaur Walk Into a Bar ... Proposed Amendments to the FRCP," Benton Franklin Counties Bar Association, January 2015
- "Federal Arbitration Act," 8th Annual Federal Civil Trial Practice Seminar, May 2014
- "Recognition and Enforcement of Foreign Judgments in the U.S.," Desert Bar, June 2013
- "A Cougar, a Lawyer and a Dinosaur Walk Into a Bar ... Opportunities in a Shifting Legal Marketplace," Desert Bar, September 2012
- Teresa Rider Bult, quoted in "[You've Got Mail, but Have You Been Served?](#)", *ABA Litigation News*, Summer 2012, p. 12-13
- J. Chad Mitchell, "[5 Things Lawyers \(and Innovators\) Can Learn from College Football Coach Mike Leach](#)," *ABA Journal*, June 26, 2012
- J. Chad Mitchell, "[Anti-Enforcement Injunctions in the US? – The Second Circuit Says 'No.'](#)" *International Litigation News*, May 2012, at 56
- "Lessons & Benefits of New Models of Legal Practice," NALP 2012 Annual Education Conference, April 2012
- J. Chad Mitchell, "[The Ten Paces: Guaranteed Arbitration Award in Six Months](#)," *ABA Journal*, January 2012
- "Non-Traditional, Value-Based Approaches to Law Firm Services," Center For Competitive Management, February 2011
- "Dispute Resolution: Doing More with Less," Desert Bar, February 2011
- "A Stitch in Time Saves Nine: Managing Risk Through Contracts," National Association of Women in Construction, January 2010
-



"Abnormally Dangerous Activities at Hanford," *Desert Bar*, September 2009

- J. Chad Mitchell, "A Personal Jurisdiction Dilemma: Collateral Attacks on Foreign Judgments in U.S. Recognition Proceedings," *Brigham Young University International Law & Management Review*, Volume 4, Spring 2008, 123
- "A Personal Jurisdiction Dilemma: Collateral Attacks on Foreign Judgments in U.S. Enforcement Actions," Center for International Legal Studies, December 2007
- "Arbitration Options for Cross-Border Transactions and the Two-Minute Drill," Center for International Legal Studies, February 2006
- "The Balancing Act: Work and Family," J. Reuben Clark Law Society, University of Illinois Student Chapter, November 2005
- Comment, "An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students' Rights with School Safety," 1998 *BYU L. REV.* 1277
- Robert H. Freilich, "Planning Blight: The Anglo American Experience," *URB. LAW.*, Spring 1997, at vii

Memberships

- American Bar Association; International Litigation Committee of the Litigation Section of the ABA
- IBA's North American Regional Forum
- United States Council for International Business, Arbitration Committee
- President of the Natural Resources Law Forum
- Chair, Columbia River Chapter of J. Reuben Clark Law Society
- Alumni Board, J. Reuben Clark Law School
- J. Reuben Clark Law School Board of Visitors

Honors

- Named in *The Best Lawyers in America* (2016-2017)
- Listed in Washington Super Lawyers (2017)
- Avvo rating of "Superb"
- Named a "Rising Star" (under 40) by *Super Lawyers* magazine, 2008
- Order of the Coif
- Brigham Young University Faculty of Law Award for Meritorious Achievements and Distinguished Service 1998
- J. Reuben Clark Law School Scholarly Writing Award 1998 for *Amortization and the Takings Clause: A Search for Fairness*
- Trial Advocacy Team, J. Reuben Clark Law School, Winner Winter Trial Advocacy Competition, 1996
- EOU Defensive Player of the Game vs. Whitworth College
- First Team All-State High School Football, *Seattle P-I* and *Tacoma Tribune*, 1990



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Community Service

- Annual Federal Civil Trial Practice Seminar Planning Committee
- Richland High School Lacrosse Club Head Coach - Varsity Boys
- J. Reuben Clark Law Society, Service and Outreach Committee
- City of Richland's Housing and Community Development Advisory Committee
- Richland School District's School Safety Committee
- Volunteer Leader, Boy Scouts of America
- Volunteer Coach for youth athletics (football, basketball)
- Richland Citizens for Good Schools

Education

- J. Reuben Clark Law School, Brigham Young University (J.D., 1998, *magna cum laude*); Executive Editor, *BYU Law Review*
- Eastern Oregon University (B.S., 1995, College Honors Graduate)

Bar Admissions

- Washington State
- United States District Court, Eastern District of Washington
- United States District Court, Western District of Washington
- Illinois
- United States District Court, Central District of Illinois
- United States District Court, Northern District of Illinois
- United States District Court, Western District of Michigan
- United States District Court, Eastern District of Wisconsin
- United States District Court, District of Colorado
- United States Court of Appeals for the Third Circuit

Andrea Clare

Andrea Clare has been practicing law for 12 years. She attended Eastern Washington University and completed her J.D. at Gonzaga University. Upon passing the bar, she went to work for a long standing reputable civil law firm. There she experienced several practice areas and was allowed to argue anything she briefed. Consequently, as a young lawyer, Andrea was able to address Division III, the Washington State Supreme Court, try a few cases Bankruptcy court, Eastern District Federal Court, and the 9th Circuit several times. She joined TMC.law as a shareholder in July 2014 and has continued her varied practice with an emphasis on trial work and personal injury cases. In her spare time, Andrea enjoys the outdoors, reading, and traveling. She has three young children that otherwise occupy (dominate) her time.

Judge Edward F. Shea

Born in Massachusetts where he attended school and college.

Received his law degree from Georgetown University Law School in 1970.

Practiced trial law in the Tri-Cities from 1971 until his confirmation as a United States District Court Judge in 1998. His chambers and courtroom are in the court wing of the U.S. Courthouse and Federal Building in Richland.

He is a past president of the Washington State Bar Association and of the Benton-Franklin Bar Association, a member of the American College of Trial Lawyers, a former member of the House of Delegates of the American Bar Association for both the Young Lawyers Division of the ABA and also for the Washington State Bar Association. Judge Shea was named National Chapter Counsel of the Year by the March of Dimes in 1994 and ABOTA Trial Judge of the Year in 2015. He is the father of four children; one attorney, Ed Jr., practicing in Tri-Cities, and one Benton-Franklin County Superior Court Judge, Jackie Shea-Brown. His wife Marge is retired, having worked as a Certified Diabetes Educator.

APPENDIX A

CHAPTER 1

Selecting and Retaining an Expert

SEARCHING FOR AN EXPERT WITNESS

*Michael Brennan, David Dilenschneider,
Myles Levin, and Jim Robinson¹*

Expert witnesses are used in a wide range of litigation, and their opinions are often viewed as critical—frequently they can make or break a case. As a result, many trials have turned into a battle of the experts. Yet despite their importance, few attorneys take the time to use the proper resources to find effective expert witnesses. In our view, the search for an expert witness should involve four essential steps: (1) learn the subject matter of the expertise at issue, (2) identify a pool of experts in that field, (3) vet those experts, and also (4) analyze how courts are treating experts in this field. This subchapter addresses how to accomplish each of these steps.

Learn the Subject Matter

If you do not have a detailed knowledge of the subject matter, it will be difficult to determine if an expert is truly qualified in a particular specialty. Careful investigation of the topic at the outset will not only allow you to determine what questions to ask a potential expert but also possibly lead to the names of experts in that field. In short, the first two steps referenced above often go hand in hand.

1. Michael Brennan is a Research Analyst at the largest law firm in Michigan, Miller, Canfield, Paddock & Stone. David Dilenschneider is a Director, Client Relations, for Lexis-Nexis. Myles Levin is the CEO of Daubert Tracker™. Jim Robinson is the founder of Juris-Pro, Inc.

Libraries

Local libraries—particularly through their websites—are excellent places to begin the search to find information about the subject matter and even to find potential experts. Start by searching libraries' online catalogs for books and journals on the subject. Pay particular attention to the identities of the authors—someone who writes extensively on the subject may make an ideal candidate to serve as an expert in your case. In addition, many public libraries offer their patrons free access to some online pay databases, such as Reference USA and Standard & Poor's. Ordinarily, all you need to access these pay databases is a library card and an Internet connection.²

Broad Internet Search

Alternatively, you may want to conduct a broad-based Internet search to educate yourself and uncover potential experts. For instance, in a products liability case, conducting a search for the name of the product at issue will likely lead to information about it and, potentially, to the names of knowledgeable experts. Note, however, that search engines such as Google and Bing sometimes tend to be overinclusive unless the search query is very precisely tailored. For example, a search in quotes will look for the exact phrase entered, thereby yielding more precise search results than a search without quotes.

Moreover, other challenges exist when it comes to using such broad Internet searches. First, the information available through the Internet is almost always unpoliced, so you must recognize that it may be inaccurate. Second, even the best search engines cannot index all of the information that is continuously added to the Web. Finally, such searches can also miss information on the websites of colleges, universities, hospitals, and associations, which can be excellent sources for finding and evaluating experts.

Professional Associations

For virtually every field and interest an association exists—and within those associations are potential experts. For example, the Joint Commission on Accreditation of Healthcare Organizations' website³ is a directory of thousands of health care organizations, including ambulatory care facilities, assisted living facilities, behavioral health-care facilities (such as chemical dependency centers and development disabilities organizations), Health

2. A comprehensive list of library websites can be found at <http://lists.webjunction.org/libweb>.

3. <http://www.jointcommission.com>.

Maintenance Organizations (HMOs), home care organizations, hospitals, laboratories, long-term-care facilities, and office-based surgeons.

The best place to find information about associations is through the Associations Unlimited Database (otherwise known as the Encyclopedia of Associations). You can access this database for free through the websites of some university libraries and public libraries. The Associations Unlimited Database contains information on thousands of international, national, regional, state, and local membership organizations in all fields. These listings provide information about each organization, its membership, and its leadership. Such a database can be extremely helpful for finding experts in rather obscure fields such as hang gliding or petroleum packaging.

Topic-Specific Websites

If you know that a particular medical condition or product will be at issue, consider conducting searches at subject-specific websites. For instance, the National Library of Medicine (NLM)⁴ is an excellent place to find information, and the names of experts, in the areas of biomedicine and health care. The NLM houses books, journals, technical reports, and manuscripts. Moreover, it, along with its associated services PubMed and MedLine Plus, contains links to medical encyclopedias, full-text news stories, articles, and free publications listed on the Internet, as well as information on how to order articles that must be purchased. Information about specific products can be found at the ThomasNet site⁵ (formerly known as Thomas Register), which has gathered company information from registrations of companies in its industrial buying guides. This free online directory contains information on thousands of products and companies and the names of potential experts.

Identify a Pool of Experts

Once you have a basic understanding of the subject matter of the expert testimony, myriad additional resources are available for identifying a pool of potential experts.

University Websites

Faculty members who teach or perform research in a particular area are potential expert witnesses. Some universities set up separate Web pages for their professors, including short videos of the professors, their curricula

4. <http://www.nlm.nih.gov>.

5. <http://www.thomasnet.com>.

vitae (CV), publications, class schedules, research projects, links the professors thought were interesting, and sometimes even their hobbies. But search these websites directly, as individual faculty members' biographies usually do not appear in search engine results.

Verdict Reports

A verdict report is a summary of a lawsuit that has either been tried to decision by a judge/jury or settled nonconfidentially. A verdict report usually contains the case name, case number, date of decision, topic (e.g., medical malpractice, employment discrimination), result (i.e., which party won?), the amount of the judgment (if any), the alleged injury, jurisdictional information (i.e., state and county where the lawsuit was tried), name of judge, names of attorneys, a brief summary of the facts, a listing of the experts who were used by the parties, and other miscellaneous information about the lawsuit. Obviously, such reports can be used to find experts in a particular field.

Over a million verdict reports are now online, and they can be searched, most-comprehensively—though for a fee—through commercial vendors such as LexisNexis. Alternatively, a few free, searchable nationwide jury verdicts websites exist. For instance, Morelaw.com has verdicts and settlements dating back to December 1996, and one may search that database by the terms “defendant’s expert” or “plaintiff’s expert.” In addition, the National Association of State Jury Verdict Publishers website⁶ is a portal for many jury verdict publications. The data from this site is organized from independent reporters responsible for publications across the United States. A table and a map show the jurisdictions covered and, according to the website, its expert witness directory contains the names of experts who have testified in civil trials across the United States.

Expert Witness Directories and Referral Companies

Expert witness directories allow you to browse for consultants in a particular area of expertise and then contact them directly. Whereas the experts usually pay a listing fee, your search is free. Such directory listings often contain valuable information about experts, including areas of expertise, educational background, professional experience, and information about the lawsuits in which they have testified (e.g., whether the expert typically testifies for plaintiffs or for the defense).

6. <http://juryverdicts.com>.

Many expert directories are available online. Of particular note, the JurisPro Expert Witness Directory⁷ is a free national online directory of expert witnesses in thousands of categories. Visitors to JurisPro are able to view and download the experts' contact information; link to the expert's website; obtain the expert's full CV (available for download or print); read articles that the expert has written that discuss his areas of expertise; review the expert's background as an expert witness (how many times the expert has testified, how often for the plaintiff versus for the defense, etc.); and obtain contact information for the expert's references. Many of the large legal portals, such as Martindale-Hubbell⁸ and Law.com, as well as specialized commercial sites, also have online directories with short biographies, contact information, and links to each expert's website. Finally, many bar associations, such as the Los Angeles County Bar Association⁹ and the San Francisco Bar Association,¹⁰ have online directories of experts.

Expert witness referral companies, such as ForensisGroup,¹¹ maintain databases of professionals who are available for expert witness assignments. The benefit of using these services is their large size and the variety of their databases, so you can save a lot of time looking for experts. The downside is that you have to contact the referral company to get information for the expert and then pay an additional fee to retain that expert.

Vet Potential Experts

Once a short list of potential experts has been identified, a thorough vetting is not only warranted, but necessary. Many judges expect that any expert presented before them will be free from significant character deficiencies. The words of United States District Court Judge Nancy F. Atlas speak volumes: "CAUTION: Never retain, use, or list in court pleadings an expert without thoroughly researching the individual."¹²

Moreover, it is possible that the failure to perform such due diligence could result in a claim of legal malpractice. For instance, a California court

7. <http://www.jurispro.com>.

8. <http://www.martindale.com>.

9. <http://www.lacba.org>.

10. <http://www.sfbar.org>.

11. <http://www.forensisgroup.com>.

12. Hon. Nancy F. Atlas & Scott J. Atlas, *Finding, Preparing, and Defending an Expert in the Age of Judicial Gatekeepers*, TIPS FROM THE TRENCHES (Dec. 19, 2001), <http://jhguth1942.tripod.com/sitebuildercontent/sitebuilderfiles/gatekeepers.pdf> (an exclusive online publication for the ABA Section of Litigation).

of appeals recently ruled that an attorney has certain responsibilities with respect to the retention and handling of experts and that the failure to adequately discharge those responsibilities could subject that attorney to a claim of professional negligence.¹³ Finally, it must be remembered that, with respect to an expert being considered for retention, it is likely that opposing attorneys will be conducting their own research, trying to find damaging information with which to discredit that expert.

As noted above, when conducting such research, it is sometimes tempting to simply do a broad-based Internet search and believe that is sufficient. It is true that an Internet search conducted through a powerful search engine (e.g., Google, Bing) may retrieve information—whether professional or personal—that might be of use when evaluating an expert. However, according to various studies, those searches access less than 5 percent of the information available through the World Wide Web.¹⁴ Moreover, it cannot be emphasized enough that not everything found through such broad searches is true. You should verify all data before relying on it.¹⁵

Consider investigating the following categories of information about potential expert witnesses: (1) professional background, (2) prior experience as an expert, (3) public statements, and (4) public records. What follows are tips about how to research these categories of information.

Professional Background

Studies suggest that falsifying credentials on a resume is not a rare occurrence among professionals, and anecdotal stories about experts and other professionals bear that out. Accordingly, you need to determine whether the expert's claimed credentials are accurate, and this involves three distinct tasks. First, gather as much biographical information from as many

13. *Forensis Group, Inc. v. Frantz, Townsend & Foldenauer*, 130 Cal. App. 4th 14 (2005). See also Wendy L. Wilcox & Christopher J. Weber, *Department: Barristers Tips: Dodging the Pitfalls of Qualifying an Expert*, L.A. LAW., Sept. 2005, at 10 (“Failure to monitor the expert and the expert’s opinion could subject counsel to litigation on the other side of the table.”).

14. In fact, an April 27, 2009, article put the number at about 1 percent. See Sarah Rodriguez, *Search Engines Besides Google? Who Knew?* VA. LAW. WKLY., Apr. 27, 2009, available at <http://valawyersweekly.com/blog/2009/04/27/search-engines-besides-google-who-knew/>.

15. For example, in *Campbell v. Secretary of HHS*, 59 Fed. Cl. 775, 781 (2006), the judge determined that procedures employed by the special master were fundamentally unfair. In particular, the judge noted that articles the special master found on the Internet, including some from Wikipedia, WebMD, and other purportedly reputable sites, did not “remotely” meet the requirement of reliability—due primarily to those sites’ “disturbing” disclaimers.

sources as possible. Second, sort and compare that information, looking for discrepancies and gaps. Third, verify all claimed credentials.

An expert's biographical information can potentially be uncovered in various places:

1. The resume or CV provided during the course of the lawsuit in question;
2. Resumes or CVs filed by the expert in prior or concurrent litigation (typically found by searching collections of court-filed documents such as those available from LexisNexis; in particular, be sure to look at witness lists and expert reports as resumes and CVs are often attached as exhibits);
3. Credentials listed by the expert in an expert (or other professional) directory;
4. Licensing and other credentials disclosed in various licensing directories (e.g., the American Board of Medical Specialties);
5. Online profiles the expert may have posted on a social networking site (e.g., LinkedIn, Facebook); and
6. Credentials displayed at the expert's website (and be sure to "capture" screenshots of any information found as websites can be changed).

After obtaining the various claimed credentials of the expert in question, cross-reference them, looking for discrepancies and changes. At some point, did the expert change his undergraduate institution from a state college to an Ivy League university? Has the expert included embellished information in a directory listing in an attempt to better market his services? A simple comparison of the aforementioned biographical information might reveal such discrepancies.

Even if such cross-referencing fails to reveal any discrepancies, you should still verify as much of the claimed credentials as possible. Verify educational background, claimed licenses (paying particular attention to whether the claimed license is still active, has lapsed, was revoked, or the like), authored works, and association memberships.

An expert's educational degrees can sometimes be verified by calling the registrar's office of the appropriate college or university. Note, however, that some universities and colleges require a release and Social Security number before they will verify an individual's attendance date and whether any degrees were conferred. Obviously, this will be easier to obtain from an expert you are retaining, as you can include the release form as part of the retention agreement. An alternative resource is one of the several online services that allow you to verify attendance and whether the expert received the degree claimed. Although these online services will not cover

every college and university in the United States, they usually post a list of those institutions that participate in their service.

Licensing information can be found online for virtually all 50 states and can easily be searched to verify the current status for any licenses an expert claims to hold—and at minimal cost. Many organizations, such as the American Medical Association, the American Board of Medical Specialties, and the American Board of Surgery, have their own websites where you can check the certification status of experts. Search Systems¹⁶ (a pay site) links to over 45,000 public record databases and allows you to run a search for the type of record (e.g., license or certification), the jurisdiction (e.g., Ohio), and the occupation (e.g., accountant) about which you are interested. Using the metasite Portico,¹⁷ you can verify licenses for occupations such as doctors, contractors, architects, and more. Finally, many certifying organizations also have an online listing of expert certifications or are willing to verify an expert's certifications telephonically.

Nothing can be more discrediting to an expert than a reprimand or license revocation for professional misconduct, especially if the misconduct goes to his credibility, such as a fraud or perjury conviction. All state governments and some professional associations maintain records of professional misconduct, and these records are sometimes available via the Internet. Because of the myriad of possible sites to search, it is impractical to search them individually. Accordingly, the best approach to take when pursuing disciplinary records is to first use public records to identify both an expert's current or prior residences and professional licenses. Thereafter, focus your research on those states and the professions and organizations with which the expert is affiliated.

Finally, be sure to research articles, books, and other publications authored by the expert in question. First, double-check that the expert has indeed authored the articles that he claims to have authored and has acknowledged coauthorship where applicable. This practice proved revealing a couple years ago with respect to a prominent mold expert.¹⁸ Second, be sure to read the articles to ensure that the expert has not stated anything contrary to the position you would like him to take in your case. In addition, search for authored works that the expert has not acknowledged, as an expert may not tout authorship if a particular work contradicts the opinion about which the expert is expected to testify in the lawsuit. Finally, read

16. <http://www.searchsystems.net>.

17. <http://indorgs.virginia.edu/portico>.

18. Daniel Fisher, *Why Sketchy Science Doesn't Stop Medical "Experts,"* FORBES, Apr. 11, 2005 (despite an expert's claim to have authored "hundreds" of scholarly articles, a search through the PubMed database turned up fewer than 70).

what other experts in the field are saying about the expert's publications to ensure that his work has not been discredited.

Prior Experience as an Expert

If your potential expert has previously served as an expert witness, you should research how he was perceived by each court, the content of the testimony, and the outcome of each lawsuit. The potential expert should provide you with a list of all previous cases in which he has appeared, but some experts, through mere negligence or outright deception—perhaps to hide bad results—fail to disclose some of the prior lawsuits in which they were involved. Accordingly, in the course of compiling information about the expert's prior testimony, watch for references to cases of which you were unaware. Of course, an expert's failure to fully disclose prior testimony would be, in and of itself, a red flag.

The first step in conducting such verification is to simply search a database of court opinions for the expert's name. Many court opinions mention experts' names, such as when analyzing whether to exclude their testimony or when assessing whether their testimony is sufficient to create a genuine issue of material fact. You should not forget to include international court opinions in your search. For instance, it is not that uncommon for an expert based in the United States to work on, and testify in, cases in Canada (and vice versa).

However, a typical Boolean search through opinions based on the expert's name is not enough—it must be supplemented. Not every case opinion specifically references an expert by name. An authoring judge, for instance, might only refer to the expert as “plaintiff's expert” and leave it at that. Moreover, many opinions exist in which an expert's name has been misspelled. A Boolean search based on an expert's name would fail to find the opinions that fall into either category.

You should, therefore, also consult a specialty expert database, such as Daubert Tracker, to ensure that none of the opinions about an expert have fallen through the cracks. Daubert Tracker Case Reports (DTCRs) summarize opinions addressing the admissibility of expert witness testimony. Each summary is put into a chart, which identifies the case name, the case number, the expert's name, the expert's area of expertise, the attorneys, the judge, a summary of the court's decision (e.g., testimony inadmissible), and more. These reports offer three significant advantages over a regular search through case opinions. First, they actually identify, by name, the expert referenced in the related case opinion—even when the opinion does not. Second, the researchers at Daubert Tracker conduct name verification—double-checking the spelling of each expert's name and correcting it if appropriate.

For example, it knows that the Allan Done referenced in *Blum v. Merrell Dow Pharmaceuticals, Inc.*¹⁹ is actually Alan Done. Another benefit is that DTCRs cover more opinions than those typically available via online services. For instance, although very few state trial court opinions are currently available online, DTCRs cover some of those that are not. In the end, DTCRs are a powerful complement to searching regular case opinions.

Do not stop with just opinions, however, because many court cases do not produce any published opinion. It is imperative that you also research other types of case-related information. For instance, commercial vendors have made the federal dockets available through the Public Access to Court Electronic Records system (PACER), and similar state court systems are full-text searchable. Specifically, LexisNexis CourtLink gives you the capability of searching through dockets of cases filed in the federal courts (as well as various state courts), and some of those dockets go as far back as the mid-1980s. Westlaw's West Dockets offers a similar service (though with more limited coverage). So by simply searching for the expert's name, you might uncover a wide variety of information about an expert beyond just opinions, including motions (e.g., "Motion in Limine to Exclude the Testimony of Expert Smith"), reports, deposition transcripts, affidavits, declarations, and resumes. Importantly, such a docket search might uncover cases in which the expert has been involved, even if that expert failed to make that disclosure to you.

In addition, various vendors, such as LexisNexis, Westlaw, and even Daubert Tracker, offer full-text searchable databases of motions and briefs filed in both state and federal courts. You can search these databases to uncover court filings that mention the expert in their main text, even if the expert's name is not referenced in the caption of the document itself (and therefore could not be found via a docket search). For example, finding a brief filed in support of a motion *in limine* to exclude an expert can provide valuable information about someone else's assessment of the expert you are considering retaining.

Verdict reports, in addition to helping you uncover prior cases in which the expert has testified, can provide additional insight. For instance, after reviewing a number of verdict reports, you might uncover potential bias—the expert always seems to testify for plaintiffs or defendants, or the expert has testified for a particular party or attorney on numerous occasions. Moreover, data contained within a verdict report might lead you to additional information about the expert. For example, you could use the case

19. *Blum v. Merrell Dow Pharms., Inc.*, No. 1027, 1996 WL 1358523 1996 Phila. Cty. Rptr. LEXIS 122 (Pa. Com. Pl. Dec. 13, 1996).

name and number listed in a verdict report, along with the jurisdictional information, to track down the file from the lawsuit to search for more information. Or, if the names of the attorneys are listed in the report, you might contact them to ask them for their impressions of the expert. Finally, if the potential expert has never been on the winning side of a case, you might not want to retain that expert. In short, how you use information found in a verdict report is only limited by your creativity.

You should also attempt to obtain copies of the transcripts of your potential expert's prior testimony. Several options exist for tracking down these prior statements, whether in a deposition or at trial. Although both LexisNexis and Westlaw now have large databases of transcripts, other options exist for those firms affiliated with either the plaintiffs' bar or the defense bar. Specifically, transcripts are available for a fee to defense attorneys who are members of the Defense Research Institute (DRI). On the plaintiff's side, the AAJ Exchange²⁰ makes available to its members a database of over 10,000 expert witnesses and over 15,000 transcripts. The commercial service TrialSmith,²¹ jointly sponsored and contributed to by more than 52 trial lawyer associations and litigation groups, claims to have more than 350,000 transcripts. One can run a free search at the site for a particular expert and then view or download the transcripts immediately. As an alternative, try directly contacting lawyers who have worked with (or against) a particular expert and ask if they have transcripts or other background information. If the expert appeared in one or more of their cases, they probably did background research themselves. These treasure troves of prior vetting can sometimes save you hours of work.

Finally, you should recognize that case-related video may be available on the Internet. Some depositions and other materials regarding expert witnesses have begun showing up (though sometimes only briefly) on websites such as YouTube.com. Therefore, searches for video material on the Internet will become an ever more important part of your work and should not be overlooked. Bing, Google, and AltaVista have added tabs to allow users to search for video. For example, running a Yahoo video search for a computer forensic expert may retrieve extracts from videotaped depositions.

Expert's Prior Public Statements

Uncovering case-related information is essential to a thorough vetting of a potential expert. However, a wealth of non-case-related information is also

20. <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/677.htm>.

21. <http://www.trialsmith.com/TS>.

available online and should be searched. Such information includes news, congressional information, postings on discussion boards, blog entries, patent information, agency decisions, law review articles, and even public records.

When it comes to an expert's prior opinions or statements on a topic, look beyond just opinions expressed in litigation. Statements made outside of litigation can sometimes be very damaging. For instance, experts often proffer opinions in articles, radio and television interviews, editorial commentary, and letters to the editor. Yet, despite the existence of such a potentially fruitful resource, many researchers fail to consider the news when they research experts.

A good first step is to search the news portion of a search engine site (e.g., Google or Bing). However, for two reasons, be aware that such searches may not provide complete results. First, the news databases available through noncommercial search engines are not as robust as those available from the commercial vendors. For instance, Google searches only about 4,500 news sources. When it comes to experts, this lack of coverage can be critical. For instance, a November 1992 article from the *Washingtonian* magazine relates a judge's ruling that a particular damages expert had given false testimony.²² A search of that expert's name through Google News, however, fails to retrieve that article. Second, although these searches are often perceived as free, you still may have to pay to access some of the articles retrieved (e.g., it costs \$2.95 to retrieve a 1999 article from the *Chicago Sun-Times*, found via Google).

Because you do not want to risk failing to find something damaging about your expert that your opponent could exploit at trial, take the second step of searching a commercially available news database. One of the largest such databases (available from LexisNexis and titled "Mega News, All (English, Full Text)") draws from over 22,000 sources, including much more than just newspaper and magazine articles. In fact, databases like this often contain transcripts from television and radio networks and shows (e.g., CNN, *60 Minutes*, *20/20*, *CBS Evening News*, National Public Radio), articles from specialized legal news sources, and other sources such as blogs.

You should also search congressional records and documents. Prominent experts often appear before Congress and testify or do work for congressional committees. Other experts, along with other professionals and scientists, sign letters on certain issues (sometimes within their specialty)

22. See *Doctors Cheer Olender Reversal*, WASHINGTONIAN, Nov. 1992.

that are sent to Congress. Insights as to an expert's political or religious position, even if not directly relevant to the issues involved in the pending lawsuit, may be of tactical value.

Discussion board postings and blogs are other potential sources of information. First, it may be possible to find an expert's opinion on a particular subject by searching postings on discussion boards. For instance, by clicking on the "Groups" tab on Google's home page, you can access more than 1 billion messages dating as far back as 1981. Second, many experts post their opinions on their own blogs, which are often linked to from an expert's website or discoverable through search engines. Because of the ease of their creation, postings and blog comments are often casual in nature, quickly written, and rarely peer reviewed. As such, you can sometimes find statements that are detrimental to the authoring expert—such unfiltered opinions can lead to strong cross-examination material by the opposing side. Also, comments posted by others to an expert's discussion board or blog entry may provide guideposts for attacking that expert's testimony.

For experts who are engineers, scientists, or the like, a search through patent information might yield damaging statements. In one of the ballot-contest lawsuits heard in Leon County, Florida, in 2000, then-Governor Bush's attorneys called to the stand an expert on voting machines. He had helped design the punch card voting devices used in many of the contested counties in Florida. The expert defended the use of the punch card voting devices and deemed them reliable. However, during his cross-examination, Gore's attorney confronted the expert with a patent he obtained on October 27, 1981, for a "new and improved" version of the voting devices used in the Florida election. In the "Background of the Invention" portion of the patent application, the expert had made the following statements:

Incompletely punched cards can cause serious errors to occur in data processing operations utilizing such cards.

If, however, the voter does not hold the voting punch straight up and down when punching, it is possible under certain temperature and humidity conditions to pull the template toward the voter a few thousandths of an inch, sufficient to prevent complete removal of the chad when the stylus is inserted. This can produce what is called a "hanging chad," as the chad-piece of the card is still attached to the card by one or two of the frangible holding points.

It must be emphasized that the presence of even one incompletely punched chip in a run of several thousand tabulating cards is in most cases too great a defect to be tolerated.

Therefore, the material typically used for punch boards in punch card voting can and does contribute to potentially unreadable votes, because of hanging chad or mispunched cards.²³

Gore's attorney used the expert's own words to support Gore's position:

Stephen Zack (attorney): Any incompletely punched cards can cause serious errors to occur in data-processing operation utilizing such cards. Is that a fair statement of what you said?

The Expert: That is correct.

As reported by the *New York Times*: "The effect of [the expert's] testimony was written plain in the strained facial expressions of the Bush legal team."²⁴

Many experts (particularly doctors and economists) appear before various agencies, so you should consider searching through agency opinions. After identifying agencies before which an expert may have appeared, contact those agencies and ask for the expert's reports or transcripts of his testimony. Note, however, that although many agencies enable you to search their opinions on their websites, such an effort can be quite time consuming. An alternative is to use commercial vendors, which have databases that combine opinions from numerous agencies, thereby making all those various opinions searchable simultaneously.

Because authors of law review articles sometimes quote experts, cite to their works, and discuss their testimony, a database of law reviews can also be a good source of information. Not all law reviews are online for free, so, for a more comprehensive law review search, use a commercial site such as LexisNexis or Westlaw, or your library's free remote databases.

Finally, as with your search on prior experience of an expert, you should determine whether any video or audio recordings of the expert are available. These are important, both for the substance of the statements and as an indication of the expert's communication skills. Some experts have included streaming video of themselves on their own websites to enable attorneys to see them in action. In addition, at least one expert directory (i.e., JurisPro) allows you to both see and hear the listed expert. Another option is to search podcasts, which can be found (1) through an online directory of podcasts, such as Podcast Alley or Blawg (click on the "Podcast" category),

23. Pat. No. 4,297,566.

24. Katharine Q. Steele, *Contesting the Vote: The Vice President; Gore Reviews His Legal Options and Says He Remains Determined to Press His Case*, N.Y. TIMES, Dec. 4, 2000, at A15.

or (2) by simply using a search engine and adding the word “podcast” to your keyword search.

Public Records regarding the Expert

Public records can reveal a lot about an expert. For instance, an expert’s financial situation might be revealed by how much his house cost, what type of car he drives, or a recent bankruptcy filing. Voter registration records may reveal a political party affiliation. A conflict of interest (e.g., the expert is related to a party) might be found by checking out real or personal property records, employment histories, or the like.

Note that a search through public records should include a search for civil and criminal matters in which the expert has been named as a party. Believe it or not, some experts have engaged in significant criminal activity. And on the civil side, many medical experts are parties to lawsuits because they are practicing doctors, and, as such, get sued. If a medical expert has been found liable for malpractice in a prior lawsuit, that information may prove valuable to the opposition when it comes to questioning that expert’s claim to expertise in a certain area. And be sure to include not only case filings but also judgment and lien information when you make such inquiries.

If the jurisdiction where the expert practices is not available online or is not covered by one of the online legal services, consider calling the clerk of the court for the county where the expert practices. The clerk may be able to tell you over the telephone if there has been any litigation in which the expert was a named party. Some clerk’s offices charge a fee, requiring that you send them your request and payment before they provide the requested information. If this is the case, then you need to plan ahead, as the response time can vary greatly from two days to (in the worst cases) well over two months.

Analyze How Courts Are Treating Experts in This Field

The background and specific qualifications of your prospective expert are crucial to the admissibility of the expert’s testimony. Such information, however, should not be analyzed in a vacuum. Equally important is how courts are generally treating experts in the field of the claimed expertise.

In certain types of both civil and criminal litigation, experts from some professional disciplines are so commonly retained that the admissibility of their testimony is uncontroversial. In commercial litigation, for example,

an accountant is usually retained if the case involves a claim of lost profits. In medical malpractice cases involving birth injuries, it is virtually inevitable that both sides will need to retain a pediatric neurologist. In such instances, you may be lured into thinking that you need not be concerned about thoroughly researching the entire class of expertise. But because there is no guarantee that the expert you are going to retain or depose in fact has demonstrated adherence to the generally accepted principles and methods of his discipline, presuming so could be quite dangerous. You must determine how the expert's methods and opinions conform to or deviate from those of other experts in the same discipline. In addition to employing all of the standard research tools previously discussed, a simple and useful practice is to have the prospective expert explain, in his own words, how questions about the science behind the methods used would be addressed. If the expert is unfamiliar with basic *Daubert*²⁵ or judicial gate-keeping concepts or cannot clearly articulate the basic methodology used to arrive at his opinions, you should think twice about retaining that expert.

This is particularly essential if the expert will be giving testimony involving a novel or emerging theory, or one with significant controversy concerning its scientific legitimacy. In such situations, you must research the entire class of the testimony relating to the theory. A good example of a class of expertise where the theory and science is emerging is trauma-induced fibromyalgia. Whereas fibromyalgia is an accepted and recognized diagnostic category and rheumatology, expert testimony that a physical trauma can cause fibromyalgia is highly controversial. Although numerous studies support a causative link between trauma and fibromyalgia, other studies do not support such a conclusion.²⁶ So, when researching an expert who will testify in an emerging area such as trauma-induced fibromyalgia, you must consider several factors:

- Know the science behind the theory: Attorneys presenting testimony in an emerging area should be thoroughly acquainted with all major studies performed and papers written on the topic.
- Know the case law: Every effort should be made to avail oneself of all major opinions and decisions that have been written on the admissibility of testimony in the emerging area.
- Know the jurisdiction: Standards for admissibility vary from one jurisdiction to the next, and those standards will have a significant impact

25 *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993).

26. See Michael Finch, *Judicial Evaluation of Traumatically Induced Fibromyalgia*, *PSYCHOL. INJ. & L.*, Mar. 2009, available at <http://www.springerlink.com/content/160849t307u46626/fulltext.html>.

on the tack taken in arguing for admissibility of novel or controversial testimony.

- Know the court/judge: The best indicator of future admissibility of a novel or controversial opinion is the established tendencies of the court or judge with respect to novel testimony in general and specifically the class of testimony at hand.
- Know the expert: When presenting novel testimony, it could be argued that the best safeguard against exclusion would be to select an expert whose testimony on the topic has already been admitted.

Conclusion

Know the subject matter. Find the right expert. Investigate the expert's background and credentials. Analyze how courts are treating expert testimony in this field. Each of these steps can be critical when it comes to ensuring that you have chosen the right expert for your client.

RETAINING AN EXPERT

*Loren Kieve*¹

This subchapter assumes that (1) you have determined you need an expert witness, either as a consulting expert or a testifying expert, and (2) you have found an expert that you believe (a) is qualified, (b) is competent and has the necessary qualifications and credentials in the relevant field of expertise, (c) will provide valuable advice or present credible and convincing testimony, and (d) has no conflict of interest or other problem that would prevent the expert from providing advice to you and your client or testifying on behalf of your client.

Before you retain the expert, you will have interviewed him extensively to discuss the potential engagement. When you do so, you should confirm, preferably in a signed written agreement, that even the preliminary information you discuss with the expert is itself confidential and may not be disclosed without your and your client's written permission. This can avoid potential embarrassment and, worse, disqualification if the expert breaches this agreement.²

You should normally retain the expert initially as a consulting expert so that you can make sure that the expert's testimony will be helpful to your case and stand up to scrutiny under cross-examination by the other side before actually designating him as a testifying expert. If the expert remains a consulting expert, you can retain another expert to testify in the case. Again, however, that expert should also first be retained as a consultant.

The written retention agreement is key to setting forth a clear understanding of what the expert will—and will not—do as part of the expert's engagement, and what your and the expert's expectations will be going forward. A model retainer agreement is attached to this chapter as appendix A and is referenced throughout this subchapter.

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2. See, e.g., *Western Digital Corp. v. Superior Court*, 60 Cal. App. 4th 1471, 1471 Cal. Rptr. 2d 179 (1998).

***Provide for the Confidentiality of the Retainer Agreement
and Materials Produced to the Expert***

You should label your retainer agreement as “Privileged and Confidential—Attorney Work Product,” preferably in boldfaced type. However, this label may not necessarily protect the retainer agreement from discovery if the expert is designated as testifying. Under Federal Rule of Civil Procedure 26(a)(2)(B)(ii) and its state court analogues, the expert will be required to disclose “the data or other information considered by the expert” in forming his opinions. It is unclear whether a court would consider the expert’s retainer agreement as falling within this language. If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert, including the retainer agreement itself, will be fair game for inquiry by the other side.³

As of the date of this book, the Federal Civil Rules Advisory Committee has proposed a revision to this rule that would become effective in December 2010 and would provide greater protection to communications between counsel and an expert.⁴ It would require that the expert disclose only those facts and data on which he is relying in forming an opinion.

Also keep in mind that sophisticated counsel often stipulate among themselves that work product and similar communications with an expert, as well as draft reports, are not discoverable.⁵ Although a stipulation that there will be no waiver by sharing work product with an expert would probably protect the information in the particular case, there is no guarantee that it would protect it against nonparties in another setting.⁶

You will also want the expert to acknowledge the confidentiality of the retention itself. Confirm in the retention agreement that the expert will maintain the confidentiality of the assignment and will not broadcast that he has been retained in the greatest case since the Ringling Bros. and Barnum

3. See 8 CHARLES ALAN WRIGHT ET AL., FED. PRACTICE AND PROCEDURE § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) (“It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed.”).

4. See *infra* “Communicating with the Expert” in chapter 2.

5. See AMERICAN BAR ASSOCIATION, CIVIL DISCOVERY STANDARDS Standard 21(e) (Aug. 2004) (“Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.”).

6. See, e.g., *Bank Brussels Lambert v. Crédit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995). (The test is whether disclosure is done in a way that “substantially increases the likelihood that the work product will fall into the hands of the adversary.”)

& Bailey circus came to town—unless you want the expert to do that and agree to it in writing.⁷

Confirm That There Are No Conflicts

An expert may be disqualified because of conflict if he has previously given advice to or consulted with the opposing party or with a person or entity with an interest adverse to your client. Although not, strictly speaking, a legal disqualification, the expert may be practically disqualified if he has taken a position contrary to the one that is being taken in your case.

You should have the expert confirm in the retention agreement that he has told you about any previous assignments that may bear on the current assignment. You want to make sure that the expert has not testified that the moon is made of green cheese when your case is based on its being red. Rule 26(a)(2)(B)(iv) and (v) require an expert's report to include "(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years," and "(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." Your previous due diligence should include not only these bare minimums, but an extensive investigation into the expert's overall career and previous assignments, without any time limitation. The last thing you want to have happen is for your expert to be impeached by his own writings or previous positions.⁸

Confirm That the Expert Will Spend Sufficient Time on the Case

The retention agreement should confirm that the expert will devote sufficient time to the matter. You do not want to spend considerable resources on your expert only to find that he has taken on a new assignment that conflicts with yours.

It is not unusual for experts to be subpoenaed, not only in the case in which they are assisting you, but in other cases.⁹ You should require your

7. See Model Agreement ¶¶ 5 and 6.

8. For more guidance on vetting your expert, see "Searching for an Expert Witness" *supra*.

9. See, e.g., *Ortiz-Lopez v. Sociedad Española de Auxilio Muto y Beneficencia de P.R.*, No. 00-1278-01A (D.P.R., May 3, 2001) (expert's credibility and qualifications, including prior testimony in cases involving similar claims, were "directly at issue"); *Expeditors Int'l of Washington, Inc. v. Vaster, Inc.*, 2004 WL 406999 (N.D. Ill. Feb. 26, 2004) (Rule 26 does not preclude a Rule 45 subpoena *duces tecum* to an expert witness where the docu-

expert to inform you immediately if he is subpoenaed so that you can take appropriate action.¹⁰

Confirm That the Expert Will Return Provided Materials

You should ensure that, when the case is over, the expert does not retain any confidential client information or protected attorney work product. Some experts, particularly ones whose livelihoods are based on providing expert consultation or testimony, may want to retain their work papers for potential use in subsequent cases. Unless there are very good reasons for letting them do so, you should insist that “what goes on in Los Angeles, stays in Los Angeles” in your case.¹¹

Address the Expert’s Compensation

The preferred method for compensating an expert is the expert’s standard hourly rate. This will permit the expert to testify that he is being compensated for the time spent on the case rather than for supplying a paid opinion. You should verify that this is, in fact, the expert’s standard hourly fee that is charged for similar assignments. You never want to compensate an expert by a contingent fee. It is unethical because it turns the expert from a supposedly neutral opinion giver into someone who is aligned with a party and has his own “skin” in the outcome of the case.

Some experts, for example, university professors and professional lecturers, may, however, ask to be compensated for having committed their time in advance to your case when they could have appeared at one or more other engagements or seminars. If so, you may consider an engagement along the lines of paragraph 11(b) of the Model Agreement. If you have a scheduled trial date, the expert may also want an agreement along the lines of paragraph 11(c).

You should specify the names and rates of anyone assisting the expert whom you will be expected to compensate. You should also confirm that

ments requested pertained to the expert, as opposed to a party; requiring the production of the expert’s deposition and trial testimony and reports for the past 10 years regarding trade secrets); *cf.* *Alper v. United States*, 190 F.R.D. 281, 283 (D. Mass. 2000) (subpoena not appropriate to obtain evidence from expert witnesses).

10. See Model Agreement ¶ 10.

11. See Model Agreement ¶ 9.

any of the expert's assistants will also abide by the terms of the expert's engagement agreement.¹²

Finally, because you have retained the expert, you should ensure that you receive the expert's statements.¹³ They should be submitted monthly so you can keep track of what the expert is doing (and also make sure that the expenses do not get out of hand). It is not unusual, particularly in large cases, to have the client pay the expert directly, so that the lawyer or law firm does not end up financing the litigation. If, however, the case is on a contingent fee arrangement, then the lawyer or law firm will normally advance expert fees as the case progresses. As noted above, however, the expert will never be retained on a contingent fee basis.

Reference Any Protective Orders

Because the expert is assisting you and may be privy to material covered by a court protective order, it is essential that the expert (and any assistants) also agree to be bound by the order.¹⁴

Ensure That the Expert Preserves His Materials

As noted above, under the current (as of 2009) version of Rule 26(a)(2)(B) (ii), an expert's report is required to include "the data or other information considered by the [expert] witness in forming [her opinions]." Many state courts have similar provisions. The federal courts and these state courts have generally held that this language requires the expert to disclose everything that he "considered" during the course of the assignment as an expert witness. This means that every note an expert writes, and every draft, document, e-mail, or phone call you have with an expert is probably discoverable.¹⁵ If your expert destroys any of these documents, you and your client may be subject to sanctions.¹⁶

Although you may be retaining the expert as a consulting expert—in which case these provisions would not apply—there is a possibility that you may later decide to have the expert testify. If so, then these provisions apply full force. It is therefore essential that the expert understand, from the outset, that he should keep (1) a careful record of everything he reviews during the

12. See Model Agreement ¶ 13.

13. See Model Agreement ¶ 15.

14. See Model Agreement ¶ 14.

15. American Fidelity Assurance Co. v. Ladonna Boyer & Comb. Ins. Co., 225 F.R.D. 520 (D.S.C. 2004); 6 MOORE'S FEDERAL PRACTICE § 26.80[1][a] (2009).

16. G. Joseph, *Expert Spoliation*, NAT'L L.J., Feb. 3, 2003, at B7.

assignment, and (2) copies of each of these materials. It is also essential that the expert understands that everything he prepares, including drafts, is fair game for the opposing side in discovery.

As also noted above, the Federal Civil Rules Advisory Committee is currently considering amendments to Rule 26(a)(2)(B)(ii) that would require the expert to disclose only material he actually relies on in forming an opinion. If these amendments are adopted, the expert will still have to maintain and identify the materials he is relying on—rather than everything he merely may have “considered.” But the line between the two is not entirely clear, so the better course is make sure the expert retains everything so that, if a dispute arises, there will be no claim of improper “expert spoliation” of discoverable material.

Protect against Release of Drafts and Notes

Clarify with your expert that any documents he creates might be discoverable. First, confirm that the expert clearly understands that anything he writes is very likely to end up in the hands of opposing counsel.¹⁷ Second, confirm that the expert will not commit *anything* (including so-called internal working papers) to paper in the way of an opinion or report without first discussing it with you. This ensures that no tentative or erroneous concepts become fair game for the other side to exploit. Third, make clear that the expert’s opinion may evolve as additional information develops in the case.

As noted above, you may, however, also want to do what experienced counsel ordinarily do in cases where both sides retain experts: have a written stipulation that modifies the terms of Rule 26(a)(2)(B) to provide that (1) communications between counsel and any expert, including a testifying expert, are off bounds from discovery; and (2) it is only the expert’s written report and materials or data the expert actually *relies on* in forming his opinion(s) and report(s) that are discoverable.¹⁸

Provide for the Expert’s Continuing Obligation after the Case Is Concluded

You should confirm that the expert is to maintain the confidentiality, even after the case is over, of any information, including conclusions, that he receives

17. See, e.g., *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, 2000 WL 1843258 (W.D.N.Y. Nov. 2, 2000).

18. See AMERICAN BAR ASSOCIATION, CIVIL DISCOVERY STANDARDS Standard 21(e) (Aug. 2004).

or develops in the case.¹⁹ You should also confirm that the expert is to continue to abide by the terms of any protective order entered in the case and to return or destroy any materials or information covered by a protective order.²⁰

Conclusion

A written engagement letter is essential to (1) establish the terms on which the expert is retained, and (2) clearly define what the expert will and will not do during the course of the engagement. The paragraphs in the attached model agreement are meant to be guides, rather than diktats, for retaining an expert.

A signed engagement letter does not, however, resolve all the potential issues surrounding an expert. You must constantly engage with and supervise your expert to make sure that you and the expert are on the same page throughout the case.

19. See Model Agreement ¶ 23.

20. See Model Agreement ¶ 24.

WORKING WITH NONTESTIFYING EXPERTS

*Matthew F. Prewitt*¹

Consulting experts labor without glory. Unless trial counsel has made a serious error, ordinarily the consulting expert will never take the witness stand, will never be deposed, and may never even be disclosed to opposing counsel. However, in any complex litigation, the consulting expert plays an essential supporting role for trial counsel. Even though you may never know his name, a consulting expert is assisting your opposing counsel to devise the unanticipated case theory or devastating cross examination that your litigation team may never consider—unless you too have retained a consulting expert.

The distinguishing characteristic of the consulting expert is confidentiality. Shielded by the attorney work product doctrine and, in some cases, by the attorney-client privilege, the consulting expert provides confidential advice to trial counsel regarding the specialized areas of knowledge that will provide the essential proof of the parties' claims and defenses at trial. Confidentiality affords the attorney and consultant the freedom to engage in a candid assessment of the potential strengths and weaknesses of both the client's and the adversary's case theories and to explore alternative case theories without fear of disclosure. This subchapter provides a practical guide to preserving the confidentiality of consulting expert work product and communications, and explains how to avoid the litigation pitfalls that may result in inadvertent waiver of the work product doctrine and attorney-client privilege for consulting experts.

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The Two Bastions of Consultant Confidentiality

The confidentiality of consulting expert work product may be protected under both the work product doctrine and the attorney-client privilege. Preserving these protections requires careful planning and diligence throughout the attorney-consultant relationship.

Work Product Doctrine

Rule 26 of the Federal Rules of Civil Procedure draws a bright line between testifying experts and nontestifying consultants.² Under Rule 26(b)(4), a party may depose “any person who has been identified as an expert whose opinions may be presented at trial,” but an expert who will not testify is generally shielded from discovery:

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.³

This protection under Rule 26(b)(4)(B) for nontestifying experts is an extension of the attorney work product doctrine, which is codified by Rule 26(b)(3):

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).⁴

The protection is available even if the only reason a party does not want the consultant to testify is that his opinion would be harmful to the client’s case.⁵ The very purpose of the rule anticipates that there will be instances in which the consulting expert reaches conclusions or provides advice that, if disclosed, would be damaging to the client’s case. By ensuring confidentiality, the work product doctrine protects the advisor from becoming an involuntary

2. *But see* “The Future of Consulting Experts: The Proposed Amendment to Rule 26(b)(4)” *infra* for a discussion of proposed amendments to Federal Rule of Civil Procedure 26(b)(4) that would substantially eliminate the distinction between testifying and consulting experts.

3. FED. R. CIV. P. 26(b)(4)(B).

4. FED. R. CIV. P. 26(b)(3).

5. *See Spearman Industries, Inc. v. St. Paul Fire & Marine Ins. Co.*, 128 F. Supp. 2d 1148, 1152 (N.D. Ill. 2001).

witness and encourages candid discussion between the attorney and the consulting expert.⁶

History of the Work Product Doctrine

The work product protection for attorneys was first recognized by the Supreme Court in the landmark decision *Hickman v. Taylor*.⁷ In *Hickman*, the Court acknowledged that shielding attorney work product from discovery is essential to preserve the integrity of the attorney-client relationship and the adversary system.⁸ When the Supreme Court subsequently expanded the work product doctrine to include expert consultants in *United States v. Nobles*,⁹ the Court recognized the central role of nonattorney consultants in assisting counsel to prepare for trial.¹⁰ In *Nobles*, defense counsel had hired an investigator to interview two witnesses. The defendant called the investigator as a witness at trial to impeach the witnesses' testimony but refused to disclose the investigator's report. The Court held that the report was protected by the work product doctrine, until the defendant waived the privilege by calling the investigator to testify.¹¹ The Court, therefore, affirmed the trial court's ruling that the investigator could not testify without also disclosing his report.

Exceptions to Work Product Protection

The work product doctrine is not an absolute privilege. Many attorneys incorrectly assume that the work product doctrine will shield facts and data collected by the consulting expert unless the protection is somehow waived. However, both Rule 26(b)(3) and Rule 26(b)(4) recognize a qualified right of the opposing party to obtain disclosure on a sufficient showing of need.

Under Rule 26(b)(4), the required showing is described as "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."¹² What qualifies as exceptional circumstances is an intensely factual inquiry that will vary from case

6. *Id.* (citing *Eliassen v. Hamilton*, 111 F.R.D. 396, 401 (N.D. Ill. 1986)).

7. *Hickman v. Taylor*, 329 U.S. 495 (1947).

8. *Id.* at 511 ("Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.").

9. *United States v. Nobles*, 422 U.S. 225 (1975).

10. *Id.* at 238–39 ("[A]ttorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the [work product] doctrine protect material prepared by agents of the attorney as well as those prepared by the attorney.").

11. *Id.*

12. FED. R. CIV. P. 26(b)(4)(B).

to case. For example, in *White v. Cooper Industries, Inc.*,¹³ a products liability case involving a broken metal chain, the trial court compelled disclosure of the results of testing performed on an unbroken link in the subject chain.¹⁴ Similarly, in *Cooper v. Meridian Yachts, Ltd.*,¹⁵ the court compelled disclosure of documents describing how an expert had “manipulated and disassembled components” during his investigation of an accident, finding “exceptional circumstances” because the opposing party would never have the opportunity to examine the objects in their original condition.¹⁶

Similarly, under Rule 26(b)(3), work product may be discovered if “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”¹⁷ For example, in a securities class action, counsel for the defendant corporation had retained the services of an accounting firm to investigate the basis for the plaintiffs’ claim and had then disclosed the final report produced by the accounting firm. The plaintiffs sought discovery of documents underlying the report, but the district court refused to compel discovery because the plaintiffs had failed to show that the information contained in those documents was unavailable from other sources, and the defendant had not disclosed the auditors as testifying experts.¹⁸

Even if the opposing party obtains an order compelling disclosure of protected work product, this disclosure ordinarily will be limited to the facts observed and recorded by the consultant. Although Rule 26(b)(4) expressly authorizes disclosure of either “facts or opinions,” the work product doctrine as developed by the courts and as codified by Rule 26(b)(3) distinguishes between disclosure of factual materials and disclosure of mental impressions and opinions:

If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.¹⁹

Courts have applied this distinction between fact and opinion work product to limit disclosure of expert work product, seeking to shield opinions and trial strategy even where the court compels disclosure of fact work product.

13. *White v. Cooper Indus. Inc.*, No. CIV. 06-4272-KES, 2008 WL 3245461 (D.S.D. Aug. 6, 2008).

14. *Id.*

15. *Cooper v. Meridian Yachts, Ltd.*, No. 06-61630-CIV, 2008 WL 2229552 (S.D. Fla. May 28, 2008).

16. *Id.* at *5–7.

17. FED. R. CIV. P. 26(b)(3)(A).

18. *In re PolyMedica Corp. Sec. Litig.*, 235 F.R.D. 28 (D. Mass. 2006).

19. FED. R. CIV. P. 26(b)(3).

For example, in *White v. Cooper Industries, Inc.*,²⁰ discussed above, the court compelled disclosure of the data collected during the testing of the metal chain, but the court refused to compel disclosure of the opinions of the consulting expert who performed the test.²¹ Similarly, in *Cooper v. Meridian Yachts, Ltd.*,²² also discussed above, the court compelled disclosure of documents describing the expert's investigation, but the court protected from disclosure the investigator's opinions regarding the cause of the accident.²³

Courts sometimes disregard the distinction between opinion and fact, however, especially where the retaining counsel fails to take adequate steps to prevent the consulting expert from becoming an indispensable witness with direct observation of disputed conditions within his expertise. For example, in *Delcastor, Inc. v. Vail Associates, Inc.*,²⁴ an engineer retained by the defendant ski resort investigated the cause of a mudslide by inspecting the site immediately after the incident.²⁵ His report contained both his observations and his opinions regarding the cause of the mudslide. The defendant disclosed the engineer solely as a fact witness and not as an expert. The plaintiffs, however, sought to examine the engineer on his opinions and to obtain a complete copy of his report. The trial court compelled disclosure of the report and his opinions because "effective cross-examination of his testimony regarding 'facts' surrounding the mudslide require[d] discovery of his opinions as to its cause."²⁶ The trial court found that "exceptional circumstances" warranted disclosure because the engineer was the only expert in a position to form opinions about the cause of the mudslide based on firsthand observations immediately after the incident. The plaintiffs would therefore be entitled to the report because "it [was] impracticable for [them] to obtain information similar to that contained in the [engineer's] report."²⁷ The defendant's mistake was in requesting a key fact witness for anticipated litigation to provide a candid opinion in a written report on a critical disputed issue.

Attorney-Client Privilege

Although the work product doctrine is typically the focus of disputes over disclosure and examination of nontestifying experts, counsel should not

20. *White*, 2008 WL 3245461.

21. *Id.*

22. *Cooper*, 2008 WL 2229552.

23. *Id.*

24. *Delcastor, Inc. v. Vail Assocs., Inc.*, 108 F.R.D. 405 (D. Colo. 1985).

25. *Id.* at 407–09.

26. *Id.* at 408.

27. *Id.* at 409.

overlook the attorney-client privilege as an important additional protection against disclosure. Unlike the work product doctrine, the attorney-client privilege is not a qualified privilege, and communications shielded by the attorney-client privilege are thus protected from disclosure unless the privilege is waived.

Application of the attorney-client privilege is well illustrated by Judge Friendly's decision in *United States v. Kovel*.²⁸ In *Kovel*, counsel instructed his client to provide information to an accountant retained by the lawyer, and the accountant then communicated to counsel the information received from the client together with the accountant's analysis to assist counsel in representation of the client. Holding that the client's communications with the attorney and the attorney's communications with the accountant both could be protected by the attorney-client privilege, Judge Friendly analogized the work of the accountant to an interpreter assisting an attorney whose client speaks a foreign language, comparing the principles of accounting to a foreign language.²⁹ However, Judge Friendly warned that not all communications with consulting experts are protected by the attorney-client privilege:

What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists.³⁰

Subsequent cases have applied Judge Friendly's interpreter analogy to limit application of the attorney-client privilege to consultant communications that facilitate communications between the attorney and client. For example, in *United States v. Ackert*,³¹ although counsel had contacted an investment banker "in order to gain information and to better advise his client," the court rejected defendant's assertion of the attorney-client privilege to protect counsel's communications with the investment banker, instructing that that privilege does not protect "communications that prove important to an attorney's legal advice to a client."³² Because the investment banker had not been asked to "clarify communications between attorney and client,"³³ the attorney-client privilege would not apply.

28. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

29. *Id.* at 992.

30. *Id.*

31. *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999).

32. *Id.* at 139.

33. *Id.* (citing *Kovel*, 296 F.2d at 992).

Preserving Expert Consultant Confidentiality

To preserve the confidentiality of the consulting expert's communications and work product, the attorney and consultant must remain ever vigilant to the requirements of the work product doctrine and the attorney-client privilege, and they must establish a record that clearly supports assertion of the privileges. This process begins with the retention of the consulting expert and must be considered with all written communications and work product of the consulting expert.

Retention of the Consulting Expert

Retention by Counsel

In theory, a consulting expert could be retained by either the attorney or the client. In practice, however, most consulting experts are retained by counsel. Retention of the consulting expert by trial counsel helps to define clearly the expert's role as assisting counsel to prepare for litigation. An expert retained solely by the client may be confused with an expert retained in the ordinary course of business and may lose the protection of the work product doctrine.³⁴ In addition, trial counsel will be experienced in drafting an appropriate retention agreement.

Retention Agreement

A retention agreement with a consulting expert should clearly specify that the expert is retained solely to provide consulting services in connection with pending or anticipated litigation and, if possible, should provide examples of some of the specific tasks to be performed by the consultant.³⁵ If the intended role of the expert and his relationship with counsel or the client are subsequently disputed by a litigation adversary seeking discovery, the recitals in a retention agreement have been relied on by courts to sustain a claim of privilege.³⁶ The retention agreement should not include any provision that suggests that the consultant may be called as a testifying expert. If it subsequently becomes necessary to call the consultant as a testifying expert, the respective dates and contents of the first retention agreement as a consultant and the second retention agreement as a testifying expert can provide the court with

34. FED. R. CIV. P. 26(b)(4)(B); *Ngo v. Standard Tools & Equip., Co.*, 197 F.R.D. 263, 266–67 (D. Md. 2000).

35. See “Retaining an Expert” *supra* for additional guidance on drafting a retention agreement.

36. See, e.g., *Hartford Fire Ins. Co. v. Pure Air on the Lake LP*, 154 F.R.D. 202, 207 n.8 (N.D. Ind. 1993).

useful benchmarks to distinguish between consultant work product that may be withheld and Rule 26(a)(2) materials that must be produced.

Documenting Informal Consultations

Instances may arise in which confidential communications precede an anticipated formal retention, but the consulting expert is never actually retained. It is well established that the work product doctrine will protect confidential communications preceding formal retention or in instances of an informal consultation.³⁷ Even in such cases, however, counsel would be well served to memorialize the purpose of the consultation in relation to pending or anticipated litigation and the participants' expectation of confidentiality through a letter or memorandum to the consultant, to avoid any future dispute. For example, in *Ngo v. Standard Tools & Equipment, Co.*,³⁸ plaintiff and his counsel conferred with plaintiff's treating physician regarding the disputed medical issues in the litigation, but no formal retention agreement or confidentiality agreement was ever signed, and the physician received no consulting fee.³⁹ The trial court rejected plaintiff's attempt to shield the physician's meeting with his attorney from discovery because the court held the treating physician was not a consulting expert.⁴⁰ The court suggested in dicta that a confidentiality agreement might have been sufficient to change the outcome of the discovery dispute.⁴¹

Joint Retention and Joint Defense Agreements

In some instances, a consulting expert may be jointly retained by two or more parties aligned against a common litigation adversary. In such cases, a formal retention agreement is even more important. It is well established that the joint defense privilege encompasses both the attorney-client privilege and the work product doctrine.⁴² The joint defense privilege allows parties and their counsel to share documents and information without waiving any privilege that otherwise would be lost by voluntary disclosure, in-

37. *Spearman Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 128 F. Supp. 2d 1148, 1151 (N.D. Ill. 2001) (FED. R. CIV. P. 26(b)(4)(B) protects communications with experts informally consulted) (citing Advisory Committee note).

38. *Ngo*, 197 F.R.D. 263.

39. *Id.* at 265–66.

40. *Id.*

41. *Id.*

42. See, e.g., *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987) (attorney-client privilege); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (work product doctrine).

cluding communications with their shared expert consultants.⁴³ A written joint defense agreement is not a prerequisite to asserting the joint defense doctrine.⁴⁴ However, a clear agreement will do much to protect against any subsequent challenge to the privilege.⁴⁵ The potential confusion created when a consultant confers with multiple law firms and perhaps their respective clients may create ambiguity that could result in an unintended waiver. A written joint defense agreement and a written expert retention agreement that directly identify the purpose and scope of the consultant's retention and the parties and counsel included within the scope of the expert's confidential consultation will provide a clear record supporting nondisclosure in any subsequent discovery battle.⁴⁶

Written Work Product and Communications

A consulting expert may produce extensive memoranda, reports, and correspondence. This written record of the consultant's work creates the possibility that protected consultant work product may be mistaken for nonprivileged, discoverable documents. The first risk is the inadvertent disclosure of consultant work product in discovery when a consultant document is mistakenly included by counsel in the party's document production as a nonprivileged document. The second risk is the possibility that the document will become the subject of a discovery dispute and may be ordered disclosed after *in camera* review if the privileged content is not apparent to the court.

Thus, any substantive document should be prepared in a manner that clearly indicates its privileged content to any reviewer. At a minimum, each document should include a boldface legend identifying the document as a consulting expert's confidential work product prepared for litigation, and the document should clearly identify the author, the date, and all recipients. As should be clear from the foregoing discussion, only in rare cases should the consulting expert's written communications and reports be addressed or delivered to anyone other than trial counsel. In addition, any substantial report or analysis prepared by the consulting expert should also include a brief preface reciting the facts that provide the basis for asserting the work

43. See *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) ("The protection afforded by the privilege extends to communications made in confidence to an accountant assisting lawyers who are conducting a joint defense.").

44. *Lugosch v. Congel*, 219 F.R.D. 220, 236 (N.D.N.Y. 2003).

45. *Id.*

46. See *Minebea v. Pabst*, 228 F.R.D. 13, 16 (D.D.C. 2005); *City of Kalamazoo v. Michigan Disposal Serv. Corp.*, 125 F Supp. 2d 219 (W.D. Mich. 2000).

product doctrine or attorney-client privilege for the document. Finally, counsel must always remember that litigation is inherently unpredictable and that the work product doctrine is only a qualified privilege. Even documents bearing a “confidential” stamp may someday be disclosed to an adversary, and both counsel and the consulting expert must be mindful that placing too much trust in such labels can be a trap for the unwary.

Preserving the Distinction between Consulting and Testifying Experts

As discussed above, the Federal Rules of Civil Procedure draw a clear distinction between the testifying expert and the nontestifying or consulting expert. Preserving that distinction is essential to protect the confidentiality of consultant work product. In practice, however, a variety of circumstances can blur this distinction, leading to compelled disclosure of the consulting expert’s communications and work product.

When Consultant Work Product Is Disclosed to a Testifying Expert

Rule 26(a)(2) requires the disclosure of “the data or other information considered by the witness in forming” his expert opinions.⁴⁷ This includes the work product of a consulting expert if reviewed and considered by the testifying expert.⁴⁸ Allowing the testifying expert to review and rely on a consulting expert’s analysis blurs the distinction between the testifying and consulting expert and makes the consulting expert a target for discovery. Disclosure of the consultant’s work product to the testifying expert ordinarily will waive the work product protection for the information and analysis disclosed to the testifying expert.⁴⁹ For example, in *Trigon Insurance Co. v. United States*,⁵⁰ nontestifying experts had participated extensively in the preparation, drafting, and editing of the testifying expert’s report. Since the testifying expert considered and incorporated in his own report the work product of the consulting experts, Rule 26(a)(2) required the disclosure of the consultants’ work product, including their draft reports.⁵¹

47. FED. R. CIV. P. 26(a)(2)(B).

48. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001).

49. *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740, 743 (E.D. Mo. 1983).

50. *Trigon Ins.*, 204 F.R.D. 277.

51. *Id.*

Not all communications between testifying experts and consultants will waive work product protection. In *Estate of Manship v. United States*,⁵² the plaintiff presented evidence of a five-hour conference call between the consulting expert and testifying expert for the defendant two days before the deadline for submission of expert reports.⁵³ The testifying expert, however, submitted a declaration that he did not receive assistance from the nontestifying expert relating to his report and that he had completed his report before the conference call. The court refused to allow the deposition of the nontestifying expert. *Manship* and similar cases may suggest that Rule 26(a)(2) can be evaded simply by avoiding written disclosures of the consultant's opinions to the testifying expert. However, a testifying expert is bound to disclose oral communications to the same extent as written communications, even if the proof of a violation of Rule 26(a)(2) is more elusive for oral communications.

When the Consultant “Ghostwrites” the Testifying Expert’s Report

The most experienced and highly qualified testifying experts may find the time demands of their practice to equal or exceed the time pressures of trial counsel. Notwithstanding the direction in Rule 26(a)(2)(B) that the expert report must be “prepared by” the testifying expert, in many cases, assistance in drafting the expert report is unavoidable. Any consulting expert who contributes to the drafting of the expert report becomes the legitimate target of discovery. A draft expert report prepared by the consultant is no less discoverable than any other source considered and relied on by the expert in preparing the report.⁵⁴ Disclosure of the consultant's draft, particularly if the draft is substantially similar to the testifying expert's final report, may result in the deposition of the consulting expert. In *Long Term Capital Holdings v. United States*,⁵⁵ for example, the opposing party sought to depose two nontestifying experts who had prepared a draft report that was reviewed by the testifying expert and that was similar to the testifying expert's final report.⁵⁶ The court granted the motion to compel their depositions but limited the scope of examination to include only their involvement in

52. *Estate of Manship v. United States*, 240 F.R.D. 229 (M.D. La. 2006).

53. *Id.*

54. In extreme cases, where the expert has merely signed a report prepared by another, the expert's testimony may be inadmissible at trial. See *Trigon Ins.*, 204 F.R.D at 294 (report must be “based on the expert's own valid reasoning and methodology.”).

55. *Long Term Capital Holdings v. United States*, No. 01-CV-1290 (JBA), 2003 WL 21269586 (D. Conn. May 6, 2003).

56. *Id.*

preparing the expert report; the court did not allow discovery of the consulting experts' opinions beyond what was set forth in their draft report provided to the testifying expert.⁵⁷

When Testifying and Nontestifying Experts Are from the Same Firm

The risk of waiving the work product protection through ghostwriting and other collaboration between the testifying expert and nontestifying consultants is often most acute when both testifying and consulting experts are from the same firm. With good reason, courts have warned against this practice and have described counsel who retain a single firm to provide both consulting and testifying experts as “playing with fire”⁵⁸ and proceeding “at their peril.”⁵⁹

Trigon Insurance again well illustrates the dangers of using a single firm. In that case, the testifying expert was a principal of the firm, and the nontestifying experts were employees of the same firm. This arrangement invited the ghostwriting issues discussed above. A decision from the Delaware Chancery Court in the *Chaparral Resources, Inc. Shareholders Litigation*⁶⁰ provides another good example of the pitfalls created by this approach. Applying Chancery Rule 26(b)(4)(B) (identical to Federal Rule of Civil Procedure 26(b)(4)(B)), the court's opinion describes the extensive interactions between the testifying expert and the consultants. The testifying expert had conversations with consultants and reviewed documents they prepared, and the consultants contributed to the testifying expert's report. The court deemed the consulting experts' opinions and work product to be subject to full disclosure as if they were testifying experts for purposes of discovery.⁶¹

An unpublished decision from the Tenth Circuit highlights a further risk of hiring consulting and testifying experts from the same firm. The trial court in *Master Palletizer Systems, Inc. v. T.S. Ragsdale Co.*⁶² had issued a general sequestration order for all trial witnesses. Although permitting both parties' counsel to seat at counsel's table a nontestifying consultant, the trial court excluded from the courtroom all consultants from the same firm as any of the testifying experts, reasoning that “having a member of

57. *Id.*

58. *Trigon Ins.*, 204 F.R.D at 281–82.

59. *In re Chaparral Resources, Inc. Shareholders Litig.*, C.A. No. 2001-VCL, 2007 WL 2998967, at *1 (Del. Ch. Oct. 11, 2007).

60. *Id.*

61. *Id.* at *3.

62. *Master Palletizer Sys., Inc. v. T.S. Ragsdale Co.*, 937 F.2d 616 (10th Cir. 1991).

the same firm as the testifying expert witness be the technical advisor at the counsel table violated the spirit of the sequestration rule, because of the risk of collaboration and communication between the two.”⁶³ The Tenth Circuit affirmed the ruling of the trial court. Thus, trial counsel was denied the assistance of his chosen consulting expert in a complex trial of technical engineering issues because of counsel’s tactical error in relying on a single firm.

Although these cases highlight the risks of using a single consulting firm to provide both testifying and nontestifying experts, there is nothing per se improper about this approach. Some attorneys will retain a single firm and then go to extraordinary lengths to preserve the appearance of separateness by using separate engagement letters, requesting separate bills, instructing the consulting and testifying experts to use separate file management, and prohibiting any direct written or electronic communications between the consulting and testifying experts. These precautions may be sufficient to protect the consultants’ work product from disclosure and may even exceed what some courts would require, but this approach begs the question whether there are any remaining benefits from hiring a single firm if the separateness of consulting and testifying experts is in fact so strictly preserved. Such precautions may only reinforce the appearance of sharp practice to skirt the disclosure requirements under Rule 26(a)(2).

When an Expert Attempts to Play a Dual Role as Consultant and Witness

In some instances, even the best prepared trial counsel may be forced to call a consulting expert as a testifying expert witness at trial. To limit the scope of disclosure required by Rule 26(a)(2), trial counsel may attempt to distinguish and withhold the witness’s communications and work product created in his initial role as a consultant. Although possible in theory, in practice the distinction is very difficult to defend against scrutiny. In general, counsel should expect that all documents prepared or reviewed by the expert relating to the subject matter of his testimony will be ordered disclosed under Rule 26(a)(2).⁶⁴ Any uncertainty about a particular document typically will be construed in favor of the party seeking discovery.⁶⁵

63. *Id.*

64. *See, e.g., Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F. Supp. 1013, 1014 (S.D.N.Y. 1983). For an example of the unusual case in which trial counsel successfully preserves the distinction, see *Grace A. Detwiler Trust v. Offenbecher*, 124 F.R.D. 545, 546 (S.D.N.Y. 1989).

65. *B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 171 F.R.D. 57, 61–62 (S.D.N.Y. 1997).

When attempting to withhold the testifying expert's consultant work product and communications, retaining counsel may prefer to focus on the task performed by the consultant when preparing or receiving the subject documents rather than the document's subject matter; in general, a task-based analysis instead of a subject matter analysis may justify a broader withholding of documents. For example, in *Securities & Exchange Commission v. Reyes*,⁶⁶ the court acknowledged that other courts had applied both standards but chose to focus on the content of the documents as the proper basis for an *in camera* review and on that basis ordered disclosed *all* documents relating to the subject matter of the expert's testimony.⁶⁷ By contrast, the court in *Messier v. Southbury Training School*⁶⁸ focused on the assigned task of the expert at the time he prepared the subject documents. On this basis, the court allowed the retaining party to withhold documents providing the expert's trial strategy recommendations.⁶⁹ Even if the court adopts a task-based analysis, any ambiguity in the recorded documents may be resolved against the retaining party, as illustrated by *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of N.Y., Inc.*⁷⁰ Although the court allowed counsel to withhold documents prepared by the consultant to assist trial counsel with deposition examination outlines and document requests, the court ordered all other documents disclosed, including trial strategy memoranda, because assisting with depositions and document discovery were the only specific tasks that were easily distinguished from the expert's preparation to testify.⁷¹

The Future of Consulting Experts: The Proposed Amendment to Rule 26(b)(4)

As this book goes to press, proposed amendments to the Federal Rules of Civil Procedure that could materially impact the use of consulting experts in the federal courts have been transmitted by the Supreme Court to Congress and may soon be implemented.

66. *SEC v. Reyes*, No. C 06-04435 CRB, 2007 WL 963422 (N.D. Cal. Mar. 30, 2007).

67. *Id.*

68. *Messier v. Southbury Training Sch.*, No. 3:94-CV-1706 (EBB), 1998 WL 422858 (D. Conn. June 29, 1998).

69. *Messier*, 1998 WL 422858 at *2.

70. *B.C.F. Oil Ref.*, 171 F.R.D. 57.

71. *Id.* at 61-62.

Proposed amendments to Rule 26(b)(4) would substantially eliminate the distinction between consulting and testifying experts by adding new subsections (B) and (C) that would shield all draft reports from disclosure by treating the draft reports as work product:

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

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

- (i) Relate to compensation for the expert's study or testimony;
- (ii) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or
- (iii) Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.⁷²

As the Advisory Committee notes make clear, the intended purpose of these amendments in part is to greatly reduce the use of consulting experts and to level the playing field for parties unable to afford retention of both the consulting and testifying experts. The Advisory Committee also recognizes that similar stipulations excluding draft expert reports and attorney-expert communications from discovery already are widely employed by counsel to reduce litigation expense.

Even if the proposed amendments are adopted, it is too early to predict the scope of their impact.⁷³ The earliest that the proposed amendments might take effect is December 2010, and counsel no doubt will be reluctant to rely fully on the amendments until the courts have been given time to provide their own gloss on their meaning and effect.

One potentially significant gap in the proposed amendments is that, because only draft reports and attorney-expert communications are shielded from production, cautious trial counsel still will be reluctant to employ testifying experts in a true dual role. Nothing in the text of the proposed

72. Proposed Amendments to the Federal Rules of Civil Procedure, *available at* <http://www.uscourts.gov/rules/>.

73. On April 28, 2010, the Supreme Court issued orders adopting the amendments and transmitting the amendments to Congress. The amendments will take effect on December 1, 2010, unless Congress enacts legislation to provide otherwise under the Rules Enabling Act, 28 U.S.C. § 2074 (a).

amendments would shield from discovery a testifying expert's preliminary or tentative use of alternative testing methodologies or data sets that proved unfavorable to the retaining party's case if such data or analyses are material to the questions addressed by the expert's report. Nor can a testifying expert be expected to erase from his memory at deposition or trial the outcome of unfavorable alternative testing methods and analyses, simply because the results are presented only in a "draft" report that has never been disclosed to opposing counsel. Although the case law in time might yield a different result, the term "draft report" would, on its face, appear to encompass few of the litigation support tasks that typically have been entrusted to consulting experts. An attorney who seeks a thorough and candid development and assessment of alternative theories and scientific or technical methodologies to support the client's case will still rely on a consulting expert even if these proposed amendments are enacted and embraced fully by the federal courts.

COURT-APPOINTED EXPERTS

Mark S. Olson, Meghan Anzelc, Dennis Hansen, Tara Vavrosky Iversen, Archana Nath, and David Prange¹

Court-appointed experts have long served a small but important role in federal and state courts. They have helped judges understand the scientific and technical basis of evidence to make admissibility decisions, and they have helped both judges and juries understand the relevance and weight or credibility of evidence to make merits decisions.² There are several types of court-appointed experts who can assist the trial court in making these admissibility and merits determinations: technical advisors, court-appointed expert witnesses, and special masters.³ This subchapter will first address the role of court-appointed experts and how they are capable of assisting the courts. It will then discuss the nuts and bolts of Federal Rule of Evidence 706, which governs the appointment and use of court-appointed experts. The subchapter will then explore how court-appointed experts are used by courts as a practical matter, including how often they are used and the debate over the propriety of their use. The use of court-appointed experts by state courts is also briefly discussed, as well as the use of technical advisors as an alternative to court-appointed experts. This subchapter concludes with practical considerations when dealing with court-appointed experts or technical advisors.

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2. Sophia Cope, *Ripe for Revision: A Critique of Federal Rules of Evidence and the Use of Court-Appointed Experts*, 39 GONZ. L. REV. 163, 168 (2003–2004).

3. The role and utilization of special masters is outside the scope of this subchapter. For in-depth information about special masters, see FED. R. CIV. P. 53 and Michael Connelly & John Muir, *Special Masters, Court-Appointed Experts and Technical Advisors in Federal Court*, 76 DEF. COUNS. J. 77 (Jan. 2009).

The Role of a Court-Appointed Expert

A court-appointed expert is capable of assisting the court in at least three areas: (1) helping the judge understand the scientific and technical basis of evidence to make an admissibility decision, (2) aiding settlement, and (3) helping the trier of fact understand the relevance and weight or credibility of the evidence to make a merits decision.⁴

Assisting the Court in Its Gatekeeper Role

In 1993, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵ the U.S. Supreme Court charged trial courts with the duty of acting as “gatekeepers” in determining when scientific evidence is properly admissible. The Court noted that trial courts should determine at the outset

whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.⁶

Since *Daubert*, a major focus of the gatekeeper has been on the reliability of scientific and other technical and complex evidence. Although *Daubert* did list four nonexclusive factors that could be considered when evaluating scientific evidence, the Court did not provide a clear roadmap for the gatekeeper in determining whether to admit or exclude scientific evidence. It did, however, suggest several tools that a trial court could consider using in its admissibility determinations. One of the tools mentioned by the Court was Rule 706 of the Federal Rules of Evidence, which allows a court, in its discretion, to procure the assistance of an expert of its own choosing.⁷ Four years later, in the second case of the *Daubert* trilogy, *General Electric Co. v. Joiner*,⁸ Justice Breyer noted in his concurring opinion that as the number of cases presenting significant science-related issues had grown, judges were able to use both the Federal Rules of Evidence and the Federal Rules of Civil Procedure to find ways to assist them in dealing with difficult issues and making determinations about complicated scientific and technical evidence. Justice Breyer cited Rule 706 as one of the “Rules-authorized meth-

4. Cope, *supra* note 2, at 168.

5. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

6. *Id.* at 592–93.

7. *Id.* at 596.

8. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

ods” for accomplishing a court’s task. Citing the amicus brief of the *New England Journal of Medicine*, Justice Breyer stated:

[A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts. . . . Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.⁹

Encouraging Settlement

The use of a court-appointed expert may also encourage parties to settle before trial. An expert who works with the parties and their experts can provide clarity about the issues on which the parties disagree, thereby reducing the number of issues in dispute.¹⁰ In addition, the expert may cause attorneys to reevaluate and change their extreme positions in the case, making it easier to reach a resolution without a trial.¹¹

Assisting the Trier of Fact

Court-appointed experts can assist the trier of fact in understanding technical issues necessary to reach a well-informed decision in a complicated case.¹² Moreover, by filling in the gaps that the parties and their experts may leave, the expert can help the trier of fact in understanding the relevance, weight, and credibility of the evidence.¹³ The expert can also provide an independent and neutral opinion, which could lessen the polarization of the parties’ theories that the parties’ experts sometimes create, or could allow for a more thorough presentation of the issues if either or both sides of the litigation fail to offer expert testimony.¹⁴

9. *Id.* at 149–50.

10. Karen Buther Reisinger, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 *IND. L. REV.* 225, 234 (1998).

11. *Id.*; JOE S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 538 (Federal Judicial Ct. 1993), available at [http://www.fjc.gov/public/pdf.nsf/lookup/13.expert.pdf/\\$File/13.expert.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/13.expert.pdf/$File/13.expert.pdf).

12. CECIL & WILLGING, *supra* note 11.

13. Buther Reisinger, *supra* note 10, at 234; Cope, *supra* note 2, at 177.

14. CECIL & WILLGING, *supra* note 11; Buther Reisinger, *supra* note 10, at 234; Cope, *supra* note 2, at 177.

Procedure for Appointing a Court-Appointed Expert

Federal Rule of Evidence 706 governs the appointment of a court-appointed expert. The rule was adopted in 1975, although a number of federal courts recognized the power before the Federal Rules of Evidence were enacted.¹⁵ The mechanics and logistics of appointing an expert under Rule 706 are straightforward but, in most cases, the devil is in the details.

The Appointment Process

Under the rule, an expert may be appointed either by motion of a party or by the court on its own motion.¹⁶ The court has discretion to request nominations from the parties¹⁷ or may simply select an expert of its own choosing.¹⁸ Some courts have appointed law professors to aid the court in selecting a panel of knowledgeable and neutral experts.¹⁹ If the parties cannot agree on an expert, the court may appoint the expert.²⁰

A Federal Judicial Center study found that in a number of instances, judges tended to rely on their personal networks to locate or select a particular expert.²¹ In addition to a judge's personal network, there are independent sources for potential experts. The American Association for the Advancement of Science established the Court Appointed Scientific Experts (CASE) program, which has attempted to match interested judges with scientific experts.²²

15. See *Ex parte* Peterson, 253 U.S. 300 (1920); *Scott v. Spanger Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962). In 1946, Rule 28 of the Federal Rules of Criminal Procedure was adopted. It permitted a trial court to appoint an impartial expert in a criminal trial. In the civil context, courts before 1975 had the inherent authority to appoint an expert under appropriate circumstances to aid the court in a just resolution of the case. See, e.g., *Danville Tobacco Ass'n v. Bryant-Buekner Assocs., Inc.*, 333 F.2d 202 (4th Cir. 1964) (appointing tobacco marketing expert in antitrust case); *Scott*, 298 F.2d 928 (appointing medical expert in personal injury case).

16. FED. R. EVID. 706(a).

17. *Gates v. United States*, 707 F.2d 1141 (10th Cir. 1983) (directing the parties to suggest potential members for a panel of experts to be appointed).

18. *Id.*; see *Students of Cal. Sch. for the Blind v. Honig*, 736 P.2d 538 (9th Cir. 1984).

19. See, e.g., *In re* Joint E. and S. Dist. Asbestos Litig., 151 F.R.D. 540 (S.D.N.Y. 1993).

20. *Gates*, 707 F.2d 1141.

21. CECIL & WILLGING, *supra* note 11, at 31.

22. The Private Adjudication Center at Duke University School of Law maintained a Registry of Independent Scientific and Technical Advisors, but the center closed in 2003. For a discussion of the use of the Duke registry in *Soldo v. Sandoz Pharmaceuticals Corp.*, 244 F. Supp. 2d 434 (W.D. Pa. 2003), see Joe S. Cecil, *Construing Science in the Quest for 'Ipse Dixit': A Comment on Sanders and Cohen*, 33 SETON HALL L. REV. 967 (2003).

Other sources of experts include universities and professional organizations.²³

Communications with the Expert

Rule 706 requires the expert to be informed of his duties either in writing or at a conference in which the parties have an opportunity to participate.²⁴ In the event the court chooses to provide the requisite notice with a written order, the order should address topics such as the following:

1. The expert's responsibilities;
2. How the expert will communicate with the court and the parties;
3. The expert's compensation;
4. Communication of the expert's findings; and
5. Whether the expert will give deposition testimony, be required to attend the trial, and/or give trial testimony.²⁵

The issue of *ex parte* communications between a party or the parties and the expert, or between the expert and the court, poses serious issues for the integrity of the process. Some courts have expressly prohibited such contact by the parties.²⁶ In *Edgar v. K.L.*,²⁷ a judge's *ex parte* meeting with a panel of court-appointed experts was grounds for disqualification of the judge. *Ex parte* communications with the expert should be discouraged, if not prohibited. In addition, every effort should be made to make as full and complete a record as possible of any communications among the court, the parties, and the expert.

The Expert's Findings

The expert must advise the parties of his findings. Courts have used a variety of means to facilitate this requirement. In some instances, the expert

23. AMERICAN BAR ASS'N, CIVIL TRIAL PRACTICE STANDARDS 11(a)(ii) 29 (1988); WILLIAM W. SCHWARZER & JOE S. CECIL, MANAGEMENT OF EXPERT EVIDENCE IN MOORE'S FEDERAL PRACTICE: REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 39 (2d ed. 2000).

24. FED. R. EVID. 706(a).

25. See Connelly & Muir, *supra* note 3, at 88.

26. See, e.g., *Lessona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1312 n.18 (C.D.N.Y. 1981) (providing in the court's order that all communication with the court expert was to be done through the court and all materials sent by the court to the expert were to be placed in the court's file).

27. *Edgar v. K.L.*, 93 F.3d 245 (7th Cir. 1996).

has submitted a comprehensive written report.²⁸ In other cases, courts, in addition to having the expert prepare written reports, have permitted meetings with counsel to allow counsel to ask the expert questions and have also held hearings in which the experts testified and were subject to cross-examination.²⁹

The Expert's Testimony

Before trial, a party may depose a court-appointed expert in a civil case.³⁰ In a criminal case, the issue of the interrelationship between Rule 706 and other statutes or rules regarding court-appointed experts is unclear.³¹

At trial, the expert may be called to testify by any party or the court. The parties may cross-examine the expert at any time, regardless of which party called the expert to testify.³²

The Expert's Compensation

Under Rule 706(b), experts are entitled to reasonable compensation in whatever amount the court may permit. In civil cases, the parties may be responsible for payment of the expert's compensation in a proportion as the court determines and when the court directs.³³ Court-appointed expert fees are taxable as costs by the prevailing party,³⁴ although such taxation is within the discretion of the court.³⁵ In exercising that discretion, the court

28. See, e.g., *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); *DeAngelis v. A. Tarricone, Inc.*, 151 F.R.D. 245 (C.D.N.Y. 1993).

29. See, e.g., *In re Joint Asbestos Litig.*, 151 F.R.D. 540.

30. FED. R. EVID. 706(a). But see *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992), in which the court prohibited depositions of court-appointed experts because it had provided extensive opportunities to the parties to learn about the experts' opinions through other means and because it thought that permitting depositions would undermine the Rule 706 process.

31. See JACK B. WEINSTEIN & MARGARET A. BERGER, 4 WEINSTEIN'S FEDERAL EVIDENCE § 706.06[4] (2d ed. 2001).

32. FED. R. EVID. 706(a).

33. FED. R. EVID. 706(b).

34. *Id.*; see also 28 U.S.C. § 1920(6).

35. See *Con-Way Transp. Servs., Inc. v. Auto Sports Unlimited, Inc.*, No. 1:04-cv-570, 2008 WL 294596, at *2-3 (W.D. Mich. Jan 31, 2008) (declining to tax court-appointed expert witness fees as costs because both parties benefited from the court-appointed expert and did not expend money in retaining experts themselves); *Assocs. Int'l, Inc. v. Altai, Inc.*, 775 F. Supp. 544, 573 (court not taxing expert witness fees to losing party), *vacated in part on other grounds*, 982 F.2d 693 (2d Cir. 1992).

may consider such factors as the nature of the case, the status of the parties, the need for the expert, and other circumstances.³⁶

Disclosure of Court-Appointed Status to the Jury

Rule 706(c) gives the court discretion as to whether it will disclose to the jury the fact that the expert who testifies was appointed by the court.³⁷ One commentator noted that this provision was the most controversial provision during the rulemaking process and “[o]pponents of disclosure argued that the opinion of a court’s expert would be decisive in any case in which it was offered because such an expert acquires from the court the mantle of both authority and impartiality.”³⁸ The Federal Judicial Center study found that the trial judge commonly discloses the appointment to the jury.³⁹ One possible way to lessen the impact of any potential undue weight that a jury might give to a court-appointed expert’s testimony would be to request a specific jury instruction dealing with the issue.⁴⁰

Court-Appointed Experts in Practice

Courts have used court-appointed experts in a wide range and variety of cases and issues including product liability cases,⁴¹ patent cases,⁴² trademark cases,⁴³

36. *Aiello v. Town of Brookhaven*, 149 F. Supp. 2d 11, 14–15 (E.D.N.Y. 2001) (citing B. WEINSTEIN & BERGER, *supra* note 31, § 706.06[4]).

37. FED. R. EVID. 706(c).

38. See 29 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 6305, at 481.

39. CECIL & WILLGING, *supra* note 11, at 49.

40. In *Monolithic Power Systems, Inc. v. O2 Micro International Ltd.*, 558 F.3d 1341, 1348 (Fed. Cir. 2009), the Federal Circuit affirmed the trial court’s use of the following jury instruction:

You should not give any greater weight to [the court appointed expert’s] opinion testimony than to the testimony of any other witness simply because the court ordered the parties to retain an independent witness. In evaluating his opinion, you should carefully assess the nature of and basis for [the court appointed expert’s] opinion just as you would do with any other witness’ opinion.

41. See, e.g., *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540 (6th Cir. 2004).

42. See, e.g., *Monolithic Power Sys.*, 558 F.3d 1341; *NEC Corp. v. Hyundai Elects. Indus. Co.*, 30 F. Supp. 2d 546 (E.D. Va. 1998).

43. See, e.g., *Tillery v. Leonard & Sciolla, LLP*, 521 F. Supp. 2d 346 (E.D. Pa. 2007).

copyright cases,⁴⁴ toxic tort cases,⁴⁵ DNA issues,⁴⁶ the interpretation and application of foreign law,⁴⁷ computer forensic investigation relating to discovery abuse and spoliation issues,⁴⁸ medical issues,⁴⁹ damage calculations,⁵⁰ mental capacity determinations,⁵¹ and bankruptcy administration.⁵²

An example of the use of formal Rule 706 court-appointed experts can be found in *In re Silicone Gel Breast Implants Product Liability Litigation*.⁵³ Multi-District Litigation (“MDL”) judge, Sam C. Pointer, appointed a national science panel under Rule 706 to review the evidence related to issues of general causation. As a first step, Judge Pointer asked six people to serve on a panel to assist in the selection of neutral experts in each of four areas of expertise—toxicology, immunology, epidemiology, and rheumatology. The selection panel was also charged with assisting the national science panel in the preparation of reports and preparation of testimony.

After the experts were appointed, the court and the parties conferred regarding the experts’ duties and topics to be addressed. In addition to prohibiting ex parte contact with any of the panel experts, Judge Pointer also appointed special counsel for the panel members. The panel heard three days of testimony from both sides’ experts and later released a report in December 1998. The plaintiffs requested written discovery and depositions of the experts regarding their conclusion that there was no link between silicone breast implants and autoimmune disease and other claimed medical conditions. The court permitted depositions to proceed and further

44. See, e.g., *Harbor Software, Inc. v. Applied Sys., Inc.*, 952 F. Supp. 1042 (S.D.N.Y. 1996); *Computer Assocs.*, 982 F.2d 693.

45. See, e.g., *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545 (D. Colo. 1990), *aff’d*, 972 F.2d 304 (10th Cir. 1992).

46. See, e.g., *United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993).

47. See, e.g., *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783 (6th Cir. 2007) (appointing expert on Japanese law); *Carbotrade S.P.A. v. Bureau Veritas*, No. 92 Civ. 1459 (JGK), 1998 WL 397847 (S.D.N.Y. July 16, 1998) (appointing expert on Greek law).

48. See, e.g., *Gutman v. Klein*, No. 03-1570, 2008 WL 4682208 (E.D.N.Y. Oct. 15, 2008) (appointing expert to analyze computer hardware relating to spoliation issues); *Cerruti 181 S.A. v. Cerruti, Inc.*, 169 F.R.D. 573 (S.D.N.Y. 1996) (appointing expert to investigate unreliable data provided by party in discovery).

49. See, e.g., *In re Breast Implant Cases*, 942 F. Supp. 958 (S.D.N.Y. 1996); see also *Walker v. Am. Home Shield Long Term Disability Plan*, 180 F.3d 1065 (9th Cir. 1999); *DeAngelis v. A. Tarricone, Inc.*, 151 F.R.D. 245 (S.D.N.Y. 1993).

50. See, e.g., *Eastern Air Lines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (2d Cir. 1976).

51. See, e.g., *United States v. Green*, 544 F.2d 138 (3d Cir. 1976).

52. See, e.g., *In re Joint Asbestos Litig.*, 982 F.2d 721.

53. *In re Silicon Gel Breast Implants Prod. Liab. Litig.*, 996 F. Supp. 1110 (N.D. Ala. 1997).

indicated that the videotaped depositions could be used in other breast implant cases.⁵⁴

Frequency of Use of Court-Appointed Experts

The Advisory Committee's note to Rule 706 suggests that "experience indicates that actual appointment [of experts] is a relatively infrequent occurrence."⁵⁵ However, the Advisory Committee also noted that the trend is increasingly to provide for their use. In the post-*Daubert* world, several commentators have forecasted that there would be an increase in the use of court-appointed experts.⁵⁶ There is very little data available regarding courts' use of court-appointed experts, but what data exists suggests a gradual trend of increased use.

The 1993 Federal Judicial Center study about court-appointed experts was conducted by Joe S. Cecil and Thomas E. Willging.⁵⁷ One of the study's findings supported the notion suggested by the Advisory Committee's note that the rule was to be used sparingly. Eighty percent of the federal judges surveyed had never appointed a Rule 706 expert.⁵⁸ Of the 20 percent who had used the rule, half of them had only done so on one occasion.⁵⁹

The two primary reasons given by the judges who invoked Rule 706 for appointing experts were to aid the court in its decision making and to aid in the settlement process.⁶⁰ The study found that even though many judges had not used the process, they were still open and receptive to it.⁶¹ Among the reasons given by the judges for not appointing experts were (1) infrequency

54. For a more detailed and thorough discussion of the MDL experience, see Buther Reisinger, *supra* note 10, at 244–52, and Loral L. Hooper et al., *Assessing Causation in Breast Implant Litigation: The Role of Science Panels*, 64 *LAW & CONTEMP. PROBS.* 139, 140 n.3 (2001).

55. FED. R. EVID. 706, Advisory Committee's note.

56. See Michal J. Saks et al., *Admissibility of Scientific Evidence*, SJ081 ALI-ABA 1, 90 (Am. Law Inst. 2004) ("[T]he chorus of voices calling for judges to exercise Rule 706 has grown nearly deafening."); Timothy Hillman, *Using Court Appointed Experts*, 36 *NEW ENG. L. REV.* 587, 587 (2002) (noting as to the use of Rule 706, "[f]rankly, it's coming, and it's going to happen sooner than later").

57. CECIL & WILLGING, *supra* note 11.

58. *Id.* at 7.

59. *Id.* at 8.

60. *Id.* at 12–18.

61. *Id.* at 11–12 (finding that 87 percent of responding judges indicated that court-appointed experts are likely to be helpful in at least some cases).

of cases requiring extraordinary assistance, (2) respect for the adversarial system, (3) difficulty identifying an expert suitable for appointment, (4) difficulty securing compensation for an expert, (5) lack of early recognition that appointment is needed, and (6) lack of awareness of the procedure.⁶²

In a similar 1998-1999 survey, 73.9 percent of federal judges reported that they would never use Rule 706 to appoint an expert, and 16.2 percent would only appoint an expert in cases with particularly difficult evidence.⁶³ A 1999-2000 study concluded that court-appointed experts “have been considered at a rate of approximately 2.7 cases per 10,000 in recent years (.027%).”⁶⁴

A survey of the combination of state and federal judges and administrative officials involved in water disputes published in 2007 suggests that a greater percentage of judges are appointing experts now than in the past.⁶⁵ Of the judges surveyed who had the authority to appoint expert witnesses, 32 percent had appointed an expert within the previous five years.⁶⁶ However, because the survey did not distinguish between state and federal judges, it is difficult to determine whether the survey truly demonstrates an increase in the use of court-appointed experts in federal court from 1999 to 2007.⁶⁷

Although it is unclear whether the actual use of court-appointed experts is on the rise, it is apparent that courts are discussing the topic with increasing frequency. A 2001 Westlaw search for federal court references to “court-appointed expert” in each year from 1983 to 2001 demonstrated that from 1983 to 1993 the number of citations to that term was between 17 to 43 times per year.⁶⁸ From 1994 to 2000, the range of citations was 48 to 72 times per

62. *Id.* at 18-23.

63. Shirley A. Donnin, *Federal and State Trial Judges on the Proffer and Presentation of Expert Evidence*, 28 JUST. SYS. J. 1, 8 (2007).

64. THOMAS E. WILLGING, SPECIAL MASTERS INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCES' ADVISORY COMMITTEE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS (Federal Judicial Center, 2000), [http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/\\$file/SpecMast.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf).

65. Mariam J. Masid, *Hydrology and the Courts: The Role of Expert Witnesses—A Study on Potential Reforms*, 11 U. DENV. WATER L. REV. 1, 38 (2007).

66. *Id.* Also of note, the majority of judges responding to the survey indicated that they are in favor of “reforms that would promote more frequent use of court-appointed expert witnesses.” *Id.* at 43.

67. *See id.* State court judges appear to be more likely to appoint experts than federal judges. The 1998-1999 study posed the same question to state court judges; of the responding judges, 57 percent reported that they would never appoint an expert. Donnin, *supra* note 63, at 11. However, the 1993 study did not include state court judges, so there is no data with which to compare the 1999 result.

68. Hooper, *supra* note 54, at n.3.

year, “with a gentle upward trend.”⁶⁹ To update this research, from 2001 to 2004 the number of cases using the term “court-appointed expert” ranged between 53 and 92. For the years 2005 to 2008 the range was 112 to 197, with 197 and 195 cases citing the term in 2007 and 2008, respectively. This quite obvious and dramatic increase in the discussion of the subject may signal that the use of court-appointed experts has or is about to become more frequent.

Debate over Propriety of Court-Appointed Experts

At the heart of the debate about whether to use court-appointed experts rest several reasons and crucial policy issues that proponents and opponents raise. Proponents of the process argue that the appointment of an expert by the court may enhance the information available to the fact finder and also “fill in gaps” in knowledge.⁷⁰ Court-appointed experts may also be helpful in facilitating settlement of a case.⁷¹ In addition, where the parties’ advocacy is inadequate or unbalanced, expert assistance may be necessary for a rational decision on a complex subject.⁷²

On the other hand, opponents of the process suggest several reasons for rejecting the use of court-appointed experts. A fear exists that the designation of a witness as appointed by the court and as “impartial” may lead the jury to believe that the expert has been “cloaked with a robe of infallibility.”⁷³ Critics also argue that the use of a court-appointed expert interferes with the deliberative process of the jury if it follows the so-called neutral opinion.⁷⁴ In addition, the process, it is argued, interferes with party autonomy.⁷⁵ Finally, the use of court-appointed experts is likely to increase the litigation costs and could even delay the proceedings.⁷⁶

69. *Id.*

70. Buther Reisinger, *supra* note 10.

71. *Id.*

72. Ellen F. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 94 (1998).

73. See, e.g., Elwood S. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416, 424 (1961).

74. *Id.*

75. THOMAS E. WILLGING, COURT-APPOINTED EXPERTS 18 (1986).

76. See Buther Reisinger, *supra* note 10, at 237–38 (citing Ellen Relkin, *Some Implications of Daubert and Its Potential for Misuse: Misapplication to Environmental Tort Cases and the Abuse of Rule 706(a) Court-Appointed Experts*, 15 CARDOZO L. REV. 2255, 2255 n.3 (1994)). For a discussion of trial lawyers’ objections to court-appointed experts, see Andrew MacGregor Smith, *Using Impartial Experts in Valuations: A Forum Specific Approach*, 35 WM. & MARY L. REV. 1241, 1281 (1994).

Court-Appointed Experts in the States

Thirty-one states⁷⁷ have adopted some version of Federal Rule of Evidence 706.⁷⁸ In most of these states, the rule is similar to the federal rule.⁷⁹ There are some differences, however. For example, in Alabama, the appointment of an expert by the court may not be disclosed to the jury.⁸⁰ In Tennessee, the court may appoint an expert for a bench trial but not for a jury trial.⁸¹

Another distinction between the state rules and the federal rule concerns the compensation provision.⁸² Some states do not have such a provision,⁸³ while others have slightly altered the method of compensating court-appointed experts.⁸⁴ In Arizona, the court's power to appoint an expert is subject "to the availability of funds or the agreement of the parties concerning compensation."⁸⁵

The vast majority of state court cases discussing court-appointed experts involve family or criminal law. In the family law context, court-appointed experts are most typically tasked with property valuations⁸⁶ or psychological evaluations.⁸⁷ In criminal cases, courts often appoint experts

77. The following states have adopted some form of the court-appointed experts rule: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, North Carolina, North Dakota, Pennsylvania, South Dakota, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

78. FED. R. EVID. 706.

79. See WRIGHT & MILLER, *supra* note 38, § 6301 nn.17–20 for a comparison of various state rules to Rule 706.

80. ALA. R. EVID. 706.

81. TENN. R. EVID. 706.

82. The compensation provision in the federal rule states as follows:

Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

FED. R. EVID. 706(b).

83. See, e.g., ALA. R. EVID. 706; LA. CODE EVID. 706.

84. See, e.g., VT. R. EVID. 706 (providing for compensation in civil cases to be paid by the parties, instead of as provided by law where available under the federal rule).

85. ARIZ. R. EVID. 706.

86. See, e.g., *Pekarek v. Pekarek*, 362 N.W.2d 394, 397 (Minn. Ct. App. 1985); *Swilling v. Swilling*, 404 S.E.2d 837, 838 (N.C. 1991); *Sharp v. Sharp*, 449 S.E.2d 39, 49 (N.C. Ct. App. 1994); *Tallman v. Tallman*, 396 S.E.2d 453, 457 (W. Va. Ct. App. 1990).

87. See, e.g., *Helfenstein v. Schutt*, 735 N.W.2d 410, 416 (N.D. 2007); *Smith v. Smith*, No. M2005-01688-COA-R3-CV, 2008 WL 1127855, at *1 (Tenn. Ct. App. Apr. 9, 2008);

for indigent defendants as a service ancillary to the defendants' right to appointed counsel and to present a defense.⁸⁸ State courts have also appointed experts to assist with foreign law issues,⁸⁹ property disputes,⁹⁰ trust and estate issues,⁹¹ electronic discovery issues,⁹² malpractice issues,⁹³ and evidentiary issues arising in the employment law context.⁹⁴

Like the federal rule,⁹⁵ state court appointments of experts are reviewed for abuse of discretion.⁹⁶ Court appointments of experts are rarely reversed, although there have been reversals in situations where the court has failed to give the parties notice and an opportunity to be heard,⁹⁷ or where the court has permitted the appointed expert to usurp judicial functions.⁹⁸

Alternative Appointment of a Technical Advisor

In contrast to appointing an expert under Rule 706, courts sometimes employ the more flexible approach of appointing a technical advisor when they are seeking assistance or education on particularly complex issues or evidence.

Mmoie v. MJE, 841 P.2d 820, 823 (Wyo. 1992); *In re Welfare of Angelo H.*, 102 P.2d 822, 824 (Wash. Ct. App. 2004).

88. See, e.g., *People v. Young*, 234 Cal. Rptr. 819, 825 (Ct. App. 1987) (holding that while an indigent felony defendant is entitled to the appointment of an expert, the defendant has no right to the appointment of any particular expert, and the defendant first has the burden to show that the expert is reasonably necessary to ensure presentation of a defense).

89. See, e.g., *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, No. Civ. A. 00C-07-161JRJ, 2003 WL 22016864, at *2 (Del. Aug. 26, 2003).

90. See, e.g., *Durbin v. Bonanza Corp.*, 716 P.2d 1124, 1127 (Colo. Ct. App. 1986); *Delany v. Canning*, 929 P.2d 475, 479 (Wash. Ct. App. 1997).

91. See, e.g., *In re Estate of Cooper*, 913 P.2d 393, 402 (Wash. Ct. App. 1996).

92. See, e.g., *Authsec, Inc. v. Roberts*, No. 13-C-06-067710, 2007 WL 2691845 (Md. Cir. Ct. July 17, 2007).

93. See, e.g., *Warren v. Eckert Seamans Cherin & Mellott*, 45 Pa. D. & C. 4th 75, 77 (Ct. Com. Pl. Apr. 25, 2000).

94. See, e.g., *Dufhilo v. D'Aquin*, 615 So. 2d 522, 525 (La. Ct. App. 1993).

95. A federal appellate court will review a trial court's decision to appoint a Rule 706 expert for an abuse of discretion. *Walker*, 180 F.3d 1065.

96. See, e.g., *In re the Welfare of Angelo H.*, 102 P.3d at 826; see also *Wilson v. Kemp*, 644 S.W.2d 306 (Ark. Ct. App. 1982); *Hager v. Commonwealth*, No. 2005-CA-002592-MR, 2007 WL 542814, at *5 (Ky. Ct. App. Feb. 23, 2007); *Collins v. Los Angeles County*, 74 Cal. App. 3d 47 (Ct. App. 1977); *Philipbar v. Philipbar*, 980 P.2d 1075, 1078 (N.M. Ct. App. 1999).

97. See *In re Welfare of Angelo H.*, 102 P.2d at 827; *Commonwealth v. Byer*, 173 S.W.3d 247, 249-50 (Ky. Ct. App. 2005).

98. See, e.g., *Petrouson v. First Nat'l Bank*, 631 So. 2d 1172, 174 (La. Ct. App. 1994); see also *Adams v. CSX R.R.*, 904 So. 2d 13, 20-21 (La. Ct. App. 2005); *SAF Constr., Inc v. AKR & Assoc.*, No. 241980, 2004 WL 224421, at *2 (Mich. App. Feb. 5, 2004); *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485 (Del. 2000).

This section compares the appointment of a technical advisor to the appointment of an expert witness.

The role of a technical advisor is to organize, advise on, and help the court understand relevant scientific evidence.⁹⁹ In that role, the technical advisor is a tutor who aids the court in understanding the “jargon and theory” relevant to the technical aspects of the evidence.¹⁰⁰ A technical advisor is not allowed to assume the role of an expert witness by supplying new evidence.¹⁰¹ As well, the technical advisor may not usurp the role of the judge by making findings of fact or conclusions of law.¹⁰²

The court has the inherent power to appoint a technical advisor.¹⁰³ A technical advisor is not subject to the provisions of Rule 706,¹⁰⁴ and thus the technical advisor is not subject to the rule’s deposition requirements, being called at trial, or cross-examination.¹⁰⁵

In a 2000 article, Campbell and Vale provided a handy comparison chart of the different characteristics of a technical advisor appointed pursuant to the court’s inherent authority and an expert appointed under Rule 706:¹⁰⁶

Technical Advisor	Rule 706—Court-Appointed Expert
Useful in a <i>Daubert</i> hearing where the qualifications or methodology of a party-selected expert have been challenged.	Most useful at trial where experts have survived <i>Daubert</i> scrutiny.
No testimony by advisor, therefore has limited utility in evaluating settlements.	Useful in evaluating settlements because the expert’s testimony will be needed.
If challenged expert’s opinions survive <i>Daubert</i> scrutiny, the advisor’s opinion cannot be used at trial.	Useful, as in the breast implant cases, where the same issue arises in other cases and objective testimony is needed for trial.

99. Ass’n of Mexican-Am. Educators v. California, 231 F.3d 572 (9th Cir. 2000).

100. Reilly v. United States, 863 F.2d 149 (1st Cir. 1988).

101. A&M Records, Inc. v. Napster, 284 F.3d 1091 (9th Cir. 2002).

102. *Id.*

103. *Reilly*, 863 F.2d 149.

104. FTC v. Enforma Natural Prod., Inc., 362 F.3d 1204 (9th Cir. 2004); *Reilly*, 863 F.2d at 155–56.

105. *Reilly*, 863 F.2d at 155–56; see also *Hemstreet v. Burroughs Corp.*, 666 F. Supp. 1096, 1124 (N.D. Ill. 1987) (holding no error in not allowing deposition of technical advisor because advisor did not provide findings to the court within the meaning of Rule 706(a)), *rev’d on other grounds*, 861 F.2d 728 (Fed. Cir. 1988).

106. Natasha I. Campbell & Anthony Vale, *Encouraging More Effective Use of Court-Appointed Experts and Technical Advisors*, 67 DEF. COUNS. J. 196, 206 (Apr. 2000).

Technical Advisor	Rule 706—Court-Appointed Expert
Less time-consuming than Rule 706 expert because no depositions. May be more attractive option for highly qualified advisors.	More time-consuming and more likely to delay trial than technical advisor because depositions will be taken. The time commitment may deter highly qualified experts from serving.
Less expensive than Rule 706 expert because no depositions will be taken.	More expensive than technical advisor because depositions will be taken.
No cross-examination, therefore more risk that flaws in advisor's opinions will not be exposed to the judge.	Parties have more opportunity to expose flaws in the expert's opinion during cross-examination.

In the Silicone Gel Breast Implant Litigation, Judge Robert E. Jones of the U.S. District Court for the District of Oregon appointed a panel of technical advisors to aid him in understanding scientific issues in connection with the defendants' motion *in limine* to exclude the plaintiffs' proffered expert testimony regarding any causal link between silicone breast implants and systemic disease.¹⁰⁷ In fulfilling his role as a gatekeeper, Judge Jones consulted with a former medical school president who helped screen potential advisors. Judge Jones then selected four experts in the necessary fields of epidemiology, rheumatology, immunology and toxicology, and biochemistry. The advisors reviewed the parties' materials as well as observed the parties' experts' testimony in court. During a preliminary hearing to address various expert issues under Federal Rule of Evidence 104, the parties presented their experts, and the court, counsel, and the technical advisors asked questions of the testifying experts.

Judge Jones permitted the parties to submit questions to be asked of the technical advisors that were designed to guide the advisors in evaluating the testimony and in preparing their reports.¹⁰⁸ After the technical advisors submitted their reports, which addressed the requested questions, the parties and the court were given an opportunity to question the advisors' findings.

Other courts have used technical advisors in other capacities. In several patent cases, technical advisors have been appointed to help the court address

107. Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387 (D. Or. 1996).

108. For a comparison of the Jones methodology and the Pointer methodology, see the useful chart in Hooper, *supra* note 54, at 145.

complex scientific and technical issues.¹⁰⁹ In one medical malpractice case, a technical advisor was appointed to assist in the calculation of the future earnings capacity of an infant negligently injured at birth.¹¹⁰ Technical advisors have also been appointed to help courts understand unusual issues such as psychometrics¹¹¹ and computer-generated legislative redistricting plans.¹¹²

Because of the lack of the procedural safeguards provided in Rule 706 in the arena of technical advisors, several courts have developed a list of guidelines for the use of technical advisors. The guidelines were initially set forth by Judge Tashima in his dissent in *Association of Mexican-American Educators v. State of California*.¹¹³ Judge Tashima suggested that courts implement the following recommendations:

1. Use a fair and open procedure for appointing a neutral technical advisor;
2. Address any allegations of bias, partiality or lack of qualifications;
3. Clearly define and limit the technical advisor's duties;
4. Make clear to the technical advisor that any advice he or she gives to the court cannot be based on any extra-record information; and
5. Make explicit, either through an expert's report or a record of ex parte communications, the nature and content of the technical advisor's advice.¹¹⁴

A number of courts have endorsed Judge Tashima's recommendations.¹¹⁵

Finally, some of the same criticisms of court-appointed experts apply equally to the use of technical advisors. For example, some critics fear that judges uncomfortable with the issues may improperly delegate decision-making authority to technical advisors.¹¹⁶ In addition, there are concerns that technical advisors may not always be neutral, and they may actually interfere with the adversarial process by providing evidence directly to the judge.¹¹⁷

109. See, e.g., *Data Gen. Corp. v. IBM Corp.*, 93 F. Supp. 2d 89 (D. Mass. 2000); *TM Patents, L.P. v. IBM Corp.*, 72 F. Supp. 2d 370 (S.D.N.Y. 1999); *Mediacom Corp. v. Rates Tech., Inc.*, 4 F. Supp. 2d 17 (D. Mass. 1998).

110. *Reilly*, 863 F.2d 149.

111. *Ass'n of Mexican-Am. Educators v. California*, 195 F.3d 465 (9th Cir. 1999).

112. *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992).

113. *Ass'n of Mexican-Am. Educators*, 231 F.3d 572.

114. *Id.* at 611-14.

115. See, e.g., *Enformac*, 362 F.3d 1204; *TechSearch LLC v. Intel Corp.*, 286 F.3d 1360 (Fed. Cir. 2002); *Conservation Law Found. v. Evans*, 203 F. Supp. 2d 27 (D.D.C. 2002).

116. Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941, 953 (1997).

117. *Id.*

Practical Considerations in Dealing with a Court-Appointed Expert or Technical Advisor

When confronted with a situation in which a court might appoint an expert or technical advisor (or in which one of the parties may want to propose such an appointment), one of the first considerations is whether such an appointment will help your position, hurt your position, or be neutral with respect to your position. The following considerations may apply to your situation, depending on the strategic or tactical value of the appointed expert/technical advisor:

1. If the case involves complex scientific or technical issues or evidence, alert the court as early as possible, including at the Rule 16 Pretrial Conference,¹¹⁸ of the potential need for court-appointed experts so that the judge will not be surprised later in the case if it is necessary to have such an expert retained or appointed and so that the process of selection and appointment can begin as early as possible.
2. Request that the court issue a written order detailing the retention of a technical advisor or the appointment of an expert. Take steps to ensure that the order specifies the precise role (e.g., technical advisor, court-appointed expert) and source of authority for the appointment.¹¹⁹
3. To the extent that the court relies on the parties to suggest names of potential experts to the court, you should keep in mind several considerations to evaluate to protect your client's position, including the following:
 - a. Whether the candidate has a relationship to any of the parties;
 - b. The candidate's experience serving as an expert, including testimonial experience;
 - c. Relevant education, training, and experience;
 - d. Familiarity with the parties, businesses, industry, products, or issues in the lawsuit; and
 - e. The candidate's willingness to serve as an expert and his availability.¹²⁰
4. Take an active role in the selection process.

118. See FED. R. CIV. P. 16.

119. In *Peterka v. Dennis*, 764 N.W.2d 829 (Minn. 2009), the Minnesota Supreme Court held that a neutral evaluator appointed by the district court to evaluate marital property in the form of business assets in a divorce proceeding met all the requirements for a Rule 706 court-appointed expert even though the court's order did not make reference to Rule 706. The court also held that Rule 706 court-appointed experts were entitled to immunity for suits performed pursuant to the appointment.

120. *NEC Corp. v. Hyundai Elec. Indus. Co., Ltd.*, 30 F. Supp. 2d 546, 559–60 (E.D. Va. 1998).

5. Take steps to prevent *ex parte* communication between the expert and any party or the court.
6. Seek to have input into the expert's methodology, including what materials the expert will review and what questions will be submitted to the expert.
7. Once a report or expert findings have been issued, request the right to conduct discovery, including a deposition.
8. If an expert's conclusions are adverse to your position, request a jury instruction that attempts to minimize the impact of the expert's testimony.¹²¹
9. If necessary, attempt to have the court use the expert in specific phases of the case rather than lumping all of the potential expert functions into a single role. For example, try to have the court first use the expert as a tutor. Then, have the court focus the expert's work on *Daubert*-related admissibility issues. You might even consider asking the court to allow the expert to assist in settlement activities. Finally, the court can direct the expert to provide testimony to the jury that initially attempts to educate and clarify for the jury what the differences in the expert opinion are and why they exist rather than simply providing the expert's own opinions and conclusions.
10. Work to establish a budget at the outset of the case to conserve resources and set a reasonable payment-sharing plan.

The specific steps you take in a particular case depend significantly on the case-specific facts with which you are dealing. However, if you can keep the procedural safeguards set out in Rule 706 and the principles recommended by Judge Tashima in his dissent at the forefront of your analysis,¹²² they should guide you in making strategic and tactical decisions.

Conclusion

With the increasing number of cases involving complex scientific and technical issues, the use of court-appointed experts and technical advisors can serve as a useful tool for a trial judge faced with fulfilling his gatekeeping function. These experts can provide important educational benefits to both a trial judge and a jury faced with complex issues. Although there are no hard and fast rules for deciding whether or when a court-appointed expert or technical advisor might be used, there are reasonable steps you can take to protect or enhance your client's position if the court decides to appoint an expert.

121. See *supra* note 40.

122. See *supra* notes 113–14 and accompanying text.

Appendix A: Model Agreement

The following agreement is to be used as a model, but should be modified as appropriate to reflect the parameters of the particular expert engagement.

PRIVILEGED AND CONFIDENTIAL—ATTORNEY WORK PRODUCT

Professor Eager B. Expert
University of Northern Utopia
201 North Forest Road
South Bank, Utopia 00001

***Southern Missouri River Dam Litigation
Civil Action No. 12345 (N.D. Iowa)***

Dear Professor Expert:

This will confirm your agreement to provide professional services to assist us as attorneys for [name of client] (“our client”) in the [describe the nature of the litigation or arbitration] (the “matter”).

To make sure that both you and this firm understand what we expect of each other, we have set forth the terms of your engagement as an expert in this matter to make sure that you and we both have a clear understanding of what will be required of you.

1. You confirm that we have explained to you the nature of this dispute, the relevant parties and the issues involved in it,¹ and that (a) you have no conflict of interest in providing your services to us as counsel for [name of client] and being adverse to [name(s) of opposing party(ies)], (b) you believe you have the necessary expertise, as a result of your education, training, and experience, to provide advice to us and our client and, if necessary, to testify on behalf of our client, (c) you know of no reason why you cannot provide expert advice to us and our client and, if necessary, testify on behalf of our client, and (d) you can, consistent with your other obligations, devote sufficient time and attention to this matter to assist us and our client and will not take on additional assignments that would make it difficult for you to do so.

1. You may want to expand on this paragraph to provide more detail about the case and how the expert’s advice or opinions will bear on it, but keep in mind that this agreement may be discoverable by the opposing party.

2. In taking on this assignment, you will be an independent contractor and not an employee of this firm or the client. Any staff or other person you engage to assist you will also be independent of and not an employee of the firm or the client. Neither the firm nor the client will withhold or pay Social Security, FICA, Medicare/Medicaid, unemployment insurance, or income or other taxes on your or your staff's or assistant's behalf.
3. The trial of this matter is currently scheduled for [date]. We will notify you if the date is changed. You agree to be available during the trial for your expert testimony. We would also expect that, in addition to working with us to develop your opinion(s) and report, you would have your deposition taken. Our best estimate is that this will be sometime in the months of [describe] of [year]. You agree to be available for deposition.²
4. You also confirm that you have disclosed to us any relevant publications, papers, and previous engagements where you provided expert opinion, advice, and/or testimony that may relate to your advice and potential testimony in this case in order for us to conclude that there is no impediment to your doing so in this case.
5. You understand the highly sensitive and confidential nature of this engagement and that you are serving as an agent of, and are providing assistance to, this law firm, which has a professional obligation to preserve the confidences and communications of our client. You will keep confidential your retention by this firm on behalf of our client, unless and until you are identified in court papers as a testifying expert or we otherwise authorize you in writing to disclose your retention.
6. To make certain there is no misunderstanding, at no time will you communicate to any other person (1) that you are assisting us, (2) the fact that you may have arrived at certain conclusions, or (3) the substance of your conclusions, in each case unless you have our prior permission, in writing, to do so.
7. Consistent with the nature of our relationship with our client, any communications between you and us or our client will be, and will remain, privileged and confidential as attorney-work product and attorney-client communications. Any materials or information provided to you are to be used by you solely to assist you in advising us on the matters for which you have been retained. By the same token, any conclusions

2. This paragraph gives you and the expert a mutual understanding of the likely time frame for the case. If you do not have a trial date, you can provide some estimate of when it is likely to be tried. The same goes for the deposition.

you may reach are to be provided solely to us as counsel for our client, and to no one else.³

8. To ensure that your assistance to us is fully protected, any materials you may prepare are to be labeled “Attorney work-product / Attorney-client communication / Privileged and Confidential.”⁴
9. You understand that any notes or work papers you may prepare in connection with your assistance to us are the property of this firm. At the conclusion of this engagement, you will return all notes and work papers prepared by you during this engagement to us unless we otherwise agree in writing.
10. If, at any time during or after your engagement, you are served with legal process or any other form of request seeking testimony, information, or documents relating to your engagement with us, you agree that you will notify us immediately, and take instructions from us as to how you will respond to that process or request.
- 11a. You will be compensated for the time you spend on this matter at your standard rate of \$_____ per hour.

OR

- 11b. We understand that your standard daily seminar fee is [\$] and that, by taking on this engagement, you will be foregoing those fees for any time you spend working on this engagement that you would otherwise have received from seminars. We therefore agree that you will be paid a daily fee of [\$] for any full days you spend on this matter, and a prorated hourly fee of [\$] for any time you spend that takes up less than a day.

OR

- 11c. The trial is scheduled to begin on [date] and will be held in [city]. We anticipate having you testify on or about [date]. If the case is settled before then, or the trial date is changed, you will be paid your outstanding fees as well as your daily rate of an additional [\$] to account for the fact that you would have otherwise participated in another engagement or scheduled a seminar for that date.

3. You want to make sure that all communications are confidential, any materials you provide the expert are to be used solely in your case, and the expert will not provide any conclusions, tentative or otherwise, to anyone but you.

4. This is self-explanatory. As noted above, this label does not necessarily mean that these materials will be protected against discovery.

12. We understand that you will use the following additional persons to assist you and their respective rates per hour are set forth next to their names:

[List, with hourly rates]

13. If you use any other person to assist you in your engagement with us, you will first obtain our permission to do so, and will also have him/her sign and provide to us a copy of this letter agreement before he/she renders any assistance to you and, through you, to us.
14. One or more protective orders have been entered by the court or courts that govern the use of confidential or proprietary information in this case. A copy of each is attached to this letter agreement. Please read them and sign the certification at the end and return a copy to me. Also please have any of your staff who will be involved in your work read the protective orders and sign a copy of the certification and return it to me. If any additional staff are engaged in this matter, please also have them sign and return to me a copy of their certification.
15. Any statements for your professional services should be sent directly to me at the address above with sufficient time and expense descriptions so we and the client will have a clear picture of your activities. Please send us your statements on a monthly basis. If you have any additional out-of-pocket expenses, please provide us with a list of them, and receipts or invoices for any individual item in excess of \$75. You will not incur any given expense in excess of [\$] without our advance agreement. You understand that we will submit your statements to [name of client] and agree that you will be paid when we receive payment from [name of client] for these statements.
16. You will keep confidential all information obtained, or analyses developed, in connection with this litigation or any related litigations with respect to which we may seek your advice and you will use this confidential information solely in connection with your engagement by us on behalf of our client.⁵
17. You will preserve any written materials, including materials stored electronically and any e-mails, generated or received by you in connection with this engagement, because these materials are potentially discoverable in litigation. It is important that we know what documents you have received in connection with your serving as an

5. This ensures that the expert does not use material developed in your case for other assignments she may have. Some experts, particularly ones that testify regularly, may want to negotiate this provision.

expert witness. If you review any other materials, we also need to keep a record of them. We would therefore request that you please keep all documents that you receive or review in this matter as part of your engagement in one or more segregated files so we can keep track of them. Also please keep any materials you may prepare, including drafts. Under no circumstances are you to destroy any written materials or delete from your electronic files any of this information.

18. If we later designate you as a testifying expert, we would expect that you will provide a written report containing your opinion or opinions. We would also expect that that report would include all the information required by Federal Rule of Civil Procedure 26(a)(2)(B) regarding experts. You agree that you are familiar with that rule and have the necessary information and materials to be able to comply with its requirements.⁶
19. If we later designate you as a testifying expert, all documents you create, review, or receive, including any drafts or notes you have prepared prior to preparing your report, may be discoverable by the other side. At no time should you destroy any document that you have created or considered in arriving at any of your conclusions.⁷
20. You should keep any materials we send you, as well as all communications between us, strictly confidential. All materials that we supply to you, as well as your reports and work product, will remain our or our client's property and may not be disclosed without our or our client's consent.⁸
21. You agree that you will not in the future consult for, or represent, any other person or entity with an interest adverse to our client's interests

6. As noted above, FED. R. CIV. P. 26(a)(2)(B)(iv) and (v) require an expert's report to include "(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years," and "(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." Many state court rules contain the same or similar provisions. This provision is designed to make sure the expert understands these requirements and that she has maintained the necessary file of information to comply with them.

7. This provision underscores the importance of the expert retaining everything she creates, reviews, or receives during the assignment to avoid a charge of expert spoliation.

8. Because, at least under the current version of FED. R. CIV. P. 26(a)(2)(B)(ii), everything an expert looks at is discoverable, you should not send the expert any material, including your own work product, that you do not want the other side to obtain. You should nevertheless emphasize to the expert that everything you give him is presumptively confidential and may not be disclosed without your and the client's consent.

- in or concerning the pending litigation, or the events or occurrences out of which the pending litigation arises.⁹
22. It is specifically understood that, because you may become a testifying expert, all documents you create may become discoverable, including drafts and notes prepared prior to the time that your opinion or report is finalized. In our experience, opposing counsel who obtain these documents in discovery often seek to use them in an unfair and misleading way, for example, to suggest that a change from an earlier draft to a later version has some sinister explanation. This is particularly unfair because you will be learning the case over time, and you may not know all relevant information prior to the time that you finalize your opinion and report. The preparation of draft opinions and reports is also expensive and should not be undertaken prematurely. Therefore, you agree that:
- (a) You will not prepare any draft opinion or report unless we have specifically discussed this with you in advance and obtained our consent (regardless of whether the draft is for internal purposes or to share with others).
 - (b) You will not share any draft opinion or report, or any notes, with any other person without our consent.
 - (c) Every draft opinion or report will bear the following legend: “THIS IS A PRELIMINARY DRAFT. IT HAS BEEN PREPARED BASED ON PRELIMINARY INFORMATION AND ON ASSUMPTIONS. NO ONE MAY RELY ON THIS DRAFT. IT IS SUBJECT TO CHANGE AS ADDITIONAL INFORMATION BECOMES AVAILABLE OR IS CLARIFIED.”
 - (d) All your notebooks or individual pages of notes will bear the following legend: “THESE NOTES ARE INCOMPLETE AND HAVE BEEN PREPARED FOR PERSONAL USE ONLY. NO ONE MAY RELY ON THEM FOR ANY PURPOSE. ALL VIEWS ARE SUBJECT TO CHANGE AS ADDITIONAL INFORMATION BECOMES AVAILABLE OR IS CLARIFIED.”¹⁰
23. You understand that your obligation to maintain the confidentiality of your engagement—and any conclusions you may reach as well as any

9. You and the client do not want the expert to use information or expertise she may have obtained on behalf of your client in a future case against your client. It would also ordinarily be improper for the expert to be retained by someone else to provide advice regarding the very occurrences that are involved in your case. Some professional experts may want to negotiate the language and scope of this restriction.

10. The text of this paragraph, as well as selected other material, is taken from an article by Gregory P. Joseph, *Engaging Experts*, NATIONAL LAW JOURNAL, Apr. 18, 2005, at 12.

other matters communicated to you as our agent in a privileged setting—will continue after your engagement has been concluded.

24. You also understand that, if a protective order has been entered in the case, you (and your staff) are under an obligation to continue to comply with that order and not divulge or use any protected information you may have received as a result of that order for an indefinite period of time even after the case is over. If you have received any information or materials that you are required to return or destroy, you will do so and confirm to us in writing that you have done so.

Would you please countersign this letter-agreement below and return a copy to me.

We do want to thank you in advance for agreeing to assist [name of client] and us in this important litigation. We look forward to working with you.

Sincerely,
John Q. Lawyer

I have read the preceding letter-agreement and any attachments to it, I have had its meaning and effect explained to me, I understand its terms, and I agree to be bound by the restrictions set forth in it.

Dated: _____

Eager B. Expert

APPENDIX B

FindLaw (<https://lp.findlaw.com/>) Corporate Counsel (/) Law Library (<https://corporate.findlaw.com/law-library/>)
How to Vet an Expert

How to Vet an Expert

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Editor's Note: This article was originally published in BullsEye, a newsletter distributed by IMS Expert Services.

Experts, sad to say, are not always honest about their credentials, as several recent news items confirm. Knowing how to verify the background of an expert – whether yours or your opponent's – could prove critical to your case.

In perhaps the most dramatic recent example, a New Orleans federal judge threw out a jury verdict in favor of pharmaceutical giant Merck & Co. after a cardiologist who testified for the defense in a Vioxx trial was found to have misrepresented his credentials.

A few weeks earlier in California, a man who fraudulently passed himself off as a computer forensics expert in two cases pleaded guilty to federal perjury charges. In Toronto, a psychiatrist had his license suspended after lying about his credentials while serving as an expert witness in two trials.

These cases illustrate why it is crucial for trial lawyers to confirm that an expert is all he claims to be. Vetting an expert's credentials should be a key step in your trial preparation.

Major legal research services provide many tools for checking an expert's background, from public records databases to deposition banks. But these major services can be expensive to use and still leave bases uncovered.

At the same time, the Web harbors a variety of resources and tools that contain potentially valuable information but that many lawyers overlook in researching an expert's background.

Yes, we all now know to check Google, but this article looks at some of the lesser-known – and mostly free – research tools you may be bypassing. Of course, these Web tools are neither foolproof nor exhaustive. No Web site can substitute for using a reputable expert-search service.

Words Can Haunt You

The old adage, "What you say may come back to haunt you," has never been more true. With millions of people posting to blogs and participating in Internet discussion groups, we are creating permanent records of our words and thoughts – like it or not.

In light of this, the blogosphere should be among your first stops in researching an expert's background. Does the expert maintain a blog? If so, has he said anything there *you* might regret? Has he posted comments to others' blogs? Have others written about him, positively or negatively, on their own blogs?

The best tool for searching blogs is **Google Blog Search** <<http://blogsearch.google.com>> (<http://blogsearch.google.com/>)>. Like Google's Web search, it is comprehensive and up to date. You can sort results by date or relevance, and you can search blogs in multiple languages.

A close second for searching blogs is **Clusty** <<http://blogs.clusty.com>> (<http://blogs.clusty.com/>)>. Clusty is not a search engine – it does not crawl or index the Web. Rather, it is a metasearch tool that calls on other blog search engines, extracts the relevant information, and then organizes the results into a hierarchical folder structure – which it calls "clusters." With this unique approach, it provides results that are both comprehensive and usefully organized.

Another source of potentially damaging comments by or about an expert is the Internet's many news groups and discussion lists To find postings someone made to one of these, search **Google Groups** <<http://groups.google.com> (<https://groups.google.com/>)> It hosts a variety of current groups as well as an archive of more than 750 million Usenet postings dating back to 1985

As podcasts become more popular, they also should be included in a background search Perhaps the person you are researching said something pertinent in a podcast or was the subject of someone else's podcast comment Several sites claim to search podcasts, but most of these actually search only the accompanying text – the title, description, author and any metadata – but not the audio file

A handful of tools now enable you to search the full spoken text of podcasts One of the best is **Podzinger** <www.podzinger.com (<http://www.podzinger.com/>)> It is based on speech-recognition technology developed for U S intelligence to monitor foreign television and radio broadcasts It uses this technology to create a textual index of the audio data in any MP3 or WAV file, converting the spoken words into searchable text

Networking Sites

Where professionals once networked at cocktail parties and civic events, today you are more likely to find them connecting through any of a number of networking Web sites The most popular at the moment is **LinkedIn** <www.linkedin.com (<https://www.linkedin.com/>)> where members post information about their careers and their connections and share mutual recommendations If your expert is listed on LinkedIn, read his profile carefully How does his listing compare with what he has provided to you? Also, look for references from others and examine his network of connections for any that might help either verify or call into question his background

Other business networking sites include **Ziggs** <www.ziggs.com (<http://www.ziggs.com/>)>, **Ryze** <www.ryze.com (<http://www.ryze.com/>)>, and **Orkut** <www.orkut.com (<http://www.orkut.com/>)> Of course, be sure also to check personal networking sites such as **MySpace** <www.myspace.com (<https://www.myspace.com/>)> and **Facebook** <<https://www.facebook.com/>>

Corporate Records

Anyone researching a publicly traded company would know to check the U S Securities and Exchange Commission's **EDGAR** database <www.sec.gov/edgar.shtml (<https://www.sec.gov/edgar.shtml>)> But fewer think to search EDGAR for information about individuals, even though it may contain a wealth of information Corporate filings can provide information on an individual's business affiliations, employment arrangements, investments, and more Even an individual's education and employment history can sometimes be tracked through EDGAR

If the expert works in the securities industry, two databases worth checking are **NASD BrokerCheck** <www.nasd.com/InvestorInformation/InvestorProtection/NASDW_005882 (http://www.nasd.com/InvestorInformation/InvestorProtection/NASDW_005882)> which provides information on the professional backgrounds of current and former NASD-registered securities firms and brokers, and the National Futures Association's **Background Affiliation Status Information Center (BASIC)** <www.nfa.futures.org/basicnet (<http://www.nfa.futures.org/basicnet>)> which does much the same for registered futures dealers

Historical Web

Web sites change over time If your expert has a Web site, what it says today may differ from what it said five years ago The best way to track historical changes in someone's Web site is through the Internet Archive's **Wayback Machine** <www.archive.org (<https://www.archive.org/>)> Here, you can find an archive that captures historical snapshots of sites While not exhaustive, it is likely to have at least some pages showing earlier versions of a site

Public Records

Any number of major research systems sell access to public records These include **LexisNexis** <www.lexis.com (<http://www.lexis.com/>)>, **Westlaw** <www.westlaw.com (<https://www.westlaw.com/>)>, **ChoicePoint** <www.choicepoint.net (<http://www.choicepoint.net/>)>, and **Accurint** <www accurint.com (<http://www accurint.com/>)> But many public records are now available online for little or no cost A variety of Web sites help direct you to these online sources of public records

One of the best is **Search Systems** <www.searchsystems.net (<http://www.searchsystems.net/>)> with links to nearly 40,000 sources of public records on the Web. It includes links to sources throughout the world, although the greatest number of sources are in the U.S. and Canada. Not all sites listed are free, but the site clearly marks those that are not. Among the listings: professional license registrations, corporate records, marriage notices, UCC filings, deed registries, birth and death records, lobbyist listings, physician disciplinary proceedings, and much more.

Other sites that provide directories of public records and information include:

- **Public Records Online Directory** <<http://publicrecords.netronline.com> (<http://publicrecords.netronline.com/>)> Links to state and municipal sites, with an emphasis on real estate, tax and vital records sources
- **Merlin Information Sources** <www.merlindata.com/industrylinks.html (<http://www.merlindata.com/industrylinks.html>)> Links to resources for finding public records and public information
- **Black Book Online** <www.blackbookonline.info (<http://www.blackbookonline.info/>)> A free public records site targeted at private investigators, skip tracers, government investigators and others. Good collection of links and descriptions
- **BRB Publications** <www.brbspub.com (<http://www.brbspub.com/>)> provides a fairly comprehensive, state-by-state list of free public records sites, as well as an index of national sites and another for Canada and U.S. territories

Social Security Numbers

Due to privacy concerns, it is difficult to find social security numbers on the Web these days. But you can easily verify that a number is valid and belongs to a living person. Enter a number in **The SSN Validator** <www.ssnvalidator.com (<http://www.ssnvalidator.com/>)> and it will tell you whether the number has been issued, in which state it was issued, when it was issued, and whether any death claims exist against the number. It will *not* tell you the identity of the holder of the number.

Professional Credentials

Various sources allow you to check the credentials of public school teachers. The **National Board for Professional Teaching Standards** maintains a directory, available at www.nbpts.org/resources/nbct_directory (http://www.nbpts.org/resources/nbct_directory), of teachers with national board certification. Several states maintain their own publicly accessible databases of teachers certified to teach in public schools. New York's, for example, is at www.nbpts.org/resources/nbct_directory (http://www.nbpts.org/resources/nbct_directory).

The best way to find whether one is available for a particular state is to check the Web site of the state's education department. A directory of state education department sites is maintained by the **U.S. Department of Education** at <http://nces.ed.gov/ccd/ccseas.asp> (<http://nces.ed.gov/ccd/ccseas.asp>).

Other Web sites provide verification of college-level degrees and attendance for a fee. These include **Credentials Inc.** <www.degreechk.com (<http://www.degreechk.com/>)> and the **National Student Clearinghouse** <www.studentclearinghouse.org (<http://www.studentclearinghouse.org/>)>. Many schools will confirm degrees directly, although they may require a release.

To check a medical doctor's license, **DocFinder** <www.docboard.org/docfinder.html (<http://www.docboard.org/docfinder.html>)> provides a database of license information for participating states. For states not included in the DocFinder database, the site provides links to their own license look-up sites.

Most states now have sites for verifying a lawyer's bar admission. In Massachusetts, for example, it is at <http://massbbo.org/bbolookup.php> (<http://massbbo.org/bbolookup.php>). You can find these for other states through the state government Web site. A new site, **Avvo** <www.avvo.com (<http://www.avvo.com/>)> rates lawyers based on publicly available information and compiles client reviews and disciplinary sanctions.

Dockets

Is your expert a party to pending litigation? To find out in federal court, check the **U.S. Party/Case Index** <<http://pacer.uspci.uscourts.gov> (<http://pacer.uspci.uscourts.gov/>)>. This is a national index of parties and cases for U.S. district, bankruptcy and appellate courts. It is updated nightly. Use of it requires a PACER account. Not all federal courts participate, but the site includes a list of those that do not.

A service with much the same information that requires no account is **Justia's Federal District Court Filings & Dockets** <<http://dockets.justia.com/>> This free, searchable resource contains information on recently filed U.S. district court civil cases. The database includes cases filed since Jan. 1, 2006 and can be searched by party name, court, and type of case.

Another low-cost option for searching federal court dockets is **Who's Suing Whom** <<http://www.tlc-i.com/texis/tmp/litcases3>> A private translation and interpretation services firm offers this tool for searching patent, trademark or copyright cases pending in federal courts. Search by case type and party name, court, state or date to find basic case information. There is a charge to retrieve full-text court dockets.

Vital Records

Vital records – birth, death and marriage certificates and divorce decrees – are increasingly available free online through state and local government sources. **Vital Records Information** <<http://www.vitalrec.com/>> tells where to find them anywhere in the U.S. It lists sources for each state, territory and county, and most cities and towns, along with contact, fee and ordering information. For records outside the U.S., the site lists links to foreign vital records sites. This straightforward site is designed with a nod towards genealogy, but it is one many lawyers are sure to find useful.

Expert Witness Rulings

The **Daubert Tracker** <<http://www.dauberttracker.com/>> is a Web site developed specifically to help lawyers track cases involving the admissibility of expert testimony and, in particular, find out how specific experts fared in the courts. Its central feature is a database of all reported cases under *Daubert* and its progeny, trial and appellate, backed up when available by full-text briefs, transcripts and docket entries. Part of what makes the site unique is that it links cases to experts. Even if the expert is not named in the court decision, the site's editors track down the expert's identity.

A year subscription is \$295 or you can purchase a two-hour session for \$25 or a half-hour for \$10. For free, you can search the site's collection of more than 10,000 briefs and other supporting documents from both appellate and trial courts relating to expert witness testimony. If you find a document you are interested in, you can also view the first 10 percent of it free. If you decide you want to purchase the complete document, the cost is \$15 for non-subscribers and \$7.50 for subscribers.

Writings

In vetting an expert, it is important to confirm authorship of listed works as well as to search for any unlisted works that could be relevant or embarrassing. Two essential resources to check for published works are the **Library of Congress Online Catalog** <<http://catalog.loc.gov>> and the records of the **U.S. Copyright Office** <<http://www.copyright.gov/search>>. Of course, it also makes sense to check **Amazon.com** <<https://www.amazon.com/>> and **Barnes & Noble** <<http://www.barnesandnoble.com/>>.

An increasingly popular resource for scholarly publications is the **Social Science Research Network** <<https://www.ssrn.com/>>. This international collaborative is home to scholarly research covering more than 400 subject areas. It contains abstracts of more than 150,000 working papers and the full text of well over 100,000 published papers. This makes SSRN an essential source for researching an expert's published papers.

Another useful source is **ISI HighlyCited.com** <<http://www.isihighlycited.com/>>. This site provides profiles and bibliographic information for the most highly cited researchers in 21 broad subject categories. For listed individuals, the site provides biographical information – including education, faculty and professional posts, memberships and offices, current research interests and personal Web sites – as well as a full listing of publications, including journal articles, books, and conference proceedings.

Other

The U.S. government maintains any number of databases that could be relevant to vetting an expert, depending on his field of expertise. One often worth checking is the **Excluded Parties List System** <<http://www.epls.gov/>>. It provides information on individuals and companies that are excluded from receiving federal contracts and federal financial assistance.

When it comes to checking someone's background, more is better. The more sources you use, the more complete your search. The free and low-cost resources described here provide useful supplements to more expensive research services.

Robert Ambrogi is the editor of BullsEye, a monthly newsletter distributed by IMS Expert Services. IMS Expert Services is the premier expert witness and litigation consultant search firm in the legal industry, focused exclusively on providing custom expert witness searches to attorneys. To read this and other legal industry BullsEye publications, please visit IMS Expert Services at www.ims-expertservices.com.

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NEWS AND COMMENTARY [Law Commentary \(https://supreme.findlaw.com/legal-commentary.html\)](https://supreme.findlaw.com/legal-commentary.html) / [Featured Documents \(https://blogs.findlaw.com/courtside/\)](https://blogs.findlaw.com/courtside/) / [Newsletters \(https://newsletters.findlaw.com/\)](https://newsletters.findlaw.com/) / [Blogs \(https://legalblogs.findlaw.com/\)](https://legalblogs.findlaw.com/) / [RSS Feeds \(https://www.findlaw.com/rss-index.html\)](https://www.findlaw.com/rss-index.html)

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APPENDIX C

(DATE)

Name
Firm Name
Address
email

Re: Engagement as Expert Witness in (_____)

Dear _____ :

Summit Law Group, PLLC represents (CLIENT NAME) in (CASE NAME / CAUSE NO. / COURT). (Client Name) is a defendant/plaintiff. Acting on behalf of (CLIENT NAME), we would like to retain you as a consulting expert witness in the (CASE NAME) case.

(CLIENT NAME) has agreed to pay your hourly rate of \$____. (CLIENT NAME) will also reimburse reasonable out-of-pocket expenses.

You should send your bills to me, care of (CLIENT NAME), on a monthly basis. Summit Law Group will pay your invoices promptly, and pass the charges through to (CLIENT NAME) as is, but this enables us to better protect the confidentiality of your work product and client communications. Please understand, however, that Summit is not and will not be responsible for the payment of your fees and costs absent a written agreement to the contrary.

You can, consistent with your other obligations, devote sufficient time and attention to this matter to assist us and our client (CLIENT NAME) and will not take on additional assignments that would make it difficult for you to devote the time needed.

In the course of your retention, we may call upon you to provide information, prepare studies or reports, participate in meetings, review materials, and undertake other tasks for the firm as counsel to (CLIENT NAME). We intend that your work, opinions, conclusions and communications should be covered by the attorney-client privilege and attorney work product rule to the extent provided by law, and you agree to do all things necessary to preserve those privileges. Your written work product will be governed by Rule 26 of the Federal Rules of Civil Procedure, which requires disclosure of a written expert report, among other requirements.

May 4, 2018

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APPENDIX D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

April 25, 2018

Lyle W. Cayce
Clerk

IN RE: DEPUY ORTHOPAEDICS, INCORPORATED,
PINNACLE HIP IMPLANT PRODUCT LIABILITY LITIGATION

No. 16-11051

JAY CHRISTOPHER,

Plaintiff–Appellee
Cross–Appellant,

JACQUELINE CHRISTOPHER,

Plaintiff–Appellee,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants
Cross–Appellees.

* * * * *

No. 16-11052

RICHARD KLUSMANN,

Plaintiff–Appellee
Cross–Appellant,

SUSAN KLUSMANN,

Plaintiff–Appellee,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants
Cross–Appellees.

* * * * *

Nos. 16-11051, 16-11052, 16-11053, 16-11054, 16-11056,
17-10030, 17-10031, 17-10032, 17-10034, 17-10035

No. 16-11053

DONALD GREER,

Plaintiff–Appellee
Cross–Appellant,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants
Cross–Appellees.

* * * * *

No. 16-11054

ROBERT PETERSON,

Plaintiff–Appellee
Cross–Appellant,

KAREN PETERSON,

Plaintiff–Appellee,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants
Cross–Appellees.

* * * * *

Nos. 16-11051, 16-11052, 16-11053, 16-11054, 16-11056,
17-10030, 17-10031, 17-10032, 17-10034, 17-10035

No. 16-11056

MARGARET AOKI,

Plaintiff–Appellee
Cross–Appellant,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants
Cross–Appellees.

* * * * *

No. 17-10030

MARGARET AOKI,

Plaintiff–Appellee,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants.

* * * * *

No. 17-10031

JAY CHRISTOPHER; JACQUELINE CHRISTOPHER,

Plaintiffs–Appellees,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants.

Nos. 16-11051, 16-11052, 16-11053, 16-11054, 16-11056,
17-10030, 17-10031, 17-10032, 17-10034, 17-10035

* * * * *

No. 17-10032

DONALD GREER,

Plaintiff–Appellee,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants.

* * * * *

No. 17-10034

RICHARD KLUSMANN; SUSAN KLUSMANN,

Plaintiffs–Appellees,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants.

* * * * *

No. 17-10035

ROBERT PETERSON; KAREN PETERSON,

Plaintiffs–Appellees,

versus

DEPUY ORTHOPAEDICS, INCORPORATED;
JOHNSON & JOHNSON,

Defendants–Appellants.

Nos. 16-11051, 16-11052, 16-11053, 16-11054, 16-11056,
17-10030, 17-10031, 17-10032, 17-10034, 17-10035

Appeals from the United States District Court
for the Northern District of Texas

Before SMITH, BARKSDALE, and HIGGINSON, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

These appeals and cross-appeal are from the second in a series of bell-wether trials from the Pinnacle Hip multidistrict litigation (“MDL”), in which several thousand plaintiffs claim injuries from Pinnacle hips manufactured and sold by DePuy Orthopaedics, Incorporated (“DePuy”).¹ The five plaintiffs in this consolidated action—Margaret Aoki, Jay Christopher, Donald Greer, Richard Klusmann, and Robert Peterson²—received Pinnacle’s metal-on-metal (“MoM”) design, suffered complications, and required revision surgery. They sued DePuy and its parent corporation, Johnson & Johnson (“J&J”),³ and secured a half-billion-dollar jury verdict. Defendants’ various post-trial motions—for judgment as a matter of law (“JMOL”), dismissal of claims against J&J for lack of personal jurisdiction, and a mistrial—were denied. Defendants renew all three lines of argument on appeal, attacking the verdict on nearly twenty independent bases. Plaintiffs cross-appeal, claiming Texas’s exemplary-damages cap violates the state and federal constitutions. In a companion appeal, defendants appeal the denial of relief from judgment under

¹ For background, see *In re DePuy Orthopaedics, Inc.*, 870 F.3d 345 (5th Cir. 2017).

² Three spouses—Jacqueline Christopher, Susan Klusmann, and Karen Peterson—alleged loss of consortium. Their claims were consolidated as well.

³ More precisely, J&J owns Johnson & Johnson International, Incorporated, which owns DePuy Synthes, Incorporated, which owns a subsidiary, which owns DePuy.

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Federal Rule of Civil Procedure 60(b)(3) on the ground that plaintiffs' counsel, Mark Lanier, concealed payment arrangements with two key expert witnesses.

Disposing of the two sets of appeals together,⁴ we conclude that only a few of plaintiffs' claims fail as a matter of law but that the district court's evidentiary errors and Lanier's deceptions furnish independent grounds for a new trial. Hence, we reverse in part, vacate the judgment and the order denying Rule 60(b)(3) relief, and remand.

I. Background

In 2011, the Judicial Panel on MDL ordered centralization of pretrial proceedings in the Northern District of Texas for cases involving the Pinnacle Acetabular Cup System hip implants. The parties agreed to a protocol for bellwether trials and, together, identified a pool of eight cases from which to select the candidates. The first bellwether trial lasted two months and ended in a jury verdict for J&J and DePuy (jointly "defendants"). The district court then jettisoned the seven remaining cases and ordered the parties to prepare ten new ones for trial. Five of those were consolidated, over defendants' objection, for the second bellwether trial, which lasted nine weeks and forms the basis of these appeals and cross-appeal.

At trial, plaintiffs claimed DePuy defectively designed and marketed its MoM implant and that J&J was liable, as a "nonmanufacturer seller," for aiding and abetting and for negligent undertaking. At the heart of the claims lay the contested science of modern hip prosthetics, and we begin with the narrow points of agreement. As outlined in both sides' briefs, prosthetic hips are designed to replicate the hip's ball-and-socket function and typically consist of

⁴ Plaintiffs' cross-appeal is meritless, and we dispose of it by footnote.

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four components: a *stem* inserted into the femur, a femoral *head* attached to the stem (the hip “ball”), a *cup* implanted into the hip socket (the acetabulum), and a metal *liner* that fits into the cup and against which the ball articulates.

The liner can be made from metal, polyethylene, or ceramic. The product at issue is Pinnacle’s MoM design, in which both head and liner (Ultamet) are made of metal. Plaintiffs received the Ultamet but, several years later, required revision to metal-on-plastic (“MoP”) or metal-on-ceramic designs.

The briefs and trial transcripts present competing histories on hip-implant technology. Both sides agree the story begins in the 1960s with “first-generation” MoMs, the earliest models to achieve widespread use. The parties further agree that these early MoMs carried certain health risks and were quickly displaced by Sir John Charnley’s metal-on-plastic (“MoP”) design, long described as the industry’s “gold standard.”

Here, we reach a fork. Defendants suggest that, in the 1990s, MoP was viewed as the industry’s “weak link” because of its tendency to cause osteolysis, bone loss in the area surrounding the implant. When the metal ball articulates against the plastic liner, it generates debris from plastic wear that can cause dissolving of the surrounding bone, which, in turn, can require revision surgery. Defendants, along with several other manufacturers, promoted MoMs in the early 2000s to address this Achilles’ heel and offer high-activity patients an alternative that would wear out more slowly than plastic.

Plaintiffs meanwhile tell a less rosy story. They claim defendants hastily reintroduced Ultamet to market, without conducting any clinical tests, for the sole purpose of increasing market share. Medical science had long discovered that plastic-wear debris, and the attendant risk of osteolysis, could be reduced considerably if the plastic liner was “cross-linked,” that is, sterilized through

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radiation. Yet, the theory goes, defendants lured surgeons away from cross-linked plastic's proven success through an intricate misinformation campaign of false advertisements and DePuy-authored academic papers.

On the core issue of marketing and design, the parties waged a war of the experts. Plaintiffs elicited testimony from engineers and medical scientists that Ultamet's MoM design was a producing cause of their injuries and that cross-linked MoP was a safer alternative. They also offered evidence that defendants, before bringing the product to market, were made aware of the considerable, and arguably unjustifiable, risks of MoM. Defendants' experts countered that, although MoP might be better suited to older patients, the risk-benefit calculus for younger, more active patients might still favor MoM. Defendants further maintained they had always been forthcoming with treating physicians about this risk calculus. The district court admitted several pieces of inflammatory character evidence against defendants—including claims of race discrimination and bribes to Saddam Hussein's Iraqi "regime"—reasoning the defendants had "opened the door" by repeatedly presenting themselves as "wonderful people doing wonderful things."

The jury found for plaintiffs on the five above-mentioned causes of action and returned a \$502 million verdict. It awarded just \$500,000 in economic compensatory damages and \$141.5 million in non-economic compensatory damages, and DePuy and J&J were assessed exemplary damages of \$120 million and \$240 million, respectively. The defendants made numerous post-trial motions—for JMOL on all claims, for dismissal on jurisdictional grounds, and for mistrial. All were denied, save the request that the court apply Texas's statutory exemplary-damages cap, which reduced the \$360 million to \$9.6 million. Defendants appeal the judgment, and plaintiffs cross-appeal

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application of the cap.

In a companion appeal, defendants request relief from judgment under Federal Rule of Civil Procedure 60(b)(3), based on plaintiffs' counsel's failure to disclose payments to two purportedly "nonretained" experts—Dr. Bernard Morrey ("Morrey Sr.") and Dr. Matthew Morrey ("Morrey Jr."). In preparation for the third bellwether trial, defendants discovered that before the second trial, plaintiffs' counsel Mark Lanier had made a \$10,000 donation to a charity of Morrey Sr.'s choosing, that Morrey Jr. had expected to be paid when testifying, and that the doctors had received post-trial payments totaling \$65,000. Defendants moved for relief, the court denied the motion, and defendants again appeal.

II. Claims Against DePuy

JMOL is warranted only if "a reasonable jury would not have a legally sufficient evidentiary basis" to find for the nonmovant. FED. R. CIV. P. 50(a)-(1)(B). We review the denial of JMOL *de novo*, applying "the same standard . . . the district court used in first passing on the motion." *Nobach v. Woodland Vill. Nursing Ctr.*, 799 F.3d 374, 377 (5th Cir. 2015) (quotations omitted). DePuy claims plaintiffs' design and marketing claims fail categorically and that Klusmann's and Greer's claims are barred by the relevant statute of limitations.⁵

⁵ Several of defendants' theories implicate the murkier areas of Texas tort law. In considering these challenges, we are guided by the en banc court's admonition:

[I]t is not for us to adopt innovative theories of state law, but simply to apply that law as it currently exists We are emphatically not permitted to do merely what *we* think best; we must do that which we think the [state] [s]upreme [c]ourt would deem best. . . . If the law of [the state] is to be changed, it is up to the [s]upreme [c]ourt of [the state] and not this court to change the substantive law of that state.

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A. Design Defect

To establish a design defect, plaintiffs had to prove that “(1) the product was defectively designed so as to render it unreasonably dangerous; (2) a safer alternative design existed; and (3) the defect was a producing cause of the injury for which the plaintiff seeks recovery.” *Casey v. Toyota Motor Eng’g & Mfg. N.A.*, 770 F.3d 322, 330 (5th Cir. 2014) (citations omitted). Texas law defines a safer alternative design as one that “would have prevented or significantly reduced the risk of the claimant’s personal injury . . . without substantially impairing the product’s utility.”⁶ Consistent with this risk-utility framework, a plaintiff “must show the safety benefits from [the] proposed design are foreseeably greater than the resulting costs, including any diminished usefulness or diminished safety.” *Casey*, 770 F.3d at 331 (quoting *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 196 (5th Cir. 2006)). The Texas Supreme Court and intermediate courts have held that a “substantially different product” cannot constitute a safer alternative design.⁷

Jackson v. Johns–Manville Sales Corp., 781 F.2d 394, 397 (5th Cir. 1986) (en banc) (quotation and alterations omitted). As a practical matter, our inquiry turns on the following predictive indicia:

- (1) decisions of the [state] [s]upreme [c]ourt in analogous cases, (2) the rationales and analyses underlying [state] [s]upreme [c]ourt decisions on related issues, (3) dicta by the [state] [s]upreme [c]ourt, (4) lower state court decisions, (5) the general rule on the question, (6) the rulings of courts of other states to which [state] courts look when formulating substantive law and (7) other available sources, such as treatises and legal commentaries.

Centennial Ins. Co. v. Ryder Truck Rental, Inc., 149 F.3d 378, 382 (5th Cir. 1998) (citations omitted).

⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 82.005(b). The alternative design must also be economically and scientifically feasible, see *Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 608 (Tex. App.—Houston [1st Dist.] 2003, pet. denied), but those requirements are easily satisfied, given that DePuy sold a line of MoP devices.

⁷ See *Brockert v. Wyeth Pharm., Inc.*, 287 S.W.3d 760, 770 (Tex. App.—Houston [14th

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Defendants seek JMOL on three accounts: (1) MoP is a different product, not an alternative MoM design, (2) plaintiffs’ design-defect theory is preempted because it conflicts with the goals enshrined in relevant Food and Drug Administration (“FDA”) regulations, and (3) medical-device liability is foreclosed by comment k to Restatement (Second) of Torts § 402A. Defendants fail on all three.

1.

Defendants’ first contention—that MoP is a different product from MoM—implicates thorny questions of identity and definition, practically impossible to settle in the abstract.⁸ In select instances, nonidentity will be obvious: For example, a proposal to add two additional wheels to a motorcycle or to “fully enclos[e] the cab” of a convertible. *Caterpillar*, 911 S.W.2d at 385. But this case does not lend itself to such straightforward resolution, as the parties dispute how to characterize the relevant product: Is it a “high-stability, low-wear” implant, of which MoP and MoM are merely two alternative iterations? Or is it the discrete MoM design, in which case MoP is a completely different beast? Hewing carefully to guidance provided by Texas courts, we conclude, based on the record, that MoP is a viable alternative design to MoM.

The alternative-design/different-product distinction emerges from two Texas cases, both distinguishable from the present. In *Caterpillar*, the Texas Supreme Court considered whether a front-end loader with a removable rollover-protection structure (“ROPS”) was defectively designed. *Id.* at 383–

Dist.] 2009, no pet.); *see also Caterpillar Inc. v. Shears*, 911 S.W.2d 379, 385 (Tex. 1995).

⁸ *Cf. Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1076 (5th Cir. 1986) (“It is important, but difficult, to determine at the outset the appropriate level of generality at which to assess appellant’s [products liability] claims.”); *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 529 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.).

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85. The court rejected the plaintiff’s proposed alternative—in which the ROPS was rendered non-removable—because the non-removable structure would thwart the ROPS’s “intended” function of enabling access to “low clearance areas.” *Id.* at 384–85. The court refused to “impose liability in such a way as to eliminate whole categories of *useful products* from the market.” *Id.* at 385 (emphasis added).

In *Brockert*, 287 S.W.3d at 769, the Texas Court of Appeals applied this principle in the pharmaceutical context to conclude that an estrogen-only drug was not a safer alternative design to Prempro, a combination of estrogen and progestin, despite that both served “the same general purpose” of treating menopausal symptoms, *id.* The plaintiff claimed her estrogen-only alternative eliminated the risk of breast cancer introduced by Prempro. *Id.* The court rejected the argument, explaining that progestin helped “reduce the incidence of endometrial hyperplasia,” *id.* at 770, and that the plaintiff had failed to “explain how Prempro could have been modified or improved” without compromising that function, *id.* at 771. Thus plaintiff’s theory was rejected as a “categorical attack” on the relevant product. *Id.*

Doctrinally, it is notable that both *Caterpillar* and *Brockert* rejected a plaintiff’s proposed alternative for failing to perform the discrete *kinds* of functions for which the alleged defective was designed—*e.g.*, accessing low clearance areas or reducing incidence of endometrial hyperplasia. But neither case clearly supports the proposition that a slight difference in *degree*—that is, that the alternative does all of the things for which the allegedly defective product was designed, but does not do one of them quite as well—automatically renders the plaintiff’s proposed alternative an entirely different product. Though this kind/degree distinction cannot dispel the underlying problem of

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characterization,⁹ it finds direct support in the above caselaw and coheres with the overall structure of Texas design-defect law.

Texas’s risk-utility test plainly contemplates that a proposed alternative design might reduce a product’s utility—that is, its capacity to perform a function for which it was designed—without rendering the alternative an entirely different product.¹⁰ If any distinction in degree rendered the proposed alternative a different product as a matter of law, that would effectively moot the substantive balancing test for liability. Where the distinction is one of degree only, the risk-utility framework provides the proper mode of analysis.

Defendants claim to have identified two relevant functional distinctions between MoM and MoP: (a) Metal is more durable than plastic and, therefore, more suitable to younger patients “who often seek not just pain relief but also the ability to resume an active lifestyle”; and (b) metal remedies osteolysis by “*eliminat[ing]* plastic debris entirely.” Neither purported distinction, however, shows MoP to be an “entirely different product” under the above, proper framework. *See Brockert*, 287 S.W.3d at 770. To the first: Durability is a distinction in degree rather than kind. All hip implants—plastic, metal, or ceramic—are designed with the twin goals of minimizing wear debris and affording maximal longevity. Defendants’ own promotional materials characterize both their MoP (AltrX LD) and their MoM (Ultamet XL) as “high stability, low wear” hip implants; they never suggest the latter enables the implantee to perform discrete tasks otherwise impossible with the former. *Brockert* and *Caterpillar* are thus distinguishable.

⁹ For example, parties could merely dispute the level of generality at which the product’s function should be described.

¹⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 82.005(b) (stating that a proposed alternative design must not “*substantially* impair[] the product’s utility”) (emphasis added).

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The question then is whether plastic substantially impairs the hip implant’s utility along the durability axis. *See Bell Helicopter*, 594 S.W.2d at 529. And though defendants presented evidence that metal was an “attractive option” for younger patients, plaintiffs presented contrary evidence that cross-linked plastic was preferable “a hundred times out of a hundred” and that it outperformed metal along the survivorship dimension by a wide margin. On this evidentiary record, we cannot conclude, as a matter of law, that MoP substantially impairs the implant’s utility in terms of stability and rate of wear.

As for reduction of osteolysis, plaintiffs rightly observe that cross-linked polyethylene was intended to do the same thing. The question then is whether the risk of osteolysis from cross-linked MoP substantially reduces MoM’s utility, and the record says not. A DePuy executive conceded that MoM, too, can cause osteolysis, and DePuy seems to have known, when it sold Ultamet, that cross-linked plastic significantly reduced the relevant risk.¹¹ Thus, defendants have not identified a sufficiently discrete functional advantage to prove

¹¹ Defendants shift course in their reply brief, stressing that MoM “eliminate[s] *plastic debris*.” That distinction is real but “of little analytical value.” *Bell Helicopter*, 594 S.W.2d at 529. MoM was believed to constitute an improvement over MoP not because it eliminated the use of plastic, but because it purported to reduce the occurrence of *adverse conditions* associated with plastic debris (osteolysis).

Put differently, plastic elimination was only the means, never the functional endgame. And though plaintiffs must do more than show that MoP has “the same general purpose as the allegedly defective product,” *Brockert*, 287 S.W.3d at 770, the facts of *Brockert* show that performing the defective product’s basic function, while simultaneously reducing the probability of a specific side effect, is sufficiently particularized for the purposes of alternative-design analysis, *see id.* at 769–70; *see also* RESTATEMENT (THIRD) OF TORTS: Products Liability § 2, cmt. f, illustration 8 (explaining that when a defendant markets a new television antenna that utilizes the electrical system in the buyer’s home, and “improves reception compared with traditional television antennas, but also introduces significant risks of electrical shock and electrocution,” the plaintiff may point to “traditional television antennas” as a reasonable alternative design and is “not confined to offering variations of television antennas that rely on electrical wiring systems” because the novel wiring method is “*merely a*

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MoP is fundamentally a different product.

At oral argument, defendants suggested the different-product/-alternative-design question should be decided from the *ex ante* perspective, when DePuy believed MoM would eliminate osteolysis and substantially outperform plastic. That those marginal benefits may have failed fully to materialize is ostensibly irrelevant to the inquiry. But defendants cite no cases for this contestable proposition¹²; and regardless, its application here would require the equally contestable factual assumption that defendants did not, and could not, reasonably foresee the risks of instability and metallosis that, according to plaintiffs, dwarf MoM's purported benefits. Plaintiffs presented evidence that defendants knew, even before December 2004 (the earliest date on which any plaintiff received his or her implant) that cross-linked MoP meaningfully addressed the osteolysis risk and that MoM carried potentially catastrophic risks of failure. Thus, the jury could reasonably conclude, even under defendants' *ex ante* framing, that plaintiffs had identified a viable alternative design.¹³

means of achieving the objective of improved television reception" (emphasis added)).

¹² Defendants' proposal presents interrelated problems of proof and incentives. On the incentive side, sophisticated actors could exploit the rule by making sub-optimal investments in *ex ante* risk detection, blinding themselves to the potential dangers of a particular product. And, as for proof, how should courts go about discerning the manufacture's "*ex ante*" intentions? Should we ask the engineers how they expected the innovation to perform relative to its market alternatives? Must we credit a designer's self-serving speculation as to the magnitude of expected benefit as well? *See generally* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 237–38 (2004). These and other evidentiary problems counsel caution. Additionally, the purpose of the "different product" rule is to guard against "eliminat[ing] whole categories of *useful* products from the market," *Caterpillar*, 911 S.W.2d at 385 (emphasis added); and, obviously, the aspiration for usefulness does not, by itself, imply its attainment.

¹³ *See Torkie-Tork v. Wyeth*, 739 F. Supp. 2d 895, 901 n.8 (E.D. Va. 2010) (reading *Brockert* for the proposition that the question whether minor "changes would fundamentally

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Defendants draw our attention to several other cases applying the alternative-design/different-product distinction, but none disturbs the above conclusion. First is *Theriot v. Danek Medical, Inc.*, 168 F.3d 253 (5th Cir. 1999), in which the plaintiff alleged a design defect in pedicle screws used for spinal stability. The plaintiff identified “external neck braces or internal systems that use hooks or wires” as potential alternative designs, *id.* at 255, and, applying Louisiana law, we rejected that theory as “tak[ing] issue with the choice of treatment [i.e., the use of pedicle screws] made by Theriot’s physician, not with a specific fault of the pedicle screw sold by [the defendant],” *id.* As the facts of that case make clear, Theriot’s proposed alternatives were obviously of a different categorical and structural ilk. Any analogy from that case to this one flatly begs the underlying issue of characterization.¹⁴

Defendants also cite *Hosford v. BRK Brands, Inc.*, 223 So. 3d 199 (Ala. 2016), holding that ionization smoke alarms and dual-sensor smoke alarms are different products. The plaintiffs argued ionization alarms were defective because they “fail to provide adequate warning” of a fire that “begins as . . . slow [and] smoldering,” *id.* at 204, and they identified the “more expensive”

transform [an allegedly defective product] into a completely different product [may be] a genuine issue of fact appropriate for jury resolution”).

¹⁴ *Cf. Michael v. Wyeth, LLC*, No. 2:04–0435, 2011 WL 2150112, at *12 (S.D.W.V. 2011) (finding that “synthetic” and “natural” progestin are “within the same class of [hormone replacement therapy] drugs that allegedly injured” the plaintiff, and distinguishing *Theriot* accordingly). Defendants also cite *Damian v. Bell Helicopter Textron Inc.*, 352 S.W.3d 124 (Tex. App.—Fort Worth 2011, pet. denied), but that case actually supports plaintiffs’ position. There, plaintiffs were injured in a helicopter crash that occurred after a bird penetrated the windshield, and they sued the manufacturer, alleging defective design. *Id.* at 130–31. The court rejected the claim because installation of a larger, bird-resistant windshield would require that the helicopter be completely restructured, turning a small and agile chopper into a heavier model. *Id.* at 150 n.19, 154 n.26. As in *Theriot*, the proposed alternative would require a dramatic restructuring of the product; here, in contrast, the plastic and metal liners are effectively interchangeable parts in the Pinnacle hip set. The contrast is obvious.

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dual-sensor alarms, which incorporate both ionization and “photoelectric technology,” as a safer alternative, *id.* Applying *Brockert* and *Caterpillar*, the court deemed them two different products, based primarily on the wide disparity in price. *Id.* at 207. That court feared liability would drive the “less expensive [option] from the market . . .[,] result[ing] in no smoke alarm being present” in homes like the plaintiffs’. *Id.*

Here, that empirical judgment is obviously inapposite, given that several plaintiffs were revised to the very alternative they propose. None of defendants’ cases counsels reversal on our facts.

2.

Defendants suggest the design-defect claims are preempted because they “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives” reflected in the MoM-related regulations of the FDA. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Defendants’ obstacle-preemption theory fails at two levels, misconstruing both the FDA’s objectives with respect to MoMs and the alleged state-law obstacle in its path.

We begin with the federal objective. Before 1976, the Federal Food, Drug, and Cosmetic Act left “the introduction of new medical devices . . . largely for the States to supervise.” *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 315 (2008). Congress stepped in with the Medical Device Amendments of 1976 (MDA) and imposed, for the first time, “a regime of detailed federal oversight,” which authorized the FDA to regulate medical devices under a three-tiered, risk-based classification scheme. *Id.* at 316. Devices classified as class I or II can be made reasonably safe through compliance with FDA’s “general controls” or “special controls,” whereas class III is reserved for cases in which “insufficient information exists to determine” whether general or special controls can

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ensure the product’s “safety and effectiveness.” 21 U.S.C. § 360c(a)(1)(A)–(C). In addition, Congress granted the FDA discretionary authority to ban outright any product that “present[s] . . . an unreasonable and substantial risk of illness or injury.” *Id.* § 360f(a)(1); *see generally Riegel*, 552 U.S. at 315–17.

Before class III devices can be brought to market, they generally must survive the FDA’s rigorous premarket approval (“PMA”) process, designed to ensure a device’s “safety and effectiveness.” 21 U.S.C. § 360e(d)(1)(A). That process is “quite time consuming,” requiring “an average of 1,200 hours [for] each submission.” *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 344–45 (2001) (quotation omitted). The statute carves out an exception for “predicate” devices that were on the market before 1976, which can remain in circulation “until the FDA initiates and completes the PMA process.” *Id.* at 345; *see also* 21 U.S.C. § 360e(b)(1)(A). And “to avoid the potentially monopolistic consequences of th[e] . . . exception,” the MDA also exempts any “substantial equivalents” of these predicate devices. *See Buckman*, 531 U.S. at 345; 21 U.S.C. § 360e(b)(1)(B). These equivalents enter the market through what is known as the “510(k) process,” which requires an applicant to show that the device either “has the same technological characteristics as the predicate device” or “is as safe and effective as a legally marketed device.” 21 U.S.C. § 360c(i)(1)(A)(i)–(ii).

The 510(k) process does not “denote official approval of the device”; to create a contrary “impression . . . constitutes misbranding.” 21 C.F.R. § 807.97. The process “provide[s] little protection to the public” because it is “focused on *equivalence*, not safety.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 493 (1996) (quotations omitted). More recently, however, the agency has clarified, in guidance documents, that “principles of safety and effectiveness underlie the

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substantial equivalence determination in every 510(k) review.”¹⁵

The MDA contains an express-preemption provision that prohibits states from “establish[ing] . . . any requirement[] (1) which is different from, or in addition to any [MDA] requirement applicable . . . to the device, and (2) which relates to [its] safety or effectiveness.” 21 U.S.C. § 360k(a). The clause covers class III, PMA products, *Riegel*, 552 U.S. at 322–23, but not 510(k)-approved products, *id.* at 322; *Lohr*, 518 U.S. at 493–94.

As relevant here, MoMs were sold before 1976 and have traditionally been treated as pre-amendment class III devices that can be brought to market through the 510(k) process. Ultamet followed that route in December 2000, when defendants characterized the product as a substantial equivalent of Ultima, one of J&J’s eventually recalled MoMs. In 2013, shortly after the FDA issued a proposed order requiring that all MoMs receive PMA, defendants chose to remove Ultamet from the market. The FDA finalized its order three years later and has not since granted PMA to any MoMs having a structure resembling Ultamet’s.¹⁶

Defendants suggest plaintiffs’ *theory* of liability—that MoMs are “categorically defective”—flouts the FDA’s considered judgment that MoMs should not be banned outright but rather regulated, and should remain available, as

¹⁵ U.S. Dep’t of Health and Human Servs., et al., *The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications* 6 (July 28, 2014), <http://www.fda.gov/downloads/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM284443.pdf>. *But see Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304, 1318 (11th Cir. 2017) (holding the district court did not abuse its discretion in excluding evidence of 510(k) review in a products-liability suit because the “510(k) review process is not relevant to a product’s safety”).

¹⁶ See 21 C.F.R. § 888.3330(b); U.S. Food & Drug, *Premarket Approval (PMA)*, available at <http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfPMA/pma.cfm>. At oral argument, defendants conceded as much.

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class III medical devices. That theory fails at two levels.

First, plaintiffs' *burden* was to show only that Ultamet was defective, not that all MoMs were. And because Ultamet was off the market before the trial, the verdict cannot have thwarted the FDA's objectives in that narrow respect. Defendants reply that plaintiffs' only colorable theory at trial covered the MoM interface writ large. Maybe so, but defendants' position assumes, without any support, that our obstacle-preemption inquiry looks through the verdict and judgment to the arguments that lie beneath them. This seems unlikely, as it is the judgment, and not the parties' assertions, that carries binding effect and the attendant power to disrupt the federal regulatory scheme.¹⁷

But even under defendants' look-through inquiry, it is not the case that plaintiffs' theory reached *all possible MoMs*. All would agree that, despite the sweeping language with which plaintiffs presented their case, their claims were impliedly limited to presently available technologies and the adverse health effects they allegedly engender.¹⁸

This seemingly pedantic point is fatal to defendants' preemption argument. The FDA effectively withdrew all MoMs from the market with its February 2016 final rule and left open a single door in the form of PMA. Arguably, the final rule contemplates the possibility that every MoM then on the market would (and perhaps should) fail PMA. That the FDA chose not to ban MoMs as a class proves no more than that it wished to give manufacturers an opportunity to create MoMs not contemplated by plaintiffs' theory of liability.

¹⁷ *United States v. Shirey*, 359 U.S. 255, 261 n.5 (1959) (Frankfurter, J.) ("Th[e] Court reviews judgments, not arguments . . . seeking to sustain them.").

¹⁸ For example, a claim that all MoPs are defective, if made before the development of cross-linked MoPs, would probably not reach next-generation, cross-linked plastic that reduces the very risks that made first-generation MoPs defective.

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Unless and until the FDA actually grants PMA to an extant MoM that carries the risks that made Ultamet defective, defendants cannot prove that even plaintiffs' theory of liability obstructs the FDA's regulatory objectives.

3.

Defendants assert plaintiffs' claims are foreclosed by comment k to Restatement (Second) of Torts § 402A:

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like

RESTATEMENT (SECOND) OF TORTS § 402A, cmt. k. The Texas Supreme Court has incorporated § 402A into its common law, *New Tex. Auto Auction Servs. v. Gomez de Hernandez*, 249 S.W.3d 400, 403 (Tex. 2008), and has considered comment k in the prescription-drug context, *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 165 (Tex. 2012). But it has never expressly extended the immunity rule to medical implants, let alone 510(k)-cleared devices, on either a categorical or a product-by-product basis.¹⁹

Jurisdictions are split on whether medical devices enjoy blanket

¹⁹ Defendants' suggestion that Texas has already rejected the case-by-case approach is unfounded. They rely on a lone federal district court decision from the prescription-drug context; but that decision relied on no more than its own policy judgment and three decisions from other jurisdictions. See *Hackett v. G.D. Searle & Co.*, 246 F. Supp. 2d 591, 595 (W.D. Tex. 2002).

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immunity,²⁰ with the majority of courts favoring the case-by-case methodology.²¹ Defendants ask that we deviate from that trend and foreclose all implant-based litigation, based on the conjecture that Texas courts might one day redraw liability boundaries in their favor. But defendants present scant predictive indicia *from Texas* to that effect, and we decline to step so far ahead of Texas courts, and against the majority view, in foreclosing broad avenues to suit.²² Comment k does not bar plaintiffs' claims.

B. Marketing Defect

To prevail on their marketing-defect claims, plaintiffs had to show (a) “the warning was defective” and (b) the defect “was a producing cause of the injury.” *Ackermann v. Wyeth Pharm.*, 526 F.3d 203, 208 (5th Cir. 2008) (citation omitted). Defendants seek JMOL on three grounds: The relevant warnings were adequate as a matter of law, plaintiffs presented no properly designated warning expert, and they failed to prove causation. We conclude that defendants are entitled to JMOL for want of causation, but only as to Greer’s and Peterson’s marketing-defect claims.

²⁰ Compare *Hufft v. Horowitz*, 5 Cal. Rptr. 2d 377, 383 (Cal. Ct. App. 1992), with *Hill v. Searle Labs.*, 884 F.2d 1064, 1067–69 (8th Cir. 1989).

²¹ See *Transue v. Aesthetech Corp.*, 341 F.3d 911, 916 n.2 (9th Cir. 2003) (collecting relevant decisions).

²² *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1217 (5th Cir. 1985) (“[I]t is not for us to adopt innovative theories of recovery or defense for Texas law, but simply to apply that law as it currently exists.” (emphasis added)); *Lofton v. McNeil Consumer & Specialty Pharms.*, 682 F. Supp. 2d 662, 679 (N.D. Tex. 2010) (“The court will not take a leap not taken by Texas courts and apply [comment k] to an over-the-counter drug[.]”). Defendants have not preserved the argument that, under a product-by-product approach, Ultramet should enjoy immunity under comment k. But even if they had, Texas caselaw offers almost no guidance on how to go about that case-by-case inquiry. Here, we are resolved to the proposition that a reasonable jury could find defendants’ product was not of the kind contemplated by comment k. See, e.g., *Hill*, 884 F.2d at 1068–69 (reserving comment k for products “incapable of being made safe given the present state of human knowledge but possess[ing] such a high degree of social need so that [their] use is warranted, provided warnings are adequate”).

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1.

The adequacy of a warning is generally a question of fact. “However, if a warning specifically mentions the circumstances complained of, then the warning is adequate as a matter of law.” *Seifried v. Hygenic Corp.*, 410 S.W.3d 427, 433 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citations omitted). Defendants claim this is such a case.

By defendants’ description, plaintiffs all “experienced corrosion and friction wear from their hip implants” and “suffered adverse reactions to that debris.” Defendants claim specifically to have warned of these circumstances in the two “Instructions for Use” pamphlets (IFUs) inserted into their acetabular cup and metal liner packages. The cup’s IFU warns that “[t]issue reactions, osteolysis, and/or implant loosening caused by metallic corrosion, allergic reactions, or the accumulation of polyethylene or metal wear debris or loose cement particles” are among “the most frequently encountered adverse events . . . in hip arthroplasty.” The liner’s IFU additionally warns of “[s]ubclinical nerve damage . . . associated with surgical trauma,” “subluxation resulting from importer position and/or muscle and fibrous tissue laxity,” “[h]istological reactions [from] exposure to a foreign material,” “higher ion release” where “bone cement is not used,” and the “potential for release of metallic debris into the joint space.” Defendants maintain these warnings reach all of plaintiffs’ purported conditions and were therefore adequate as a matter of law.

But in determining whether warnings are adequate as a matter of law, Texas courts subject them to a demanding standard of specificity. In *Jordan v. Geigy Pharmaceuticals*, 848 S.W.2d 176, 182 (Tex. App.—Fort Worth 1992, no writ), where the plaintiff suffered renal failure from an anti-inflammatory, the court reversed a summary judgment for the defendant on the plaintiff’s

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failure-to-warn claim. It held that the warning at issue—which described “renal pathology in *long-term* administration to animals” and “overt renal failure . . . *typically followed by recovery to the pretreatment state*”—did not sufficiently address “irreversible renal failure” or “acute renal failure,” both suffered by the plaintiff. *Id.* at 181–82. Plaintiffs’ position here is at least as compelling.

As for the cup IFU, it was drafted *before* the Ultamet liner was ever created, and it addresses only general adverse events relevant to all hip arthroplasty. Assuming Ultamet is defective for the reasons plaintiffs allege, the warning fails to put surgeons on notice as to the distinctive risks that arise from MoM—“metallosis,” “pseudotumors,” and “tissue necrosis”—or the magnitude of those risks. The liner IFU fares no better: It fails squarely to address “metal wear debris” that occurs when the metal ball articulates against the metal liner, the underlying cause of plaintiffs’ injuries. And, taken in context, its warnings about nerve damage, dislocation, and ion release concern complications not at issue in this case—*e.g.*, surgical trauma and the implant’s adaptation to the bone.

Not until after the FDA issued its proposed rule in 2013 did defendants specifically warn about the metallosis, pseudotumors, and tissue necrosis—the sorts of conditions that plaintiffs maintained caused their revision surgery. In short, though defendants’ IFUs identified metal debris generally, a reasonable jury could conclude that the warning failed to describe with reasonable specificity the source of the wear-debris problem, the conditions to which it gives rise, and the magnitude of the risk. Texas law requires a closer match than these defendants can show.

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2.

Defendants alternatively suggest plaintiffs failed to provide expert testimony that the device was defectively marketed. They note that Morrey Jr., plaintiffs' only expert to testify on the allegedly inadequate warning, was never designated as an expert on warnings *per se*²³ and never testified directly on the contents of Ultamet's IFUs. Both claims are unpersuasive. To the first: Plaintiffs designated Morrey Jr. as their warnings expert before trial, and as the surgeon-intermediary tasked with interpreting and applying the warning, he was likely equipped to assess its adequacy. To the second: Plaintiffs' counsel read excerpts from warnings included in an FDA study in 2000 but later excised from the IFUs. Morrey Jr. replied that physicians "should have been made aware of those things, because those are the same risks that you're going to tell your patient when you're counseling them." This was sufficient to allow a reasonable jury to conclude the IFUs' warnings were inadequate.

3.

Defendants claim plaintiffs failed to show the inadequate warning actually caused their physicians to select Ultamet. Under the learned-intermediary ("LI") doctrine, which Texas applies in "medical products liability actions,"²⁴ "the manufacturer . . . satisfies its duty to warn the end user of its product's potential risks by providing an adequate warning to a 'learned intermediary,' who then assumes the duty to pass on the necessary warnings to the end user." *Centocor*, 372 S.W.3d at 142. Where the LI doctrine applies, plaintiffs must show that, but for the inadequate warning, their doctors would have

²³ See *Perez v. Goodyear Tire & Rubber Co.*, No. 04-14-00620-CV, 2016 WL 1464768, at *9 (Tex. App.—San Antonio 2016, no pet.).

²⁴ *Porterfield v. Ethicon Inc.*, 183 F.3d 464, 468 (5th Cir. 1999) (citing *Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656, 663 (Tex. App.—Houston [14th Dist.] 1998, no pet.)).

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recommended different treatment, *see Ackermann*, 526 F.3d at 208, 214, or provided additional warnings that would have led plaintiffs to withhold consent, *McNeil v. Wyeth*, 462 F.3d 364, 373 (5th Cir. 2006).²⁵ The issue is generally a fact question, but “[w]hen the prescribing physician is aware of the product’s risks and decides to use it anyway, any inadequacy [in] the product’s warning, as a matter of law, is not the producing cause of the patient’s injuries.” *Centocor*, 372 S.W.3d at 170.

At the threshold, the parties debate the relevance, under Texas law, of “objective evidence”—that is, evidence “that a different warning would have affected the decision of a reasonable doctor.” *Id.* at 171. The Texas Supreme Court referenced “objective evidence” just once, in *Centocor*, noting that the plaintiffs not only “lack[ed] subjective evidence [about what the particular physician would have done] but presented no *objective evidence* that a different warning would have affected the decision of a reasonable doctor to prescribe [the relevant drug] for [plaintiff’s] condition.” *Id.* (emphasis added). Here, plaintiffs proffered objective evidence in Morrey Jr.’s testimony that, if the full risks of MoM were known to physicians, “they would run to polyethylene.”

At least one federal district court has dismissed *Centocor*’s language as *dictum*²⁶—but that is error. As our caselaw makes plain, non-binding language from the state supreme court is the second- or third-best predictive indicium of how that court might decide an underdetermined legal question. *Centennial*,

²⁵ Plaintiffs posit only that DePuy had a duty to warn Aoki and Klusmann directly of Ultamet’s risks. *See Murthy v. Abbott Labs*, 847 F. Supp. 2d 958, 971–73 (S.D. Tex. 2012). Because we conclude that the jury’s causation findings as to those patients are not unreasonable even if LI applies, we need not consider this alternative theory.

²⁶ *In re Mentor Corp.*, MDL Docket No. 2004 4:08-MD-2004 (CDL), Case No. 4:13-cv-229 (Burke), 2016 WL 4611572, at *3 (M.D. Ga. Sept. 2, 2016).

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149 F.3d at 382. Though the *dictum* here is weak—the court was emphasizing how thoroughly the *Centocor* plaintiffs had failed to make their case, *Centocor*, 372 S.W.3d at 171, rather than affirmatively describing the types of proof that might sustain plaintiffs’ burden—it suggests objective evidence is at least relevant to the inquiry.

Relevance, however, does not imply sufficiency. In the LI context, causation entails *two distinct factual predicates*: first, that the doctor would have read or encountered the adequate warning²⁷; and second that the adequate warning would have altered his treatment decision for, or risk-related disclosures to, the patient.²⁸ *Centocor* addressed only the latter, suggesting a jury *might* be allowed to presume a particular physician would respond “reasonably” to fuller disclosure. But that presumption must yield to contrary subjective testimony by the treating physician,²⁹ and *Centocor* fails to explain how objective evidence would apply to whether that doctor would have read or encountered the warning in the first instance.³⁰ When considered for the limited purpose intimated in *Centocor*, objective evidence would have little

²⁷ *Pustejovsky v. Pliva Inc.*, 623 F.3d 271, 277 (5th Cir. 2010) (rejecting, at summary judgment, failure-to-warn claim where treating physician “did not recall ever reading the package insert” and plaintiff offered no more than “speculat[ion] about other ways an adequate warning might have reached [the treating physician] and altered her decision”).

²⁸ See *Centocor*, 372 S.W.3d at 170; *Ackermann*, 526 F.3d at 208; *McNeil*, 462 F.3d at 373.

²⁹ See *Centocor*, 372 S.W.3d at 170; *Ackermann*, 526 F.3d at 208.

³⁰ *Pustejovsky*, 623 F.3d at 277. Relatedly, our court has expressed “doubt” that Texas recognizes either prong of the “read-and-heed” presumption in the LI context. *Ackermann*, 526 F.3d at 213; *Ebel v. Eli Lilly & Co.*, 321 F. App’x 350, 358 (5th Cir. 2009). *But see Koenig v. Purdue Pharma Co.*, 435 F. Supp. 2d 551, 557 (N.D. Tex. 2006) (describing a modified read-and-heed presumption under which the “physician would have incorporated the additional risk into his decisional calculus,” and speculating “this is the likely analysis applied by Texas Courts”). At most, the *dictum* in *Centocor* addresses the “heed” half of the presumption, but it says nothing of whether the physician would “read” the warning in the first place.

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bearing on any of plaintiffs' claims.

Take Greer and Peterson. Their treating physicians, Goletz and Schoch, did not testify, and plaintiffs offer no record evidence suggesting the two actually read or encountered defendants' inadequate warnings. On appeal, plaintiffs cite only their own statements for support: Greer testified Goletz told him his "[MoM] would not wear, [and] would last [his] lifetime," and according to Peterson, Schoch said the same "because [Peterson's MoM] wouldn't have any plastic to wear out." But these snippets say nothing of how the doctors came to hold their respective views. Did Schoch and Goletz rely upon defendants' representations in choosing Ultamet, or did they learn of MoM's purported advantages by some other means? If the latter, how would better disclosure have reached the doctors? Not even "objective evidence" can fill these discrete evidentiary voids. The jury was left to guess, and plaintiffs' claims fail as a result. *See Pustejovsky*, 623 F.3d at 277.

Aoki's and Klusmann's claims are more complex, given that the testimony from their treating physician, Heinrich, contains somewhat mixed signals. On the one hand, Heinrich claimed he was aware of the "risk of ions attacking the tissue and the bone and getting in the blood" when he chose to implant both patients with MoM. *See Centocor*, 372 S.W.3d at 169–71. And yet, his testimony also suggests defendants' omissions and misrepresentations played some part in his treatment decisions of both patients.

In Aoki's case, Heinrich testified he used aSphere, Pinnacle's metal femoral head, because DePuy's "simulator data" suggested it "minimize[d] th[e] wear-in phase"—the immediate post-operative period in which articulation causes "an increased release of ions"—relative to alternative metal head designs. Heinrich "asked" "DePuy people" about "aSphere" and "made the

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decision” to use the product “based on” their representations. Meanwhile, plaintiffs presented Heinrich with emails suggesting DePuy knew its claims about aSphere were untrue, a deception Heinrich seemed to know nothing about. Heinrich also acknowledged more generally that “J&J[/]DePuy” said nothing of the increased “problems” with MoMs in “2008, 2009, maybe even in 2010.”

Klusmann’s case presents a similarly mixed bag. He received bilateral MoM implants in 2004 and 2005 and began to experience intermittent pain as early as 2006. Heinrich consistently treated Klusmann with “conservative care” until 2011, when he first recommended revision. In explaining that delay, Heinrich testified that “doing things like checking ion levels and things of that nature” was less common then. Plaintiffs’ counsel then read a letter from a DePuy physician criticizing MoMs for their potentially “catastrophic complications” and detailing the proper post-operative detection procedures. He then asked Heinrich, “[I]f DePuy had sent you this information—it certainly would have changed the way you were treating Mr. Klusmann, wouldn’t it?” Heinrich offered a qualified replied: “To a certain degree. The only thing I would say is that he put in here that once he has ruled out other issues like back problems, loose implants, tendinitis, then he goes on to this workup. And so from that standpoint, yes, I agree.” At the least, this testimony suggests DePuy’s omission altered the course of Klusmann’s post-operative care.

To summarize: Though Heinrich had general awareness of the possibility that metal wear debris could cause adverse tissue reactions, he seems to have been unaware of (a) the magnitude of the risk, (b) the proper post-operative procedures to be followed with MoM patients who experience pain (Klusmann), and (c) DePuy’s misstatements about aSphere’s wear-related

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advantages (Aoki). Additionally, Heinrich relied on disclosures by DePuy's representatives in making his treatment decisions. A reasonable jury could discern causation on two bases. First, Heinrich's mixed messages may have been too equivocal to rebut plaintiffs' objective evidence, *cf. Centocor*, 372 S.W.3d at 169; and second, the subjective testimony itself—which included evidence of both deception and reliance—likely permitted an inference of causation. Either way, there is nothing unreasonable in the causation findings as to Aoki and Klusmann.

Christopher's case is the most straightforward of the lot. Kearns, his treating physician, testified, "The metal liner, according to the data supplied by the company, through publication and representatives, [could] last much longer than all the other product liners available at the time." Kearns claimed he "got [his] information from" "a DePuy consensus panel," a "brochure that [his] DePuy representative gave [him]," "word of mouth, from [his] partners, and from the literature . . . scientific journals." Yet, he was "never told" that the newer MoM designs were "unpredictable" and could lead to "a sudden catastrophic breakdown of the bearing." Defendants stress that Kearns never read the Ultamet's IFUs, but that concession, by itself, is not fatal. For Kearns's testimony makes clear he relied on DePuy to apprise him of the risks, and it plausibly suggests he would have learned of Ultamet's risks by other means. *Cf. Pustejovsky*, 623 F.3d at 277. Christopher's claim easily succeeds.

In short, defendants were entitled to JMOL on marketing-defect claims by Greer and Peterson. That is not so for Aoki, Christopher, or Klusmann.

C. Statute of Limitations

Defendants suggest Greer's and Klusmann's claims are barred by Texas's statute of limitations, which requires that personal injury suits be filed

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“not later than two years after the day the cause of action accrues.” TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). Under Texas’s discovery rule, limitations is tolled “until the plaintiff discovers, or through the exercise of reasonable care and diligence should have discovered, the nature of the injury.”³¹ “The term ‘discovered[]’ . . . is quite broad,”³² and it occurs whenever the plaintiff “has knowledge of facts which would cause a reasonable person to diligently make inquiry to determine his or her legal rights.”³³

Greer and Klusmann received their MoM implants in 2004 and 2005, respectively, underwent revision surgery between 2011 and 2012, and sued within a few months of revision. Defendants claim that both began to experience hip-related pain as early as 2008, placing them on inquiry notice as to potential defects in their implants outside the statutory window. That assertion assumes pain was a “fact” sufficient to motivate an inquiry into the implant’s defect. But both the record and Texas caselaw suggest otherwise.

The record shows that despite plaintiffs’ and their surgeons’ diligence, neither group linked plaintiffs’ symptoms to a potential defect in Ultamet for several years post-implant. And Texas caselaw confirms that appellate courts will reverse the factfinder’s judgment on the accrual date only where the connection between the treatment decision and the pain is obvious—for example, when the plaintiff or his physician expressly connects the symptom to the

³¹ *Porterfield*, 183 F.3d at 467; see also *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990).

³² *Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1140 (5th Cir. 1997).

³³ *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 754 (Tex. App.—Amarillo 1995, writ denied); see also *Pirtle v. Kahn*, 177 S.W.3d 567, 571 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

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allegedly defective product.³⁴ Because none of defendants' record citations proves this, we lack a sufficient evidentiary basis to reverse the finding of timeliness.

III. Personal Jurisdiction

J&J claims it was never a proper party because the district court lacked personal jurisdiction over it. The due-process standard is familiar: A defendant must make "minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quotations and alterations omitted).³⁵ Jurisdiction may be general or specific. The former requires "continuous and systematic" forum contacts and allows for jurisdiction over all claims against the defendant, no matter their connection to the forum. *Id.* (citations omitted). In contrast, the latter obtains only where a defendant "purposefully direct[s]" his activities toward the state, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), and the plaintiff's claim "aris[es] out of or [is] related to" the defendant's forum contacts, *J. McIntyre Mach., Ltd.*

³⁴ See *Porterfield*, 183 F.3d at 467 (holding that limitations began to run when plaintiff "knew" her abdominal symptoms were associated with a mesh implant, despite that surgery revealed for the first time that the mesh had attached to her stomach and liver); *Bell*, 899 S.W.2d at 755 (holding that limitations began to run as soon as plaintiffs associated their symptoms with the ingestion of a nutritional supplement that caused the disease); *Vaught*, 107 F.3d at 1139 (same).

³⁵ "A federal court sitting in diversity may exercise personal jurisdiction over a non-resident defendant (1) as allowed under the state's long-arm statute; and (2) to the extent permitted by the Due Process Clause of the Fourteenth Amendment." *Mullins v. Test-America, Inc.*, 564 F.3d 386, 398 (5th Cir. 2009). Here, "[b]ecause the Texas long-arm statute extends to the limits of federal due process, the two-step inquiry collapses into one federal due process analysis." *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008).

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v. Nicastro, 564 U.S. 873, 881 (2011) (quotation omitted).³⁶

“This court reviews a district court’s exercise of personal jurisdiction *de novo*,” *In re DePuy*, 870 F.3d at 353, and its underlying “jurisdictional findings of fact” for clear error, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 529 (5th Cir. 2014). “A factual finding is not clearly erroneous as long as it is plausible in the light of the record read as a whole.” *Walker v. City of Mesquite*, 402 F.3d 532, 535 (5th Cir. 2005) (quotation omitted). The plaintiff “bears the burden of establishing” personal jurisdiction, *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989), and though he need only make a *prima facie* case at the Rule 12(b)(2) stage, his burden escalates to “preponderance of the evidence” “by the end of trial.” *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986) (citations omitted).³⁷

Plaintiffs’ principal jurisdictional theory is “stream of commerce.” That doctrine recognizes that a defendant may purposely avail itself of the protection of a state’s laws—and thereby will subject itself to personal jurisdiction—“by sending its goods rather than its agents” into the forum. *Nicastro*, 564 U.S. at 882. In *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), neither Justice Brennan nor Justice O’Connor could marshal a majority on the question whether mere awareness that a product will be sold in the forum state suffices to support jurisdiction under the

³⁶ The test for specific personal jurisdiction has a third requirement: Assertion of jurisdiction must be fair and reasonable. *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 382 (5th Cir. 2002). Defendants shoulder the burden and must make a “compelling case.” *Id.* (quoting *Burger King*, 471 U.S. at 477). Because J&J does not assert that exercising jurisdiction would be unfair or unreasonable, it has forfeited any argument under this prong.

³⁷ Where the district court conducts a pre-trial evidentiary hearing on jurisdiction, the preponderance-of-the-evidence standard applies. *Travelers*, 798 F.2d at 831. There was no hearing in this case.

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stream-of-commerce doctrine. The issue divides the circuits, with ours having embraced Justice Brennan’s more expansive view. *See Choice Healthcare, Inc. v. Kaiser Found. Health Plan of Colo.*, 615 F.3d 364, 373 (5th Cir. 2010). Accordingly, plaintiffs need only show that J&J delivered the product that injured them “into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state.” *Ainsworth v. Moffett Eng’g, Ltd.*, 716 F.3d 174, 177 (5th Cir. 2013).

J&J insists that it cannot be subject to personal jurisdiction because DePuy—its executives, engineers, and salespeople—and not J&J, played the principal role in developing and selling the Ultamet. Preliminarily, it cannot be, as J&J suggests, that nonmanufacturing parents categorically lie beyond the stream of commerce no matter the nature of their contributions. Personal jurisdiction does not turn on labels or *relative* connection to the forum.³⁸ Instead, we look to “the relationship among the defendant, the forum, and the litigation.” *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). Minimum-contacts analysis is more “realistic”³⁹ than “mechanical,”⁴⁰ turning on matters of “substance” rather than “form.”⁴¹ Recognizing that a nonmanufacturing parent

³⁸ *See Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989) (“The label attached to [a defendant’s] role in the distribution scheme is not the critical question.”); *see also Doan v. Consumer Testing Labs. (Far E.) Ltd.*, 105 F.3d 654 (5th Cir. 1996) (unpublished) (implying that personal jurisdiction is properly exercised over a defendant “sufficiently connected with a particular product so as actually to ‘touch’ the product”).

³⁹ *Burger King*, 471 U.S. at 479.

⁴⁰ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Luv N’ care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465,471 (5th Cir. 2006) (declining to credit “technicalities”) (citing *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197 n.8 (5th Cir. 1980)); *see also Nuovo Pignone*, 310 F.3d at 381 n.8; *Dontos v. Vendomation NZ Ltd.*, 582 F. App’x 338, 345 (5th Cir. 2014) (expressing hesitation about per se rules in the jurisdictional context).

⁴¹ *Bd. Of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 680 (1996) (“In determining what is due process of law regard must be had to substance, not to form.”) (quoting *Chicago, B. &*

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will sometimes lie within the stream (even where the corporate veil remains intact), we conclude that J&J’s marketing and sales role crosses the necessary threshold.

J&J’s role in Ultamet’s design, promotion, and sale demonstrates that J&J significantly contributed to the product’s placement into the stream of commerce.⁴² On design, the record suggests J&J (a) merged DePuy with another subsidiary that developed Ultamet’s precursor Ultima,⁴³ (b) integrated the design teams, and (c) transferred a helpful patent to DePuy. On marketing and sale, J&J (a) reviewed, edited, and approved DePuy’s Pinnacle ads, product brochures, journal articles, public statements, and representations to regulators promoting Pinnacle MoMs⁴⁴; (b) provided substantial funding for certain of DePuy’s promotional activities; (c) independently promoted MoMs via a satellite telecast to physicians all over the country, including Texas, and a website, hipreplacement.com, which referred visitors to Texas surgeons and allowed Texas residents to have Ultamet-related information mailed directly to them; (d) referred to the product as its own; (e) granted DePuy “market clearance” to “manufacture, use, and sell” Ultamet worldwide;⁴⁵ (f) placed its

Q.R.R. Co. v. City of Chi., 166 U.S. 226, 235 (1897)).

⁴² See *Irving*, 864 F.2d at 386–87 (rejecting argument that defendant’s role in the stream-of-commerce chain was “too minor” to give rise to personal jurisdiction where, among other things, the defendant “held itself out as the seller,” “derived economic benefits from” sale of the product, and “placed no geographic limits” on where downstream broker could operate).

⁴³ In seeking the FDA’s 510(k) clearance, DePuy characterized Ultamet as Ultima’s “substantial equivalent.”

⁴⁴ A number of these materials, in particular the brochures and advertisements, included misleading statements related to MoM’s “fluid film lubrication,” limited wear debris, and general survivorship rate. Plaintiffs’ claims were based in part on these statements.

⁴⁵ J&J asserts that the clearance document was never admitted into evidence. The

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logo on the packaging of the product as received in Texas; and (g) “monitored” Texas surgeon-consultants promoting Ultamet. Also, DePuy generated considerable revenue for J&J’s subsidiary Medical Device & Diagnostic.⁴⁶ Finally, although it is neither necessary to nor determinative of the jurisdictional question, we note that both the district court and jury found, under Texas tort law, that J&J was a “seller” of Ultamet. This combination of factors—collectively showing that J&J participated in developing Ultamet, greenlighted its sale worldwide, held the product out as its own, independently promoted the product, exercised ultimate controlling authority over the product’s design and promotion, and derived revenue from its sale—is sufficient to show that J&J was a link in the stream-of-commerce chain.

These factors also distinguish J&J’s role from the passive parent-

trial record confirms that it was.

⁴⁶ See *Choice Healthcare, Inc.*, 615 F.3d at 373 (“Deriving revenue from such commercial activity is the quid pro quo for requiring the defendant to suffer a suit in the foreign forum.”); see also *Luv N’ care*, 438 F.3d at 470 (“Where a defendant knowingly benefits from the availability of a particular state’s market for its products, it is only fitting that the defendant be amenable to suit in that state.”). We have held that a person who designed and licensed a product sold by a third-party lay outside the stream-of-commerce for jurisdictional purposes. In *Seifert v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 269–70 (5th Cir. 2006), a worker’s estate sued a pair of nonresident defendants in Mississippi after the worker had died on a defective helicopter platform. One of the defendants leased the helicopter to a non-party, which then installed the defective platform; the other codefendant, Camus, had designed, patented, and licensed the platform to that same non-party. He also served as a pilot for the non-party and had incidentally flown the helicopter with the platform at issue into Mississippi and inspected it there before the accident. *Id.* As to Camus, we held “[t]he stream-of-commerce theory does not provide a basis for jurisdiction, because [he] did not place a product into the stream, but merely licensed a design to [the non-party].” *Id.* at 275. Camus’s contributions to the introduction of the helicopter platform into Mississippi differ in both kind and degree from J&J’s role here. The plaintiff in *Seifert* presented no evidence that Camus exercised control over whether and where the offending product could be sold, participated in its marketing, directly derived revenue from its sale, or placed his logo on the product and held it out as his own.

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subsidiary relationship that we have held insufficient to support jurisdiction.⁴⁷ Where all the above considerations obtain, a parent corporation like J&J has “purposely avail[ed] itself of the privilege of conducting activities” in the states it expects the product to be sold, “thus invoking the benefits and protections of [that state’s] laws.” *Nicastro*, 564 U.S. at 880 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). “[W]here individuals ‘purposefully derive benefit’ from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.” *Burger King*, 471 U.S. at 473–74 (citation omitted) (quoting *Kulko v. Cal. Superior Court*, 436 U.S. 84, 96 (1978)).

Accordingly, J&J’s significant role in placing the Ultamet into the stream of commerce with the expectation that it would be purchased by consumers in Texas rendered J&J amenable to suit for injuries caused by the Ultamet in Texas. The district court properly exercised personal jurisdiction over J&J.

IV. Claims Against J&J

J&J avers that the claims against it—aiding and abetting, non-manufacturer seller, and negligent undertaking—all fail on the merits. We agree with J&J only as to aiding and abetting.

A. Aiding and Abetting

Plaintiffs’ cause of action for aiding and abetting derives from

⁴⁷ See, e.g., *Dickson Marine v. Panalpina*, 179 F.3d 331, 338 (5th Cir. 1999); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990).

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Section 876(b) of the Restatement (Second) of Torts, which provides that, “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement” The Texas Supreme Court “has not expressly decided whether Texas recognizes a cause of action for aiding and abetting,”⁴⁸ and the parties disagree at length about whether Texas courts, if squarely presented with the question, would fashion an aiding-and-abetting cause of action, outside of the conspiracy context, when the predicate offense sounds in strict liability.

But that debate is beside the point. When sitting in diversity, a federal court exceeds the bounds of its legitimacy in fashioning novel causes of action not yet recognized by the state courts.⁴⁹ Here, despite ample warning, the district court exceeded its circumscribed institutional role and “expand[ed] [Texas] law beyond its presently existing boundar[y].” *Rubinstein*, 20 F.3d at 172.

Plaintiffs offer two responses, neither persuasive. First, they suggest treating the state courts’ abstention as a *de facto* rejection would effectively eviscerate the *Erie* analysis.⁵⁰ Not so. *Erie* authorizes us to wager a guess

⁴⁸ *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224 (Tex. 2017) (citing *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996)).

⁴⁹ *Johnson v. Sawyer*, 47 F.3d 716, 729 (5th Cir. 1995) (“As there is currently no Texas law creating a common law cause of action for a statutory violation for which violation there is an express and comprehensive statutory cause of action, we will not undertake to . . . create such a Texas common law cause of action.”); *Rubinstein v. Collins*, 20 F.3d 160, 172 (5th Cir. 1994) (“It is axiomatic, of course, that we will not expand state law beyond its presently existing boundaries.”); *Harmon v. Grande Tire Co.*, 821 F.2d 252, 259 (5th Cir. 1987) (“As an *Erie* court, however, it is not our job to lay down broad new rules of state law.”); *Galindo*, 754 F.2d at 1217 n.8 (counseling against “substantive innovations” in state law).

⁵⁰ See also *In re Hous. Reg’l Sports Network, L.P.*, 547 B.R. 717, 759 n.19 (Bankr. S.D.

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about how the state court might fill the interstices of existing doctrinal frameworks; inventing a new framework *ex nihilo* is another matter entirely.

Plaintiffs also cite three Texas cases,⁵¹ for the proposition that Texas has long recognized aiding-and-abetting claims “in some form.” But none of the three speaks, let alone clearly, to the question. *Pippen* involved a principal-agent relationship,⁵² *Kinzbach Tool* a joint-tortfeasor matter,⁵³ and *McKinnon & Van Meter* transferee liability in a fraudulent-transfer case.⁵⁴ And even if we were to construe these as stealth aiding-and-abetting decisions, their half-century-old judgments would have to yield to the court’s more timely and direct pronouncements to the contrary. J&J is entitled to JMOL on plaintiffs’ aiding-and-abetting claim because no such claim exists in Texas.

B. Nonmanufacturer Seller

J&J challenges plaintiffs’ “nonmanufacturer seller” claim. Section 82.003(a) of the Texas Civil Practice & Remedies Code declares that “[a] seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves” one of seven exceptions. Question 3 of the jury charge asked whether J&J was a “nonmanufacturing seller” under section 82.003 and then whether J&J satisfied the requirements of

Tex. 2016) (asserting the same *ipse dixit* that *Erie* has no purpose if federal courts lack the power to fashion entirely novel causes of action under state law).

⁵¹ *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942); *McKinnon & Van Meter v. Reliance Lumber Co.*, 63 Tex. 30, 31 (1885)

⁵² *Pippen*, 439 S.W.2d at 665.

⁵³ *Kinzbach Tool*, 160 S.W.2d at 514 (applying “settled . . . law of [Texas] that where a third party knowingly participates in the breach of duty of a *fiduciary*, such third party becomes a joint tortfeasor”) (emphasis added).

⁵⁴ *McKinnon & Van Meter*, 63 Tex. at 31.

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either of two exceptions to that immunity—whether it “participate[d] in the design” of the Ultamet and whether it “actually kn[e]w of” a defect in the Ultamet. The jury answered yes to both questions.

J&J claims “nonmanufacturer seller” is an affirmative defense rather than a standalone cause of action. The verdict proves that J&J could be found guilty under one of the exceptions to the affirmative defense, but only if it had also been found liable for a standalone cause of action such as design or marketing defect. It claims no such finding was made—ergo, the nonmanufacturer-seller charge was “bizarre” and “meaningless.”

But J&J creates confusion from whole cloth. The first two questions in the jury charge concerning design and marketing defects focus on the product, rather than the conduct or identity of the responsible parties,⁵⁵ because that is the focus of Texas products-liability law.⁵⁶ Though Questions 1 and 2 mention DePuy and not J&J, those references serve only to fix the relevant temporal frame—i.e., what condition was the product in *when* it left DePuy’s possession?—rather than to exclude other nonmanufacturer sellers from

⁵⁵ Question 1 reads in relevant part,

Was there a design defect in the Pinnacle Ultamet Hip Implant at the time it left the possession of DePuy Orthopaedics, Inc. . . . ? . . .

. . .

In answering this question, you are instructed to consider only the condition of the Pinnacle Ultamet Hip Implant, and not the conduct of DePuy Orthopaedics, Inc. The Pinnacle Ultamet Hip Implant may have a design defect even if DePuy Orthopaedics, Inc. exercised all possible care in designing it.

Question 2 asked, “Was there a defect in the warnings at the time the Pinnacle Ultamet Hip Implant left the possession of DePuy Orthopaedics, Inc. . . . ?”

⁵⁶ *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871 (Tex. 1978) (“Strict liability looks at the product itself and determines if it is defective. Negligence looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production”).

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liability. This is especially so, given that the Ultamet was never “in” or “left” J&J’s possession. Hence, in the instructions that precede Question 3, the charge specifically instructs, “Answer Question 3 only if you have answered ‘yes’ to Question 1 or Question 2. Otherwise do not answer Question 3.” As is obvious from this language, the district court had the jury determine J&J’s liability through a combination of questions: first, whether the product was deficiently designed or marketed, and then whether those defects were imputable to J&J as a nonmanufacturer seller. J&J cites no procedural rule that prohibited the court from dividing the elements of a cause of action in this way, and we decline to invent one now.⁵⁷

C. Negligent Undertaking

J&J maintains that plaintiffs’ negligent-undertaking claim fails for insufficient evidence. Negligent undertaking requires a finding that (1) J&J undertook to perform services that it knew or should have known were necessary for plaintiffs’ protection (here, a duty to design Ultamet for safe use and to regulate its marketing, sale, and distribution); (2) J&J failed to exercise reasonable care in performing those services; and (3) plaintiffs or their physicians relied on J&J’s performance, *or* J&J’s performance increased plaintiffs’ risk of harm. *Nall v. Plunkett*, 404 S.W.3d 552, 555–56 (Tex. 2013). Disagreement lies primarily at the first prong: Plaintiffs recite J&J’s laundry list of Ultamet-related contacts, which J&J dismisses as “typical of a parent-subsidary relationship” and thus insufficient to “disregard the corporate form.”

Texas caselaw reveals no precise control threshold a parent must cross before undertaking a duty to its subsidiary’s customers. Texas courts have

⁵⁷ In a footnote, defendants question whether J&J was properly deemed a seller under Section 82.003. They cite no cases for that under-defended theory, so we do not consider it.

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made clear that mere possession of “the authority to compel” a subsidiary is not enough—the parent “must actually” exercise that authority in a manner relevant to the undertaking inquiry.⁵⁸ At the same time, it is plainly *sufficient* to show the parent has “the controlling, primary authority for maintaining safety at [its subsidiary’s] facilities.”⁵⁹

The gap between these two poles is wide, and there is little guidance. Nothing J&J points to in Texas law suggests “primary authority for maintaining safety” is *necessary* to sustain an undertaking claim. Given that plaintiffs have identified several instances in which J&J actually exercised its veto authority, especially in the marketing context, we cannot say every “reasonable” juror reviewing J&J’s role in Ultamet’s design, marketing, and distribution would find that J&J had not undertaken a duty to Ultamet users.⁶⁰ The challenge is to sufficiency of the evidence, and there is nothing unreasonable in the jury’s determination.⁶¹

⁵⁸ See *Little v. Delta Steel, Inc.*, 409 S.W.3d 704, 721 (Tex. App.—Fort Worth 2013, no pet.) (quoting and contrasting *White v. Elcor Corp.*, No. 09-00-0031-CV, 2001 WL 359833 (Tex. App.—Beaumont Apr. 12, 2001, no pet.) (unpublished)).

⁵⁹ *Id.*

⁶⁰ See *Johnson v. Abbe Eng’g Co.*, 749 F.2d 1131, 1133–34 (5th Cir. 1984).

⁶¹ See *Bagby Elevator Co. v. Schindler Elevator Corp.*, 609 F.3d 768, 773 (5th Cir. 2010) (requiring “great deference to the jury’s verdict” and reserving reversal for situations in which “the court believes that reasonable jurors could not arrive at any contrary conclusion” (quotation omitted)). Defendants plausibly suggest that if we find for J&J on even one of the claims against it, we must remand for a new trial on exemplary damages on all claims. Cf. *Robertson Oil Co. v. Phillips Petroleum Co.*, 871 F.2d 1368, 1376 (8th Cir. 1989) (reversing some but not all of plaintiff’s claims and remanding for a new trial on punitive damages because each of the plaintiff’s theories of liability “involve[d] different conduct” and would therefore “support a different amount of punitive damages”). We need not reach that question, given our holding, which we will explain, that evidentiary errors warrant a new trial on all surviving claims.

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V. Request for New Trial

In the alternative, defendants request a new trial based on irrelevant and prejudicial evidence. A district court can grant a new trial if it finds “the verdict [was] against the weight of the evidence, the damages awarded [were] excessive, the trial was unfair, or prejudicial error was committed in its course.” *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985) (discussing FED. R. CIV. P. 59(a)). We review that decision for abuse of discretion, “especially” where, as here, the motion “ha[s] been denied.” *Knight v. Texaco Inc.*, 786 F.2d 1296, 1299 (5th Cir. 1986) (citations omitted). Because the errors are sufficiently egregious, multiple, and prejudicial to pierce the usual deference, we order a new trial.

A. The Deferred Prosecution Agreement and Saddam Hussein

We begin with the most problematic evidence: the bribes paid by non-party J&J subsidiaries to the “henchmen” and “regime” of Saddam Hussein in Iraq. In 2011, J&J entered into a Deferred Prosecution Agreement (“DPA”) in which it “admit[ted], accept[ed], and acknowledg[ed] that it [was] responsible for” violations of the Foreign Corrupt Practices Act committed by non-party affiliates. One of the alleged violations involved bribes by two such affiliates to the Iraqi government, then under Hussein’s control. In the middle of trial, the court ordered DePuy to produce a Federal Rule of Civil Procedure 30(b)(6) corporate representative to testify before the jury at length about the DPA. Plaintiffs’ counsel then mentioned it several times, including during closing arguments.

The district court allowed these repeated references to Hussein and the DPA because defendants had supposedly “opened the door” by eliciting testimony on their corporate culture and marketing practices. This justification is

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strained, given that J&J owns more than 265 companies in 60 countries, and the Iraqi portion of the DPA addresses conduct by *non-party* subsidiaries.

“[T]he Rules of Evidence do not simply evaporate when one party opens the door on an issue.”⁶² And a party cannot introduce evidence of prior bad “acts . . . to show that on a particular occasion the person acted in accordance with the character.” FED. R. EVID. 404(b)(1). Our Rule 404(b) inquiry proceeds in two steps: “First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant’s character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403.”⁶³ Though our inquiry is deferential and “inclusi[ve],”⁶⁴ we go well beyond rational-basis review. Even where the evidence serves some conceivable non-character purpose such as impeachment, we still must carefully consider whether the introducing party was actually “attempting to convince the jury that [the defendant] was a bad man” who acted in conformity with his bad character in the case at hand.⁶⁵ If yes, the unduly prejudicial effect of such an argument will very likely substantially outweigh its probative value.

The Rule 404(b) question lends itself to just one reasonable resolution. During closing arguments, Lanier suggested unequivocally that the jury treat

⁶² *United States v. Bursey*, 85 F.3d 293, 296 (7th Cir. 1996) (quotation omitted); see also *United States v. Young*, 470 U.S. 1, 6–14 (1985).

⁶³ *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc); see also *United States v. Mendez*, 643 F. App’x 418, 426–27 (5th Cir.), cert. denied, 137 S. Ct. 164, and cert. denied, 137 S. Ct. 198, and cert. denied, 137 S. Ct. 198 (2016).

⁶⁴ *United States v. Shaw*, 701 F.2d 367, 386 (5th Cir. 1983), abrogated on other grounds by *Green v. Miller*, 483 U.S. 756, 763 (1987).

⁶⁵ *Id.*

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the DPA not as impeachment, nor even as otherwise-inadmissible rebuttal evidence offered “curatively,”⁶⁶ but as a proxy for J&J’s liability:

If you go back and look at the DPA, that’s the deferred prosecution agreement where the company paid money one time because of kickbacks to doctors in America, the other time because of the bribes to Saddam Hussein’s government, the bribes in Greece, Romania, Poland and other places where they were bribing people to put in . . . their products. The DPA has [J&J] admitting its responsibility in it. J&J is admitting that they’re responsible. They have already taken this issue out of your hands realistically. *That alone is a winner. . . . [J&J] has admitted their responsibility for this. That ought to be enough.* [Emphasis added.]

Indeed. Lanier tainted the result by inviting the jury to infer guilt based on no more than prior bad acts, in direct contravention of Rule 404(b)(1). That alone provides grounds for a new trial.⁶⁷

Plaintiffs insist the DPA was admissible because it went to defendants’ “intent, knowledge, plan, motive, and opportunity.” But that suggestion is as dubious as it is vague. The record makes plain that the DPA and Hussein were “wafted before the jury to trigger their punitive instinct.”⁶⁸ Lanier repeatedly referenced bribes to the Hussein “regime,” despite that the alleged bribes involve neither DePuy nor its products. Crucially, he then invited the jury to

⁶⁶ 1 MCCORMICK ON EVID. § 57 (7th ed. Updated June 2016).

⁶⁷ At oral argument, Lanier suggested the underlying issue in questions 3, 4, and 5 was whether J&J was a “seller,” and his reference to the DPA served only to show J&J previously had claimed responsibility for its subsidiary’s bad acts. That theory is doubly flawed: First, counsel expressly referenced the bribes in Iraq, which involved *nonparty* subsidiaries, and second, questions 4 and 5—J&J’s liability for negligent undertaking and aiding and abetting—clearly require more than the conclusion that J&J was a “seller”—e.g., that it knew or should have known the product was defective. Considered in context, Lanier’s statements obviously invited the jury to infer liability based solely on J&J’s admissions in the DPA.

⁶⁸ *Shows v. M/V RED EAGLE*, 695 F.2d 114, 119 (5th Cir. 1983), *abrogation on other grounds recognized by Coursey v. Broadhurst*, 888 F.2d 338, 342 n.4 (5th Cir. 1989).

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infer J&J's *liability* based solely on that. Nothing in our otherwise inclusive Rule 404(b) jurisprudence countenances such a tactic.⁶⁹

Plaintiffs lastly suggest that any error was harmless, because the court instructed the jury generally not to treat counsel's statements as evidence. But the court "gave no cautionary instruction at the time of the improper argument," *United States v. McPhee*, 731 F.2d 1150, 1153 (5th Cir. 1984), and its subsequent generic instruction made no mention of the DPA. Granted, "in some instances, the district court may determine that a specific curative instruction is inappropriate because it would merely call further attention to the evidence, and thus be more harmful than the original comment." *United States v. Thomas*, 548 F. App'x 987, 990 (5th Cir. 2013) (citation omitted). But the references to Hussein were both recurring and "highly prejudicial," presented as if sufficient to prove liability. *Id.*

A general instruction at the close of trial was "grossly inadequate under the circumstances." *McPhee*, 731 F.2d at 1153. Lanier's statement was among "the last thing[s] the jury heard before retiring to deliberate," *United States v. Polasek*, 162 F.3d 878, 887 (5th Cir. 1998), and a colossal verdict followed. Because the taint is unmistakable, the verdict cannot stand.

B. Allegations of Race Discrimination

Lanier coupled his impermissible references to Saddam Hussein with

⁶⁹ Plaintiffs alternatively suggest the DPA was admissible under Federal Rule of Evidence 406 as evidence of a "routine practice" of bribing doctors. Not so. In *United States v. West*, 22 F.3d 586, 592 (5th Cir. 1994), we held a handful of questionable transactions by the FDIC did not prove a routine "when considered in light of the FDIC's dealings with literally thousands of debtors during the mid- to late 1980s." The DPA reveals kickbacks by J&J and subsidiaries in four countries over the course of ten years. When considered in light of the fact that J&J directly or indirectly owns more than 265 companies operating in 60 countries, that record is far too slim to show a repetitious and semi-automatic routine of behavior.

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hearsay allegations of race discrimination. While questioning DePuy's president, Andrew Ekdahl, Lanier read the following excerpts from a resignation letter by a former DePuy employee: "I will never understand the humor in a joke about me eating KFC, and yet blamed for my inability to forge relationships with people that find this humor funny. I'm tired of 'over-hearing' the word 'N-i-g-g-e-r' or words like it . . ." And, to quote counsel, "she goes on and on and on." Before the letter was read, defendants objected on hearsay and Federal Rule of Evidence 403 grounds and, after a lunch recess, moved for a mistrial. The court overruled the objections and denied the motion. As with Hussein, reference to a "filthy . . . racial email" resurfaced once more during Lanier's closing argument, in his explanation of why J&J had participated in Ultamet's design and knew of its defects.⁷⁰

Plaintiffs again suggest defendants placed their character in issue by describing DePuy as an employee-friendly workplace. *See Croce v. Bromley Corp.*, 623 F.2d 1084, 1092–93 (5th Cir. 1980). But even if that were so, the letter is valid impeachment only if introduced to prove the matter asserted: that racism infected DePuy's workplace culture. That is impermissible hearsay.

Plaintiffs posit that the letter was admissible under Federal Rule of Evidence 801(d)(2)(D), as a statement by an employee on a matter within the scope of employment. But Rule 801(d)(2)(D) does not apply to resignation letters, where the employee is no longer "inhibited by [his] relationship with the principal." *Young v. James Green Mgmt., Inc.*, 327 F.3d 616, 622 (7th Cir.

⁷⁰ His exact words were, "J&J participated in the design all the way up to aSphere where the president of [J&J] is getting updates from the head of marketing at DePuy, Richard Berman of the filthy email fame and the racial email fame. Did [J&J] know of the defect?"

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2003) (quotation omitted). A contrary rule would badly flout Rule 801's underlying rationale. In reading the letter to the jury, Lanier refocused its attention on serious, and seriously distracting, claims of racial discrimination that defendants had no meaningful opportunity to rebut via cross-examination. This spectacle fortifies our conviction that a new trial is required.⁷¹

⁷¹ The same is true of counsels' unit-of-time argument, made during closing argument. Lanier's co-counsel first told the jury, "If you don't consider the damages by the day, by the hour, by the minute, then you haven't considered their damages." Then, during rebuttal, Lanier elaborated, "[P]lease, please, please, if they [the defendants] will pay their experts a thousand dollars an hour to come in here, when you do your math back there don't tell these plaintiffs that a day in their life is worth less than an hour's time of this fellow, or people they put on the stand." The court promptly overruled defendants' objection.

As a general matter, unit-of-time arguments like this one are impermissible because they can lead the jury to "believ[e] that the determination of a proper award for . . . pain and suffering is a matter of precise and accurate determination and not, as it really is, a matter to be left to the jury's determination, uninfluenced by arguments and charts." *Foradori v. Harris*, 523 F.3d 477, 512 (5th Cir. 2008) (quotation omitted). Lanier's reference to expert fees was meant simultaneously to activate the jury's passions and to anchor their minds to a salient, inflated, and irrelevant dollar figure. The inflammatory benchmark, bearing no rational relation to plaintiffs' injuries, easily amplified the risk of "an excessive verdict." *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1240 (5th Cir. 1985). The argument was "design[ed] to mislead," *Foradori*, 523 F.3d at 512, and tainted the verdict that followed.

Plaintiffs urge that the district court could cure the problem by offering a "specific cautionary instruction" that the unit-of-time claim reflects the lawyer's private opinion, "which the jury is free to disregard." *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 377 (5th Cir. 1989). In *Colburn*, we vacated damages because counsel had presented "a 'unit of time' argument without a specific cautionary instruction," raising a "substantial and ineradicable doubt as to whether or not the jury has been properly guided in its deliberations." *Id.* at 377–78 (quotation omitted). Here, the record reveals only a general instruction that "any statement or arguments made by the lawyers are not evidence and are not instructions on the law." *Colburn* explicitly deemed this inadequate. *Id.*

We decline to address defendants' remaining evidentiary challenges regarding DePuy's 2007 DPA, the *Doubt is Their Product* book, cancer and suicide, the "thousands" of pending Ultamet suits, and unrelated transvaginal mesh suits. The district court should weigh carefully the applicability of Rules 403 and 404(b) and, where necessary, should issue specific instructions to avoid undue prejudice. *See, e.g., Croce*, 623 F.2d at 1092.

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VI. Rule 60(b)(3) Motion

In their companion appeal,⁷² defendants challenge the district court’s denial of a motion for relief from judgment under Rule 60(bA)(3) on the ground that Lanier concealed payments to two key expert witnesses. We agree and reverse.

A. Facts

The story begins in August 2015, when, in preparation for the second bellwether trial (*Aoki*), plaintiffs’ counsel made expert disclosures listing Morrey Sr. and Morrey Jr. as expert witnesses “who ha[v]e not been retained or specially employed to provide expert testimony in this litigation.”⁷³ In December of that year, Lanier met with Morrey Sr. to discuss the history of

⁷² In their cross-appeal, plaintiffs assert that Section 41.008 of the Texas Civil Practice and Remedies Code—which caps exemplary damages at twice the amount of economic damages, plus non-economic damages not exceeding \$750,000—violates the state constitutional right to “open courts,” TEX. CONST., art. 1, § 13, and the federal Constitution’s equal protection clause. Those claims are frivolous.

To the first, Texas courts have uniformly held that Section 41.008 does not violate the “open courts” provision. *See Waste Disposal Ctr., Inc. v. Larson*, 74 S.W.3d 578, 588 (Tex. App.—Corpus Christi 2002, pet. denied) (“[T]he open courts provision of the Texas Constitution serves to protect only private rights and interests, [whereas] the statutory cap on exemplary damages affects only public punishment interests[.]” (citation omitted)); *Hall v. Diamond Shamrock Ref. Co., L.P.*, 82 S.W.3d 5, 22 (Tex. App.—San Antonio 2001) (same), *rev’d on other grounds*, 168 S.W.3d 164 (Tex. 2005); *cf. Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. App.—Houston [14th Dist.] 1998, no pet.). To the second, plaintiffs suggest the cap’s differentiation between economic and non-economic injury effectively discriminates based on wealth. But even if that were so, the law need only survive rational-basis review, *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513, 519–20 (6th Cir. 2005), and Section 41.008 does so by injecting predictability into exemplary damages awards and preempting potentially unconstitutional awards. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996) (recognizing constitutional limits on a punitive-damages award). The cross-appeal fails.

⁷³ Non-retained, or uncompensated, experts need not prepare expert reports in advance of their testimony. FED. R. CIV. P. 26(a)(2)(B).

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MoM implants. Toward the end of their meeting, Lanier offered payment, which Morrey Sr. declined. Lanier then asked whether there was a charity to which he could contribute, and Morrey identified his alma mater, St. Rita's Catholic School in Fort Worth. Lanier wrote it a \$10,000 check, dated December 4, 2015—five weeks before to trial.

The *Aoki* trial began January 11, 2016. Plaintiffs claim Morrey Sr. first agreed, and was called on, to testify two weeks after the trial had already begun.⁷⁴ Yet, he appears in the trial transcripts as early as opening statements, when plaintiffs' counsel described him as "Mayo trained" and "eminently qualified to give [his opinion]." Once Morrey Sr. did eventually take the stand, Lanier explained how he had "*hoped* you [Morrey Sr.] would be testifying." Recounting their meeting in December, Lanier described to the jury how they shared the "best apple pie in the world." St. Rita's and the \$10,000 check went unmentioned.

Morrey Sr. was a compelling witness. He walked the jury through the history of MoP and MoM designs and explained that he used MoP, a safer alternative, on all his patients, including Billy Graham and former-President George H.W. Bush. During both the direct and redirect, Lanier repeatedly emphasized Morrey Sr.'s independence—reflected in his peer-reviewed work, royalty-collection practices, and continuing-education lectures—and contrasted that independence with the purportedly biased and self-interested

⁷⁴ On the eve of Morrey Sr.'s testimony, defendants filed a late-night motion asserting that plaintiffs had improperly designated him as a "nonretained" expert—he was not a treating physician of any of the plaintiffs, and his opinions were not formed in the course of treatment—and that his testimony should therefore be excluded. At trial the next day, the court allowed Morrey Sr. to testify, but only on condition that he later provide a written report and make himself available for a deposition and future cross-examination. Plaintiffs eventually provided defendants with an expert report summarizing his testimony, but it made no mention of any compensation agreement, and the doctor never reviewed it.

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work of DePuy's doctors.

His son, Morrey Jr., also an orthopaedic surgeon, performed Greer's revision surgery and evaluated Klusmann. Before Morrey Jr.'s testimony, defendants moved to exclude any testimony that would exceed his role as a treating physician. During arguments on the motion, Lanier emphasized how "very important" it was "for the Court to know and the record to reflect that Dr. Morrey was properly and timely disclosed as nonretained. We have no economic arrangement with him. We do not fund him. We do not pay him his time" ⁷⁵ Echoing his father, Morrey Jr. testified MoP was "always . . . a safer alternative than" MoM, and that there is no "benefit in using [MoM] that outweighs [the] risk."

Long after the Morreys had exited the scene, Lanier reminded the jury of their compelling *pro bono* testimony, which he contrasted repeatedly with the "bought testimony" of defendants' paid experts. For example, when defense expert pathologist Scott Nelson claimed he was compensated "like all experts," Lanier seized the opportunity: "Dr. Matt Morrey wasn't compensated. Bernard Morrey wasn't compensated. . . . For him to say --." The court cut short and quickly sustained the objection. And again on cross, Lanier returned to the subject, reminding the jury that "Dr. Morrey, Sr. . . . the one that put in President Bush's metal-on-poly hips . . . came and testified here, *on his own*." Additionally, the Morreys featured prominently in Lanier's closing statement: "Dr. Morrey senior, no expense coming to this courtroom, not a paid witness." And again:

If President Bush could talk to the surgeon and pick him, he's good

⁷⁵ The judge allowed the testimony on the condition that Morrey Jr. file a report and be available for cross-examination. Morrey Jr. later provided a summary of his testimony, and defendants did not recall him for further cross.

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enough for me. And to pick a metal-on-poly hip, good enough for me. That's who did the surgery. That's the kind of [implant] that he put in. And the reason that he was here is I called his son and said what happened here. He said I don't use this kind of hip. Why not? My dad told me not to. *That's not bought testimony.* That's not conjured. That's not rehearsed. *That's real life.* That's the way they lived. [Emphasis added.]

The jury was instructed that it could “consider any bias evidence that the expert witness has been or will be paid for . . . reviewing the case and testifying.” As between “real life” and “bought testimony,” it chose the former by a margin of \$502 million.

But that choice was a false one, manufactured entirely by Lanier. During preparation for the third bellwether trial, details emerged suggesting that (a) Morrey Sr. had directed a \$10,000 donation to his alma mater before trial, (b) Morrey Jr. had expected compensation from the start, and (c) both received sizeable sums after the verdict. The revelations began when plaintiffs' counsel chose to bring back the Morreys and redesignate them as traditional expert witnesses for the next trial. After shifting designations, plaintiffs produced two letters from Lanier, both dated April 7, 2016, thanking the Morreys for their “pro bono” testimony at the *Aoki* trial and enclosing generous checks—\$35,000 to Morrey Sr. and \$30,000 to Morrey Jr.

The checks raised red flags. And so defendants' counsel questioned Morrey Sr. during a deposition about whether he had received “any other compensation” for his testimony. His reply revealed, for the first time, the existence of the donation: “[Lanier and I] had a preliminary discussion, and a check was given to a charitable organization[,] . . . St. Rita's Catholic School in Fort Worth.”

A similarly striking revelation emerged during Morrey Jr.'s deposition.

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He told defendants' counsel that he had expected payment from the start and had even inquired of plaintiffs' counsel about how to receive payment. Rather than rebuffing that request as inappropriate, plaintiffs' team told Morrey Jr. "don't worry about that." What truly surprised Morrey Jr. was not the fact of payment, but the amount—\$30,000 was apparently "twice" what he had been expecting. As for the "factual basis" of his expectations, Morrey explained that it flowed from his understanding of what happens "*whenever you're involved in these as a witness* [W]e have a fee sheet that we fill out our hours involved and we submit it afterwards." (Emphasis added.)

Misrepresentations in hand, defendants moved for relief from judgment under Rule 60(b)(3), which affords redress in cases of "fraud . . . , misrepresentation, or misconduct." FED. R. CIV. P. 60(b)(3). The district court denied the motion. It found no "agreement for compensation" at the time of trial; and it reasoned that, regardless, defendants had "not shown how evidence of [p]laintiffs' experts receiving a fraction of the compensation of [d]efendants' experts would have produced a different result at trial."

B. Analysis

Defendants had a heavy burden, in the district court, to show by clear and convincing evidence that plaintiffs had engaged in misrepresentation that prevented defendants from fully and fairly presenting their case. *Wilson v. Thompson*, 638 F.2d 801, 804 (5th Cir. Unit B Mar. 1981). Our review is doubly deferential: We consider the trial court's factual findings to the contrary for clear error, *id.*, and we reverse only if its clear-error judgment constitutes abuse of discretion, *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005). This is the rare case in which counsel's deceptions were sufficiently obvious, egregious, and impactful to penetrate the layers of deference that

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would ordinarily shield against reversal.

The district court misstated the substantive test under Rule 60(b)(3). The inquiry is not whether the misrepresentation altered the result,⁷⁶ but whether it “prevented the losing party *from fully and fairly presenting his case or defense.*”⁷⁷ Defendants need only show that the alleged misrepresentations foreclosed potentially promising cross-examination tactics; the misrepresentations need not be outcome-determinative, nor even intentional, to compel reversal.⁷⁸

Now, to the question whether Lanier, knowingly or unknowingly, misled the jury in representing repeatedly that the Morreys had neither pecuniary interest nor motive in testifying. The facts speak pellucidly: The pre-trial donation check, Morrey Jr.’s expectation of compensation, and the post-trial payments to both doctors are individually troubling, collectively devastating.

Consider first the check to St. Rita’s. In December, Lanier and Morrey Sr. met at the latter’s house, they discussed the contents of his testimony, and Lanier made a donation to a charity of Morrey Sr.’s choosing, all before trial.⁷⁹

⁷⁶ *Wilson*, 638 F.2d at 804 (“[A] party . . . may prevail without showing that the alleged fraud affected the outcome of the prior trial.”).

⁷⁷ *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1345 (5th Cir. 1978) (emphasis added) (quotation omitted). In *Rozier*, *id.* at 1349, we reversed the denial of plaintiff’s Rule 60(b)(3) motion after defendants had failed to produce a potentially inculpatory document before trial. “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation,” *id.* at 1344 (citations omitted), and prior disclosure could “have made a difference in the way plaintiff’s counsel approached the case or prepared for trial,” *id.* at 1342 (quotation omitted).

⁷⁸ See *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995); accord *Bros Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965).

⁷⁹ Plaintiffs’ counsel did not disclose the check until *after* oral argument in a Fifth Circuit Rule 28(j) letter. Interestingly, plaintiffs’ briefing relies on Morrey Sr.’s deposition

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Plaintiffs had already designated Morrey Sr. as a non-retained expert who might testify, and they had been priming the jury for his appearance as early as opening statements. Once it was “formally” decided that Morrey Sr. would testify, Lanier’s failure to disclose the donation, and his repeated insistence that Morrey Sr. had absolutely no pecuniary interest in testifying, were unequivocally deceptive.⁸⁰

In his defense, Lanier asserts the date of the donation “confirms [it] was a ‘thank you’ for time spent with [plaintiffs’ counsel] rather than a promise by [Lanier] to make a charitable contribution in exchange for Dr. Morrey’s testimony.” Before interrogating this story, let us speak plainly: Lawyers *cannot* engage with a favorable expert, pay him “for his time,” then invite him to testify as a purportedly “non-retained” neutral party. That is deception, plain and simple. And to follow that up with post-trial “thank you” check merely compounds the professional indiscretion.

As for counsel’s explanation, we cannot rule out the possibility Lanier believes what he says. But our inquiry turns on the various actors’ conduct and what it reasonably suggests, rather than self-serving ex-post statements as to state of mind. A lawyer would not make a \$10,000 donation to an expert’s charity of choice—a “gift” for his time—without realizing the “gift” would likely induce subsequent testimony.

Granted, the record includes no evidence that Lanier stated *expressly*

testimony for the proposition that the check was tendered *after* his testimony. And when pressed at oral argument that a pre-trial date would invite “devastating impeachment,” Lanier’s co-counsel conceded, “I agree with your logic. I do agree with your logic. But Mr. Lanier is not sure exactly when it was done.”

⁸⁰ *Saunders v. Comm’r*, 720 F.2d 871, 873 (5th Cir. 1983) (“One need not personally receive the taxable benefits provided one has the power to determine the recipient. . . . One may not assign income actually earned and thereby avoid the tax impact.”).

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that the donation came with strings attached. But sometimes, in matters of persuasion, what goes without saying is best left unsaid. Take Lanier's post-trial checks. At oral argument, he acknowledged those thank-you payments were designed to induce the Morreys to testify at the next bellwether trial, despite never expressly making that request. The pattern leaves little doubt about the desired effects of the donation.⁸¹

Morrey Jr.'s expectation of payment is equally troubling. Lanier claims Morrey Jr. did not necessarily expect payment "*by the Plaintiffs,*" and even if he had, Lanier and crew were not "mind-readers" and cannot be expected to have divined Morrey Jr.'s secret wishes. Such suggestions require a suspension of common sense. As Morrey Jr.'s deposition makes clear, his expectation of payment derived from his intuitive understanding that expert witnesses are entitled to payment for their services. That intuition led him to inquire about payment *with the plaintiffs*, the parties that solicited and directly benefited from his services.

As for "mind reading," plaintiffs' counsel has it backward: This is a free-market society in which Morrey Jr.'s expectation of compensation was the standard one. We find, by the "clear and convincing" evidence of common sense, that Lanier misled the jury in creating the impression that Morrey Jr. had neither pecuniary incentive nor motive in testifying. Neither our double deference nor counsel's specious reasoning can alter that conclusion.

Finally, the deceptions obviously prevented defendants from "fully and

⁸¹ Suppose we did believe Lanier's various and independent explanations for why he could pay his expert *before and after* trial without ever compromising the witness's non-retained status. An opinion countenancing his behavior would read like a blueprint on how to evade Rule 26 with impunity. Parties could pay experts "for their time" before trial and later exchange compelling "pro bono" testimony for sizable, post-trial "thank you" checks.

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fairly” defending themselves. *See Rozier*, 573 F.2d at 1339. Lanier emphasized to the court the “importan[ce]” of Drs. Morreys’ pro bono testimony, and Lanier repeatedly leveraged the false contrast between defendants’ paid mercenaries and plaintiffs’ unpaid altruists to his clients’ advantage. At the least, disclosure would have enabled defendants to try to impeach the Morreys with evidence of compensation.⁸² The district court abused its discretion in concluding otherwise. Calculated or not, falsehoods marred plaintiffs’ victory. The verdict cannot stand.

Conclusion

DePuy is entitled to JMOL on Greer’s and Peterson’s defective marketing claims, and J&J is entitled to JMOL on all plaintiffs’ aiding-and-abetting claims. The remaining claims avoid JMOL, though a new trial is required for the district court’s serious evidentiary errors and counsel’s misrepresentations. The judgments are REVERSED in part, and the judgment and the order denying Rule 60(b)(3) relief are VACATED, and the remaining claims are REMANDED for a new trial consistent with this opinion.⁸³

⁸² Plaintiffs respond that the “possibility of bias was exponentially greater with Defendants’ experts,” because they were paid far greater sums of money “over many years.” They add that Morrey Sr.’s decision to divert the \$10,000 to a charity would only serve to bolster his credibility. But these jury arguments confuse the inquiry. The central question is not whether the non-disclosure was outcome-determinative but, instead, whether disclosure would have opened up potentially promising impeachment tactics on cross-examination, which it patently did.

⁸³ As the court confirmed by questions at oral argument, the defendants, despite their serious critiques of the district judge’s actions in this case and related MDL proceedings, *see In re DePuy Orthopaedics, Inc.*, 870 F.3d 345, 351 (5th Cir. 2017) (finding “grave error”), have not asked us to require these cases to be reassigned to a different judge under “this court’s supervisory power to reassign,” *United States v. Stanford*, 883 F.3d 500, 516 (5th Cir. 2018). We express no view on the issue but note that reassignment is both “extraordinary” and “rarely invoked.” *Id.* (citation and internal quotation marks omitted).

APPENDIX E



January 6, 2014

Re: Supplemental and Rebuttal of Federal Rule 26(a)(2)(C) Disclosure for Steve Titus

Mr. Titus will provide expert testimony in rebuttal to the October 7, 2013 Williams Supplemental Expert Report, the November 25, 2013 Williams Amended Supplemental Expert Report and in response to the accounting ordered by the Court on December 20, 2013. Titus will testify concerning Exhibits 1549-1553, attached hereto. Titus is expected to testify that Williams' opinions on damages do not accurately represent the profit or loss of corn marketing activity by Lansing under the CMA in the area around Plymouth. Titus is expected to testify about the flow sheets and what each item on the flow sheets represents. Titus is expected to testify that a reasonable estimate of the profit or loss due PGT using solely the flow sheet gross profit margin as the starting point and based on all corn sold in the Plymouth area is \$1,792,851. Titus is expected to testify that \$565,077 of that amount is accounted for by rebates. Titus will explain the Lansing prepared profit and loss statements that have been produced in this case as compared to his analysis in Exhibits 1549 and 1550. Titus will explain how various accounting concepts are reflected in the flow sheets and the Lansing prepared profit and loss statements. Through Exhibits 1551-1553, Titus will demonstrate the flow of transactions on the backup information that has been produced in this case to the Lansing prepared profit and loss statements.

SELECTING AND EFFECTIVELY USING EXPERT WITNESSES

MAY 18, 2018

by David H. Smith

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I. INTRODUCTION

In many cases attorneys will decide he or she needs to retain an expert to assist in presenting their case. In other cases attorneys will be confronted with expert testimony they believe is inadmissible. For cases filed in state court the admissibility standard for proposed expert testimony is the *Frye*¹ standard based on Civil Rule 702, while in federal courts the standard is *Daubert*² under Federal Rule of Civil Procedure 702. One simple way to distinguish between these standards to understand they put different parties in the role of gatekeeper. Under *Frye*, the gatekeeper is the community that has generally accepted a particular scientific principle or discovery but under *Daubert* the gatekeeper is the judge. Understanding who the gatekeeper is key to distinguishing the different approaches to admissibility in state and federal court.

II. DIFFERENCES BETWEEN *DAUBERT* AND *FRYE* STANDARDS

A. *Frye*.

The *Frye* standard came from a criminal case discussing the admissibility of a systolic blood pressure deception test, the precursor to the polygraph machine. The court held that expert testimony must be based on scientific methods that are sufficiently established and accepted. The court stated: “just when a scientific principle or discovery crosses the line between experiential and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”

Washington enshrined the *Frye* standard when it adopted ER 702 which states:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise.

Although the *Frye* standard requires (1) a generally accepted scientific theory, and (2) a generally accepted method for applying this theory to the case at bar courts can define the theory

¹ *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993).

or method at such a high a level of abstraction that all kinds of generally applicable findings can be admitted without exploring whether the scientific community accepts them as well founded. This can relax the gatekeeper function under ER 702 to the point novel theories that have not, and cannot, be scientifically validated have gained admission. It is important to note that most jurisdictions have moved away from the *Frye* standard for these reasons and Washington remains one of 8 states³ that still follow it.

B. *Daubert*.

The *Daubert* standard for admissibility of expert witness testimony arose from 3 U.S. Supreme Court cases that interpreted FRCP 702. In *Daubert* the court held the rule did not incorporate the *Frye* “general acceptance” test and instead incorporated a flexible reliability standard. In *General Electric Co. v Joiner*⁴ the court held a district court judge could exclude expert testimony when there are gaps between the evidence relied upon and the conclusion or opinion the expert would offer at trial. And in *Kumho Tire Co. v Carmichael*⁵, the court extended the judge’s gatekeeper function to all expert testimony, including testimony that was non-scientific (e.g., shoe print analysis). Based on the *Daubert* standard a party can challenge the admissibility of proposed expert testimony either pretrial as a motion in limine or during trial, although the best practice would be to file the *Daubert* motion well prior to trial.

Under the *Daubert* standard, “a trial judge must determine at the outset, whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue [, which] entails a preliminary assessment of (3) whether the reasoning or methodology underlying the testimony is scientifically valid and of (4) whether that reasoning or methodology properly can be applied to the facts in issue.” In addition, admissibility of challenged expert testimony is considered a preliminary question under FRCP 104(a) that the district court must decide prior to allowing the witness to testify. Hence, *Daubert* motions must be considered as part of an attorney’s work up of any case involving potential expert testimony. As a general rule the *Daubert* motion should be filed within a reasonable time after the close of discovery, as delaying filing the motion may result the party only being allowed to voir dire the expert prior to his or her testimony.

³ California, Illinois, Maryland, Minnesota, New jersey, New York, and Pennsylvania are the others.

⁴ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

⁵ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

In exercising its gatekeeper role under FRCP 104(a) the district court judge must consider the following factors when ruling of the admissibility to challenged expert testimony:

- (1) whether the theory or technique in question can be and has been tested in the field and not just the laboratory;
- (2) whether it has been subjected to peer review and publication;
- (3) its known or potential error rate;
- (4) the existence and maintenance of standards controlling its operation; and
- (5) whether it has had an explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community (the “general acceptance” assessment).

The U.S. Supreme Court cautioned that this list should not be considered a “definitive checklist or test,” but in practice these factors are the only ones typically used by district courts evaluating the admissibility of scientific evidence.

The scope of the expert’s testimony is limited by FRCP 702 (Testimony by Expert Witnesses) which states:

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.

FRCP 704 permits the expert to base his or her opinion or inferences on “facts or data...of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may 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.”

C. *Daubert* Decisions are Difficult to Overturn on Appeal.

The author had occasion to litigate the admission of expert testimony in 2015.. In that case, *Murray v Southern Route Maritime*⁶, the issue was the admissibility of the expert testimony to be offered by Dr. Michael Morse, an electrical engineering professor. Dr. Morse proposed to testify that a longshoreman could receive a low-voltage shock that could cause bodily injuries far from the path of the electrical current. The relevant pages of the opinion are attached for the reader’s consideration. In *Murray*, following a *Daubert* hearing, the district court issued an order detailing why Dr. Morse’s diffuse electrical injury theory was reliable under FRCP 702 and *Daubert*. Although our appeal of this decision was unsuccessful, it is illustrative of the analysis the district court should conduct during a *Daubert* hearing.

As the Ninth Circuit noted, district judges play an active and important role as gatekeepers examining the full picture of the experts’ methodology and preventing shoddy expert testimony and junk science from reaching the jury. For this reason appellate courts give trial court’s ruling “the deference that is the hallmark of abuse-of-discretion review” and will not second-guess its sound judgments. This deference requires trial counsel devote sufficient time and attention to developing solid expert opinions, and when appropriate, to challenging opinions deemed not scientifically based or supported.

III. DIFFERENCES BETWEEN STATE AND FEDERAL RULES REGARDING EXPERT DISCOVERY

A. Washington State Expert Discovery Rules.

CR 26(b)(5)(A)(ii) allows a party to depose all experts its opponent expects to call at trial and does not specifically limit the time allowed for the taking of a deposition. Expert opinions may also be obtained through Interrogatories. CR 26(b)(5)(A)(i). Experts, however, are not required to answer interrogatories directly as these discovery devices can only be served on parties. As a practice pointer it is often useful to have an expert involved in responding to interrogatories concerning their backgrounds and opinions.

⁶ *Murray v Southern Route Maritime*, No. 14-36056 (9th Cir. 2017).

The extent to which disclosures regarding expert opinions are required on whether the expert is expected to testify at trial or has been retained solely for consulting purposes. For consulting experts, discovery may only be had upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. CR 26(b)(5)(B). This is a difficult standard to meet, and it protects even the identities of consulting experts⁷. For an expert expected to be called at trial, Rule 26(b)(5)(A)(i) provides that a party can be required to disclose the identity of such expert, the subject matter on which he or she is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the basis for these opinions upon interrogatory from the opposing party. Although there is no affirmative initial obligation to provide a testifying expert's report to the opposing party, the Washington Supreme Court has confirmed that written materials of testifying experts may be discovered through a Subpoena Duces Tecum issued pursuant to CR 44(a)(1)(C) as part of the expert's deposition⁸. For these reasons it suggested that opposing party serve interrogatories asking about the expert's opinions and its basis, serve requests for the production of documents seeking the expert's report and supporting documents, and a subpoena duces tecum on the expert for his or her complete file as part of the expert's deposition. There is no real authority regarding the discoverability of the expert's complete file, but the attorney's communications with a testifying expert, including materials sent to the expert, are discoverable⁹. The author assumes that draft reports and other preliminary materials are beyond the reach of CR 26(b)(5).

B. Special Washington Rules regarding Discovery from Treating Health Care Providers.

CR 26(b)(7) creates special rules for obtaining discovery from a treating health care provider, even if he/she is disclosed as an expert witness. Under the rule the party seeking discovery from a treating health care provider must pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in

⁷ *Detwiler v. Gall*, 712 P.2d 316 (Wash Ct. App. 1986).

⁸ *In re Det. of West*, 171 Wn.2d 383, 256 P.3d 302, 314 (2011) (although this was a criminal matter, the decision interpreted CR 26(b)(5)).

⁹ Washington Practice, Civil Discovery § 9.03, Scope of Expert Witness Discovery (2014) (expert discovery may include “documents and communications exchanged between the party and the expert and documents supporting the expert's report in the party's possession”).

advance, absent a court order to the contrary, the deposition will occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery.

C. Standards for Admission of Treating Health Care Provider’s Opinion Re “Cause.”

Often counsel will encounter situations in which a treating health care provider is asked to, or offers and opinion testimony regarding the cause of an injury or condition. Whether this is considered expert testimony under CR 702 or FRCP 702 is a subject of obscure jurisprudence. In federal court “a physician’s assessment of the cause of an injury is expert testimony.” *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011). Where a physician opines on the cause of an injury, the “testimony must be based on a reasonable degree of medical certainty.” *Luttrell v. Novatis Pharm. Corp.*, 894 F. Supp. 2d 1324, 1340 (E.D. Wash. 2012).

Washington courts require that causation medical testimony must also be based upon a reasonable degree of medical certainty. *Fabrique v. Choice Hotels Int’l, Inc.*, 144 Wn. App. 675, 685, 183 P.3d 1118 (2008). They also allow non-physician health care providers to offer causation testimony. In *Frausto v. Yakima HMA, LLC*, 118 Wn.2d 227, 393 P.3d 776 (2017) the Supreme Court upheld the admission of an advanced registered nurse practitioner (ARNP) causation testimony in a medical malpractice action. The court’s reasoning in *Frausto* appears based on a ARNPs authority to make medical diagnoses like a physician, while noting that registered nurses and other health care professionals are not qualified to make medical diagnoses and their causation testimony remains inadmissible, on the other hand. By allowing medical causation testimony only by the former, the Court has provided helpful rationale for defendants to rely on in arguing that professionals not empowered to make medical diagnoses remain per se disqualified from providing medical causation testimony.

D. Federal Expert Discovery Rules.

FRCP 26(a) mandates the disclosures of the identity of expert witnesses and any reports containing the “facts or data” considered by an expert in forming his or her opinion. FRCP 26(b)(3), limits the scope of the disclosure to “documents and tangible things” prepared “by or for” a party or its representative in anticipation of litigation. While an opposing party may

sometimes overcome that limitation by showing a “substantial need” for certain factual materials, the “mental impressions, conclusions, opinions, or legal theories of a party’s attorney” concerning litigation are “virtually undiscoverable.”

The Judicial Conference Advisory Committee comment on FRCP 26(a)(2)’s disclosure obligation notes the rule requires disclosure of the “facts and data” that the expert considered to form his or her opinion but under FRCP 26(b)(4)(B) specifically protects from discovery any drafts of expert reports or disclosures, and also most expert-attorney communications. Those exclusions are found in FRCP 26(b)(4)(C) with protects all expert-attorney communications, except to the extent that they “(i) relate to compensation for the expert’s study or testimony; (ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.”

FRCP 26(a)(2)(B) requires each expert to “prepare, sign and submit a written report if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.” The report must contain: (1) a “complete statement” of the witness’ opinions, (2) the “facts or data considered by the witness in forming them,” (3) proposed exhibits summarizing or supporting the expert’s opinions, (4) the witness’s qualifications, including a list of all publications authored in the previous 10 years, (5) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition, and (6) a statement of the compensation to be paid for the study and testimony in the case. FRCP 26(a)(2)(C) exempts from the written report requirement experts not retained for the purpose of giving testimony but are otherwise qualified to offer expert opinions, such as physicians. For these witnesses there still must be a disclosure of the subject matter of their testimony under FRCP 702, 703 or 705, with a summary of the facts or opinions the witness is expected to offer.

It is important to note that FRCP Rule 37(c)(1)- (Failure to Disclose Expert) provides that if “a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”

IV. PRACTICAL TIPS FOR CONDUCTING A *DAUBERT* HEARING

A. Procedural Rules Applicable to *Daubert* hearings.

Typically *Daubert*¹⁰ hearings are not discussed in the Scheduling Order issued following the FRCP 16 Pretrial conference and only become necessary once Initial Expert Designations and Reports are exchanged. Here are some practical considerations if counsel decides a *Daubert* challenge is appropriate.

1. The attorney challenging the expert witness should request a “meet and confer” conference with opposing counsel to discuss the following:
 - (a) the names of the expert witnesses that will be the subject of the hearing
 - (b) exchange the resume or CV of each expert witness
 - (c) the specific subject matter about which the expert witness is expected to testify
 - (d) each opinion the expert is expected to provide at trial that is subject to challenge
 - (e) the basis of each opinion, including the facts and data relied upon
 - (f) the principles and/or methods used to arrive at those opinions
 - (g) a good faith estimate by each party of the time each will need for their presentation
 - (h) a good faith estimate of the total amount of time needed for the hearing
2. The parties should provide the court with a stipulated request for a *Daubert* hearing setting forth the names of the expert witnesses to be called, a summary of their expected testimony and its relevance to the challenged testimony.
3. The opposing counsel should retain consulting experts to review the challenged testimony and potentially testify in opposition at the hearing.
4. Once the hearing date is set, the parties should request a supplemental scheduling order which sets deadlines for filing memorandum in support of and in opposition to the *Daubert* motion.
5. If necessary, the parties should agree on the scheduling of limited expert witness depositions to develop any areas relevant to the expected challenged testimony.
6. The moving party should ensure the hearing is reported by a court reporter.

¹⁰ *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

7. Following the hearing the prevailing party should request permission to file a proposed order and the losing party should be given the opportunity to serve a proposed order.

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROGER MURRAY; ELISE MURRAY,
husband and wife,
Plaintiffs-Appellees,

v.

SOUTHERN ROUTE MARITIME SA, a
Panamanian corporation; SYNERGY
MARITIME PVT LTD, an Indian
corporation; APL IRELAND M/V,
IMO number 9260914, her gear,
appurtenances, equipment and
furniture, in rem,
Defendants-Appellants.

No. 14-36056

D.C. No.
2:12-cv-01854-
RSL

OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted May 10, 2017
Seattle, Washington

Filed August 31, 2017

Before: M. Margaret McKeown, Carlos T. Bea,
and N. Randy Smith, Circuit Judges.

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Opinion by Judge McKeown;
Dissent by Judge Bea

SUMMARY*

Labor Law

The panel affirmed the district court's judgment, after a jury trial, in favor of the plaintiff in an action under the Longshore and Harbor Workers' Compensation Act.

While working aboard a vessel, the plaintiff, a longshore worker, experienced an electrical shock when a piece of rebar he was holding came into contact with a floodlight provided by the vessel owner. He alleged that the vessel owner had been negligent in turning over the ship with a faulty floodlight.

The panel held that the district court properly instructed the jury that the vessel owner owed a duty to the plaintiff as a longshore worker to turn over the ship and its equipment in a reasonably safe condition, which necessarily required the vessel owner to take reasonable steps to inspect the ship and equipment before turnover.

The panel held that the district court did not abuse its discretion in allowing the plaintiff's key scientific expert to describe his theory of electrical injury because the court adequately assessed the reliability of his theory and fulfilled its gatekeeping function under Federal Rule of Evidence 702

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The district court also did not err in admitting the medical experts' testimony.

Dissenting in part, Judge Bea concurred in the panel majority opinion's conclusions and reasoning regarding the jury instructions, the scope of the defendants' turnover duty, and the admission of the statements by the plaintiff's medical experts. He dissented from the majority's conclusion that the district court properly admitted the scientific expert's testimony. Judge Bea wrote that because the causal mechanism by which low voltage shocks purportedly cause certain injuries is not understood and because the district court did not evaluate the methodologies used by the expert to identify the posited correlation between low voltage shocks and certain injuries, the district court abused its discretion in admitting the expert's testimony.

COUNSEL

Philip A. Talmadge (argued), Talmadge/Fitzpatrick/Tribe, Seattle, Washington; Barbara L. Holland and David H. Smith, Garvey Schubert Barer, Seattle, Washington; for Defendants-Appellants.

Howard Mark Goodfriend (argued) and Ian C. Cairns, Seattle, Washington; C. Steven Fury, Francisco A. Duarte, and Scott D. Smith, Fury Duarte P.S., Seattle, Washington; for Plaintiffs-Appellees.

OPINION

McKEOWN, Circuit Judge:

The events underlying this appeal center on Roger Murray, a longshoreman who experienced an electrical shock while working aboard the M/V APL IRELAND, a vessel owned by Southern Route Maritime SA and Synergy Maritime Pvt. Ltd. (collectively, the “vessel owner”). While Murray was descending a ladder and holding a piece of rebar, the rebar came into contact with a floodlight provided by the vessel owner which allowed electrical current to flow through his right arm, across his chest, and out through his left pinky, where it left a visible burn mark. Murray exhibited a range of ailments after the shock, including stuttering, balance and gait problems, and erectile dysfunction.

Murray sued under the Longshore and Harbor Workers’ Compensation Act (“Longshore Act”), 33 U.S.C. § 901 *et seq.*, alleging that the vessel owner had been negligent in turning over the ship with a faulty floodlight. The jury awarded Murray over \$3.3 million for his injuries and awarded his wife \$270,000 for loss of consortium. The district court denied the vessel owner’s motions for judgment as a matter of law, new trial, and remittitur.

Unwilling to go down with the ship, the vessel owner appeals, asserting three trial errors—a flawed jury instruction and two errors related to the admission of testimony by Murray’s experts. We disagree on all counts. The district court properly instructed the jury that the vessel owner owes a duty to Murray as a longshoreman to turn over the ship and its equipment in a reasonably safe condition, which necessarily requires the vessel owner to take reasonable steps to inspect the ship and equipment before

turnover. Further, the court did not abuse its discretion in allowing Murray's key scientific expert to describe his theory of electrical injury because the court adequately assessed the reliability of his theory and fulfilled its gatekeeping function under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Likewise, there was no error in admitting the medical experts' testimony. We affirm.

Analysis

I. Jury Instruction Defining the Turnover Duty Under the Longshore Act

The Longshore Act provides a cause of action to longshoremen against the vessel owner "[i]n the event of injury . . . caused by the negligence of a vessel." 33 U.S.C. § 905(b). Here, Murray claims that the vessel owner breached its duty to turn over the vessel and its equipment in a safe condition.

At issue is Instruction 14, in which the district court defined the vessel owner's turnover duty:

One of the duties [vessel owners] owe to longshoremen is called "the turnover duty of safe condition." [The vessel owner] ha[s] the duty to use reasonable care to turn over the vessel and its equipment in such condition that an expert and experienced longshoreman would be able, by the exercise of reasonable care, to carry on his work on the vessel with reasonable safety to persons and property. In exercising such reasonable care, [the vessel owner] ha[s] a duty to take reasonable steps to inspect the vessel and its equipment.

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The first sentence is introductory. The second sentence captures almost word-for-word the Supreme Court's general description of the turnover duty:

A vessel [owner] must exercise ordinary care under the circumstances to turn over the ship and its equipment and appliances in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care to carry on cargo operations with reasonable safety to persons and property.

Howlett v. Birkdale Shipping Co., S.A., 512 U.S. 92, 98 (1994) (citation and internal quotation marks omitted); *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 166–67 (1981). The third sentence of the instruction gives practical meaning to the turnover duty by recognizing a duty to inspect the ship and equipment.

In the vessel owner's view, Instruction 14's formulation of the turnover duty is legally flawed because the instruction improperly expands the vessel owner's obligation to inspect the ship and equipment, states that the duty is to the longshoremen rather than the stevedoring company, and imposes an ongoing duty to inspect. Reviewing *de novo*, we conclude that the district court did not commit instructional error. See *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997).

A. Turnover Duty Encompasses Duty to Inspect

The Supreme Court's first major exposition on the turnover duty under § 905(b) came in *Scindia Steam*, which contemplates a duty to inspect as part and parcel of the turnover duty. Although a duty to inspect is not mentioned explicitly, the Court defined the vessel owner's "duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations." *Scindia Steam*, 451 U.S. at 167. To that end, a vessel owner fulfills its responsibilities when it provides a reasonably safe workplace for the longshoremen. *Id.* at 166–67. The only way the vessel owner can do so is by checking the ship and equipment before turning them over in order to confirm that they are safe enough to be used in cargo operations. Otherwise, the turnover duty would be rendered nugatory, taking on a "see no evil" approach.

As one treatise puts it, *Scindia Steam* "implicate[s] the shipowner's duty to inspect the ship for hazards before turning the ship over . . . because inspection is integral to providing the stevedore with a reasonably safe workplace." Robert Force & Martin J. Norris, *The Law of Maritime Personal Injuries* § 8:30 (5th ed. 2016). Justice Brennan's concurrence in *Scindia Steam* reads the majority opinion the same way, explaining that the law requires a vessel owner to "take reasonable steps to determine whether the ship's equipment is safe before turning that equipment over to the stevedore." 451 U.S. at 179 (Brennan, J., concurring).

The Court's later pronouncements on the turnover duty reinforce the inspection obligation. After reiterating a vessel owner's general turnover duty, the Court in *Howlett* examined the "corollary" duty to warn the stevedore of latent hazards that are known or should be known to the vessel owner. 512 U.S. at 98–99. The Court went on to conclude

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that the duty to warn attaches where “the exercise of reasonable care would place upon the shipowner an obligation to inspect for, or discover, the hazard’s existence.” *Id.* at 100. In explaining the relationship between the duty to warn and the inspection duty, the Court cited a Third Circuit case for the proposition that “the shipowner’s duty to warn the stevedore of hidden dangers necessarily implies a duty to inspect to discover those dangers.” *Kirsch v. Plovidba*, 971 F.2d 1026, 1029 (3d Cir. 1992), *cited in Howlett*, 512 U.S. at 100. *Howlett* more than suggests that reasonable steps be taken to inspect the ship and equipment before turnover.

Our court has been even clearer on a vessel owner’s duty to perform an inspection to fulfill its turnover duty. We have unequivocally held that “[w]here the shipowner itself supplies equipment, it has a duty to inspect the equipment before turning it over for use by the stevedore.” *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1357 (9th Cir. 1983); *see also Lincoln v. Reksten Mgmt.*, 354 F.3d 262, 268 (4th Cir. 2003) (“[T]he vessel might have been negligent in the maintenance, upkeep, and *especially the inspection* of the deck in question, so that, in the exercise of reasonable care, it might have discovered the defect . . . , enabling it to warn the stevedore of the defect.” (emphasis added)); *Reed v. ULS Corp.*, 178 F.3d 988, 992 (8th Cir. 1999) (affirming summary judgment for vessel owner because “[t]he record reflects that the inspection of the gangway . . . was reasonable”); *Kirsch*, 971 F.2d at 1029 (noting “the shipowner’s duty to inspect the ship for hazards *before* turning the ship over to the stevedore”).

This formulation of the turnover duty produces doctrinal coherence because it logically fits the duty to inspect within the general turnover duty and its corollary duty to warn. The

turnover duty mandates exercising reasonable care to provide a ship and equipment that are reasonably safe for the stevedore to carry on cargo operations. Part of that duty is to examine the ship and equipment. When that inspection turns up latent hazards that would not be obvious to or anticipated by a competent stevedore, the vessel owner's duty to warn kicks in because the vessel owner is in the best position to detect and avoid harm and should be liable if it does not speak up. *See Howlett*, 512 U.S. at 101–03. The vessel owner's belated argument to limit the inspection to identifying latent hazards would dilute the turnover duty envisioned by the case law and would be unworkable in practice.

Recognizing a duty to inspect as part of the turnover duty does not expand shipowner liability. The inspection is constrained by what is reasonable under the circumstances, and the ultimate measure of whether the vessel owner has satisfied its turnover duty is whether the vessel owner has provided a reasonably safe environment for the longshoremen to carry out their work. The limited nature of the duty undercuts the vessel owner's fear that it will be obligated to scour every inch of the vessel and tear apart all of the equipment. Because the inquiry turns on reasonableness, our rule also does not resurrect the strict-liability unseaworthiness regime that Congress dismantled by passing § 905(b). *See Scindia Steam*, 451 U.S. at 168–69. The duty to inspect falls comfortably within the turnover duty, and the district court's instructional clarifier was on the mark.

B. Turnover Duty Runs to the Longshoremen

The vessel owner's complaint that Instruction 14 improperly states that the turnover duty is "owe[d] to longshoremen" was not adequately raised in the district

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court. Granted, the vessel owner's counsel objected to another instruction on this ground and proposed an instruction regarding the stevedoring company's duties to the longshoremen. However, those efforts did not raise the objection to Instruction 14 with sufficient specificity to "bring into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943); *see also* Fed. R. Civ. P. 51(c)(1). At a minimum, the vessel owner would have to demonstrate plain error in the instruction to warrant reversal. *See* Fed. R. Civ. P. 51(d)(2).

The vessel owner cannot make that showing because the law supports the proposition that vessel owners owe the turnover duty to the longshoremen. The relevant statute, § 905(b), speaks of "injury to a person covered under this chapter," which includes longshoremen. *See* 33 U.S.C. §§ 902(1), (3); 905(b). The two leading Supreme Court cases involve suits brought by longshoremen against vessel owners and say that "the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care." *Scindia Steam*, 451 U.S. at 166; *see Howlett*, 512 U.S. at 98 (outlining the "three general duties shipowners owe to longshoremen"). We have framed the inquiry in the same way: "Although the turnover duty of safe condition is usually framed in terms of stevedores, it is clear that danger to *longshore workers* is an essential part of the inquiry." *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1270 n.4 (9th Cir. 1994).

The stevedoring company's separate obligation under 33 U.S.C. § 941(a) to provide a "reasonably safe" workplace for its longshoremen does not somehow override the vessel owner's duty to the longshoremen to turn over the ship and equipment in a safe condition. Those duties happily coexist, with the vessel owner ensuring a safe ship upon turnover and

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the stevedoring company ensuring a safe work environment during cargo operations. *See Scindia Steam*, 451 U.S. at 170–72. The district court properly instructed the jury on the vessel owner’s turnover duty to longshoremen.

C. Turnover Duty Is Not Continuing

The vessel owner also did not put the district court on notice about its complaint that Instruction 14 creates a temporally unrestricted duty to inspect and leaves the vessel owner open to a virtually unlimited obligation. *See Benigni v. City of Hemet*, 879 F.2d 473, 475–76 (9th Cir. 1988) (noting that “the record indicates that the trial court was not made aware of any specific concern with the proposed instructions”). In any event, regardless of the standard of review, the vessel owner’s challenge cannot be sustained because Instruction 14 plainly refers to the moment of turnover and not to a perpetual duty, and other instructions confirm that limitation.

Instruction 14 itself refers to the vessel owner’s duty when it “*turn[s] over* the vessel and its equipment.” Looking at the surrounding instructions, Instruction 12 summarizes Murray’s theory of the case “that [the vessel owner was] negligent because the vessel and its equipment were not *turned over* in a [safe] condition.” And Instruction 13, which sets forth the elements of Murray’s negligence claim, states that liability cannot be found unless the vessel owner “*turned over* the [vessel] and its equipment in [an unsafe] condition.” These related instructions make clear that the district court did not charge a continuing post-turnover duty.

II. Reliability of Dr. Morse's Testimony Under *Daubert*

The district court admitted Murray's scientific expert, Dr. Michael Morse, who testified that low-voltage shock can cause bodily injuries far from the path of the electrical current. Following a hearing, the court issued an order detailing why Dr. Morse's diffuse electrical injury theory was reliable under Federal Rule of Evidence 702 and *Daubert*. We review for abuse of discretion and conclude that the court performed a sufficiently rigorous evaluation of Dr. Morse's theory and did not "reach[] a result that is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

The starting point for our analysis is the Supreme Court's decision in *Daubert*, a case that effected a sea change in the way that courts consider admission of expert testimony. Before *Daubert*, courts generally followed the "general acceptance" test, which focused on recognition in the relevant field. 509 U.S. at 585–86. The Court in *Daubert* rejected that test as too rigid; drawing on Federal Rule of Evidence 702, the Court constructed a flexible test examining the "reliability" and "fit" of the offered expert testimony. *See id.* at 589–92.

The question of reliability probes "whether the reasoning or methodology underlying the testimony is scientifically valid." *Id.* at 592–93. To give shape to the inquiry, the Court identified four factors that may bear on the analysis: (1) whether the theory can be and has been tested, (2) whether the theory has been peer reviewed and published, (3) what the theory's known or potential error rate is, and (4) whether the theory enjoys general acceptance in the applicable scientific community. *See id.* at 593–94. But

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the Court was quick to emphasize that the factors are not “a definitive checklist or test” and that the reliability analysis remains a malleable one tied to the facts of each case. *Id.* at 591, 593. Later cases have reiterated that the *Daubert* factors are exemplary, not constraining. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999); *id.* at 159 (Scalia, J., concurring) (“[T]he *Daubert* factors are not holy writ . . .”).

It is important to remember that the factors are not “equally applicable (or applicable at all) in every case.” *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). Applicability “depend[s] on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” *Kumho Tire Co.*, 526 U.S. at 150 (citation omitted). A district court may permissibly choose not to examine factors that are not “reasonable measures of reliability in a particular case.” *Id.* at 153.

Because of the fluid and contextual nature of the inquiry, district courts are vested with “broad latitude” to “decid[e] how to test an expert’s reliability” and “whether or not [an] expert’s relevant testimony is reliable.” *Id.* at 152–53. District judges play an active and important role as gatekeepers examining the full picture of the experts’ methodology and preventing shoddy expert testimony and junk science from reaching the jury. *See Daubert*, 509 U.S. at 595–97. That is why we owe the court’s ruling “the deference that is the hallmark of abuse-of-discretion review” and may not second-guess its sound judgments. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141–43 (1997).

The court did not abuse its discretion here because its reliability inquiry satisfies these standards and the court applied the correct legal framework to the facts in a manner that was neither illogical nor implausible nor contrary to the record. In its *Daubert* order, the court first explains that Dr.

Morse “has published his findings in peer-reviewed papers.” “[S]ubmission to the scrutiny of the scientific community” can be a strong indicator of reliability “because it increases the likelihood that substantive flaws in methodology will be detected.” *Daubert*, 509 U.S. at 593. Dr. Morse’s theory has been peer-reviewed and published many times over: Murray’s filings in the district court cite eight articles by Dr. Morse published in reputable scientific journals. More generally, Murray submitted a wealth of examples of other scientists publishing in peer-reviewed journals on the theory of low-voltage and diffuse electrical injury.

The court then discusses acceptance of Dr. Morse’s theory by other professionals in the biomedical engineering field. The court was on solid ground in rejecting the vessel owner’s contention that “the number of confirmed low-voltage cases is too small to draw scientifically valid conclusions and that the minimum voltage required to cause injury has not yet been established with any degree of certainty.” Relying on the record, the court specifically credited Dr. Morse’s response that “over the past two decades both the immediate and extended symptomology of low-voltage shock has been recognized,” an observation grounded in his expertise in electrical injury and years of research in the field. Also, the record is replete with examples of articles that explicitly agree with Dr. Morse’s theory and methodology as well as articles that cite to and expand on his conclusions. Even if the vessel owner presented medical sources disagreeing with Dr. Morse, the district court could properly give weight to the fact that Dr. Morse’s theory has been acknowledged and credited by scientists in the community without determining the exact degree of acceptance. *See id.* at 594.

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The court's analysis does not end there. It evaluates the genesis of the expert opinion, a factor recognized in the advisory notes and our case law: Dr. Morse's theory "w[as] not developed for purposes of this litigation." *See* Fed. R. Evid. 702 advisory committee's note to the 2000 amendments; *Daubert*, 43 F.3d at 1317. Importantly, our cases call this consideration a "very significant fact" that "provides important, objective proof that the research comports with the dictates of good science." *Daubert*, 43 F.3d at 1317. The order also goes on to say that "[Dr. Morse's] conclusions are reasonable extrapolations from the patient files reviewed," tracking another known factor. *See Joiner*, 522 U.S. at 146 ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."); *see also* Fed. R. Evid. 702 advisory committee's note to the 2000 amendments (listing "[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion"). Based on these multiple considerations, the district court concluded that Dr. Morse's theory was grounded in science, as demanded by *Daubert*. *See* 509 U.S. at 594 (explaining that the "overarching subject is the scientific validity").

The adequacy of the court's review and the soundness of its judgment are further underscored by its discretionary decision to convene a *Daubert* hearing to explore matters with the parties. *See United States v. Alatorre*, 222 F.3d 1098, 1102, 1105 (9th Cir. 2000). At the hearing, the district judge played a proactive role: he was eager to receive information from the parties, asking them to submit all relevant articles and stating that he would "look[] at the entire body of the case, every document that has been filed beforehand, and every document that's filed in this motion and response." He gave the attorneys the opportunity to debate the issues and actively questioned them about the

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strengths and weaknesses of their positions. Only after this extensive back-and-forth and consideration of the parties' papers did the court issue its order admitting Dr. Morse's testimony.

It is true that the order does not scrutinize the testability and error rate factors. Although *Daubert* does not require a methodical walkthrough of each factor, the best practice may be for district courts to at least reference the four *Daubert* factors so as to avoid an appeal issue like the one here. See *Black v. Food Lion, Inc.*, 171 F.3d 308, 311–12 (5th Cir. 1999) (“In the vast majority of cases, the district court first should decide whether the factors mentioned in *Daubert* are appropriate. Once it considers the *Daubert* factors, the court then can consider . . . other factors . . .”). That said, we emphasize that not every factor is relevant to reliability in every case and that the significance of each factor is case-dependent. District courts have broad range to structure the reliability inquiry and may choose not to comment on factors that would not inform the analysis.

The district court's silence about the testability and error rate factors falls within that broad discretion. The omission may be attributed in part to the parties' nearly exclusive concentration on the other two factors—peer review and general acceptance. Those issues were teased out at length in the parties' motions and at the *Daubert* hearing, and thus the court put them front and center in its order assessing Dr. Morse's testimony.

Even more forcefully, the district court's order highlighted that the subject of Dr. Morse's testimony was narrow: he would discuss his theory of low-voltage diffuse electrical injury, but he would not offer an opinion on whether Murray's particular injuries were caused by the low-voltage shock. That limited focus made many of the vessel

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owner's critiques on testability misplaced and made the error rate a poor measure of reliability in this case. *See Kumho Tire Co.*, 526 U.S. at 153 (permitting district courts to discount factors that are not "reasonable measures of reliability in [the] particular case"). And to the extent that testability was raised before the district court, it was not forgotten or wholly ignored—the parties and district judge spent time at the *Daubert* hearing exploring whether Dr. Morse had followed a modified methodology drawn from one of his published papers. All of this convinces us that the district court fulfilled its gatekeeping role and did not jump to a conclusion that is unreasonable or unsupported by record evidence.

Our view that the district court acted well within its discretion is in accord with how we have treated other *Daubert* challenges. On many occasions, we have found an abuse of discretion when a district court completely abdicates its gatekeeping role. *See, e.g., City of Pomona v. SQM N. Am. Corp.*, No. 15-56062, 2017 WL 3378770, at *7 (9th Cir. Aug. 7, 2017) (explaining that the district court's "failure to make any findings regarding the efficacy of [the] expert opinions constituted an abdication of the district court's gatekeeping role, and necessarily an abuse of discretion"); *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (faulting the district court for "provid[ing] no explanation or analysis for rejecting [the expert's] qualifications"); *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014) (en banc) ("[T]he district court failed to assume its role as gatekeeper with respect to [the expert's] testimony."); *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001) ("The district court never clearly articulated why it excluded this evidence."). Other times, the analytical error has been egregious, like when a court would not let a highly qualified

and experienced doctor comment that prosthetic elbows normally do not wear out in eight months. *See Primiano v. Cook*, 598 F.3d 558, 562–63, 566 (9th Cir. 2010). In rare instances, we have even faulted district courts for being too robotic in applying *Daubert*. *See Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1233 (9th Cir. 2017) (“The district court looked too narrowly at each individual consideration, without taking into account the broader picture of the experts’ overall methodology.”). None of those circumstances is applicable here.

At the end of the day, the appropriate way to discredit Dr. Morse’s theory was through competing evidence and incisive cross-examination. *See Primiano*, 598 F.3d at 564 (“Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion.”). Indeed, many of the vessel owner’s complaints focus on statements made by Dr. Morse at trial. The best medicine was adversarial testing, not exclusion, and the vessel owner had abundant opportunity to undermine Dr. Morse’s theory and advance its own position. We decline the invitation to severely curtail district courts’ discretion to determine reliability under *Daubert* merely because the vessel owner’s defense was unsuccessful.

III. Admission of Medical Experts

The district court had a proper basis to admit Murray’s medical experts, who testified that Murray’s symptoms were caused by the electrical shock. The vessel owner’s claim that the experts did not testify on a more-probable-than-not basis is belied by the record. Before trial, Murray’s experts confirmed their medical opinion to a reasonable degree of certainty on a more-probable-than-not basis. And, at trial, there were numerous instances in which the experts testified in the same fashion. For example, one of the experts

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explicitly referenced the relevant standard in attesting that “[i]t’s my opinion that on a *more probable than not* basis [Murray] suffered a brain injury in the accident” and “that [the brain injury] relate[d] directly to th[e] incident [where he was electrocuted].”

Similarly, Murray’s experts properly followed the differential diagnosis framework. Differential diagnosis is appropriate to reject alternative causes where it is “grounded in significant clinical experience and examination of medical records and literature.” *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1199 (9th Cir. 2014). Here, the experts who did not have experience with diffuse electrical injury reviewed the medical literature. The experts fully explained how Murray’s symptoms fit with the literature or their experience and were not pre-existing or unrelated to the shock. The district court did not abuse its discretion in admitting the medical testimony.

AFFIRMED.

BEA, Circuit Judge, dissenting in part:

I concur in the panel majority opinion’s conclusions and reasoning regarding the jury instructions, the scope of the defendants’ turnover duty, and the admission of the statements by Murray’s medical experts. I write separately to dissent on the issue of whether the district court properly admitted the testimony of Dr. Morse regarding the harms that can be caused by low voltage electric shocks. Put simply, the district court failed to exercise properly its gatekeeping function by permitting Dr. Morse’s testimony without examining the methodologies by which Dr. Morse identified the injuries purportedly caused by low voltage

shocks, even though Dr. Morse could not explain the causal mechanism by which such injuries occur.

As explained in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591–93 (1993), which interpreted Federal Rule of Evidence 702, the touchstone for admissibility of testimony by scientific experts is “whether the reasoning or methodology underlying the testimony is scientifically valid.” Given the many ways that scientific expertise is developed and applied, however, the Supreme Court and this court have recognized that the four factors articulated in *Daubert* do not constitute a mandatory checklist. *Id.* at 593–95. Rather, each factor should be addressed to the extent relevant to a particular expert’s testimony. *Id.*; see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999), *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). While an appeals court may not second guess the sound judgment of the district court on the admissibility of expert testimony, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), the unreasonable failure to consider a relevant *Daubert* factor is an abuse of discretion. See *Kumho Tire*, 526 U.S. at 152.

In this case, the district court evaluated only two of the relevant *Daubert* factors: whether the expert’s research was peer reviewed and whether it was generally accepted by other scholars. The district court failed to consider whether Dr. Morse’s theory can be and has been tested and the error rate associated with the methodologies he relied upon to render his opinion. The district court did not offer any reasons as to why it overlooked these two factors.

First, the relevance of Dr. Morse’s testimony to Murray’s injuries is unclear. Dr. Morse testified that Murray’s symptoms were consistent with the low voltage shocks he

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had studied, but Dr. Morse's expert report discusses low-voltage shocks as being those of 110 volts. This was roughly twice the voltage of the shock experienced by Murray, which was somewhere between 41 and 58 volts. Expert testimony should not be admitted if it is not relevant, which this court has defined as evidence that "logically advance[s] a material aspect of [a] party's case." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (citation omitted). In this case, the definition of "low voltage" relied upon by Dr. Morse (110 volts) differed significantly from the "low voltage" shock suffered by Murray (41–58 volts). Such a difference raises serious doubts about the relevance to Murray's injuries of Dr. Morse's expertise, a doubt which the district court failed to address in its *Daubert* order. The district court failed to cite any record evidence that would allow Dr. Morse's findings regarding 110 volt shocks to be extrapolated to the lower voltage shock experienced by Murray.

Second, the district court does not explain why the *Daubert* factors of testability and error rate were not relevant to evaluating the admissibility of Dr. Morse's expert testimony. As Dr. Morse conceded, the mechanism by which the hypothesized injuries resulting from low voltage shocks occur is not understood. Such an admission should reasonably have led the district court to apply greater scrutiny to the methodology by which Dr. Morse arrived at his hypothesis about diffuse injury from low voltage shock. If the mechanism for an injury is not understood, it is that much more important to ensure the reliability of the methods by which a correlation between low voltage shocks and certain injuries was identified. Instead, the district court ignored the exact *Daubert* factors that evaluate the rigor of these methodologies. Namely, the district court failed to evaluate whether the theory or technique in question "can be

(and has been) tested.” *Daubert*, 509 U.S. at 593. While Dr. Morse’s hypothesis that low voltage shocks cause certain injuries can be tested, the record evidence does not establish that Dr. Morse’s theory was tested either through animal testing or other controlled experiments. Even if Dr. Morse is correct that low voltage shocks cause injury, this record does not establish whether such injuries are commonplace or extremely rare results of low voltage shock. In addition, the error rate of the particular research methodologies employed by Dr. Morse to identify the relationship between low voltage shocks and certain injuries was not addressed by the district court. For example, Dr. Morse relies in part on self-reported internet surveys of people who purportedly suffered a low voltage shock. See Michael S. Morse et al., *Diffuse Electrical Injury: A Study of 89 Subjects Reporting Long-Term Symptomatology that Is Remote to the Theoretical Current Pathway*, 51 IEEE Transaction on Biomedical Engineering 1449 (2004). By not considering the error rate of such self-reported surveys, the district court ignored the degree to which the survey respondents may have made up or imagined their symptoms, may not have actually received a low voltage electric shock, may have exaggerated their symptoms, or may have misunderstood the questions posed in the survey.

Taken together, the fact that Dr. Morse could not explain the causal mechanism behind the hypothesized relationship between low voltage shocks and certain injuries means that the *Daubert* factors that address the reliability of the methods – such as error rate and testability – used to identify this correlation had special importance in this case. By ignoring these factors, without stating a reasonable basis for such omissions, the district court’s *Daubert* analysis in fact merely evaluated the general acceptance of Dr. Morse’s theories as demonstrated through certain peer reviewed

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articles (functionally the same as the *Frye* test rejected in *Daubert*) and failed to evaluate the methodologies underlying Dr. Morse's opinion. This was an abuse of discretion in its gate-keeping function which the deference owed cannot overcome.

Finally, there are important problems with the analysis performed by the district court of *Daubert* factors of peer review and general acceptance. First, while the district court placed a great deal of weight on the fact that Dr. Morse's research on low voltage shocks had been subject to peer review, the Supreme Court has explained that the peer review factor is not alone dispositive and even if an expert's research is peer reviewed, a district court must still ensure that the expert's opinion is based on a reliable methodology. *Daubert*, 509 U.S. at 594 (“[t]he fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration”). Moreover, while the scientific literature in the record does establish that some experts accepted Dr. Morse's theories, the record makes clear that this acceptance did not rise to the level of general acceptance as a number of scientists criticized Dr. Morse's theory as controversial or not persuasive, in part because, as discussed above, the mechanism by which injuries from low voltage shocks purportedly occur is not understood. *See Daubert*, 509 U.S. at 594 (“a known technique which has been able to attract only minimal support within the community...may properly be viewed with skepticism” (citation omitted)).

Because the causal mechanism by which low voltage shocks purportedly cause certain injuries is not understood and because the district court did not evaluate the methodologies used by Dr. Morse to identify the posited correlation between low voltage shocks and certain injuries,

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the district court failed to carry out its gatekeeping function. *Barabin*, 740 F.3d at 464 (“Just as the district court cannot abdicate its role as gatekeeper, so too must it avoid delegating that role to the jury.”). For these reasons, I respectfully dissent.



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Erika is an attorney with Stokes Lawrence Velikanje Moore & Shore. Erika assists businesses with employment, contract, and land use issues in state and federal court and before administrative agencies. Her employment practice includes working with clients on preventative measures, such as trainings and counseling on disciplinary actions and workplace investigations.

Erika also serves as a Ninth Circuit Lawyer Representative for the Eastern District of Washington and as a board member for the Walter Clore Wine and Culinary Center and the YMCA of the Greater Tri-Cities.

After growing up in Prosser, Erika received an agricultural economics degree from Washington State University. She then attended law school at the University of Idaho, where she graduated at the top of her class. Erika and her family lived in the Tri-Cities for 14 years, where she served as a staff attorney to U.S. District Court Judge Edward Shea, researching legal issues, drafting opinions, and preparing the judge for hearings and trials. While working for the Eastern District, Erika participated on the supervising team for Richland's Sobriety Treatment and Education Program and served on the District's Pro Se Litigation Committee.

Erika, her husband, and their two kids now live in Prosser, where they keep busy with youth sports and activities and community organizations.

Focus on Conflicts of Interest

**Federal Civil Trial Practice Seminar
May 18, 2018**

**Hugh Spitzer
UW School of Law**



Types of conflict issues

Current Conflict (RPCs 1.7, 1.8, and 1.18)

Conflict between lawyer's two present obligations

Successive conflict – former clients(RPCs 1.7 and 1.9)

Conflict between lawyer's present and past obligations

Imputed conflict (RPC 1.10)

- * Conflict between lawyer's present obligation and a colleague's obligation
- Successive and imputed conflict between lawyer's past and present obligations after changing jobs

Declining or Terminating Representation (RPC 1.16)

Conflicts: Focus Topics for Today

- **Who is a “Current Client?”**
- **Documenting the Client Relationship**
- **The Organization as Client**
- **Joint Representations**
- **Former Clients**
- **Advance Consents**

Quick Review of Some RPCs



RPC 1.7(a) – Current Conflicts

Except as provided in ... (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. **A concurrent conflict of interest exists if:** (1) the representation of one client will be **directly adverse** to another client; or (2) there is a significant risk that the representation of one or more clients will be **materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RPC 1.7(b)

(b) Notwithstanding...paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve ... the same litigation...; and
- (4) each affected client gives informed consent, confirmed in writing....

RPC 1.7 Cmt. [2]

Resolving Current Client Conflicts

1. Clearly identify lawyers and clients
2. Determine whether conflict of interest exists
3. Decide whether representation can be undertaken despite conflict (i.e., is the conflict “consentable”)
4. If so, consult with the affected clients and obtain their informed consent, confirmed in writing

RPC 1.7(b): Consent to conflict

Notwithstanding a conflict under (a), may represent if...

- Reasonable belief you could represent both clients competently and diligently
- Not prohibited by law
- Does not involve client v. client in same litigation
- Clients give informed consent, confirmed in writing
- Consent to current conflicts, and “screens”

RPC 1.18: Prospective Clients

RPC 1.18(a): A person who discusses with a lawyer the *possibility* of forming a client-lawyer relationship is a “prospective client”

RPC 1.18(b): Even if no client-lawyer relationship ensues, the lawyer can't use or reveal info learned from the prospective client except as allowed by RPC 1.9, or by informed consent

RPC 1.9(a) Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in **the same or a substantially related matter** in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

RPC 1.10(a) Imputation

[W]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9

RPC 1.10(b) Imputation

(Disqualified lawyer left the firm)

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from... representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless: (1) **the matter is the same or substantially related** to that in which the formerly associated lawyer represented the client; and (2) **any lawyer remaining in the firm has information** protected by Rules 1.6 and 1.9(c) that is material to the matter.

RPC 1.9(b) Former Clients

(Lawyer newly arrives at the firm
from a former firm)

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a **firm with which the lawyer formerly was associated** had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom **that lawyer had acquired information** protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

RPC 1.10(e) Imputation

(Effect on other firm lawyers when a new lawyer arrives from another firm)

(e) When the prohibition on representation...is based on Rule 1.9(a) or (b), and **arises out of the disqualified lawyer's association with a prior firm**, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified unless: (1) the personally disqualified lawyer is screened...and is apportioned no part of the fee...; (2) the former client... receives notice; (3) the firm is able to demonstrate by convincing evidence that no material information...was transmitted by the personally disqualified lawyer....

RPC 1.16(a)

(Declining or Terminating Representation)

(a) Except..., a lawyer shall not represent a client or, where representation has commenced, shall...withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(3) the lawyer is discharged.

Focus: Who is a “Current Client”?

- READ those boring “new client” checks
- Spend the time to *promptly* fill out new matter sheets, and do it *accurately* (!)
- Watch out for “Accidental Clients”
- *Document* the engagement, even if it’s a hassle.

Who is a “Current Client”?

You aren't going to know if there's a conflict between a new client and a client for whom you're responsible if you don't read the doggone “new client” lists.



Who is a “Current Client”?

(Keeping Imputation at the Top of Your Mind)

Helpful Hint:

Never, use the term “my client” when talking with your colleagues.

Always refer to “the client I’m responsible for.”

(That’ll remind you that *every* firm client is *your* very own client, so you’ll take more interest in those doggone lists.)

Who is a “Current Client”?

Your colleagues aren't going to know if there's a conflict between a new client and clients for whom they are (or were) responsible if you don't fill out the conflict check *forms...promptly* and *accurately*.

(And *why* those five-year-old closed matters are still important...ugh!)

Who is a “Current Client”?

Helpful Hint: Be sure to get the prospective client’s name(s) right.

Restatement § 14

An attorney-client relationship arises when:

1. A person manifests to a L the person's intent that the L provide legal services; and either
 - a) The **L manifests** to the person **consent** to do so;
or
 - b) the **L fails to manifest lack of consent** to do so,
and the L knows or reasonably should know that the person reasonably relies on the L to provide the services....

FOCUS: Documenting the Client Relationship (or Non-relationship)

- **Engagement letter**
 - “I accept you as a client.”



- **Non-engagement letter**
 - “I decline to represent you as a client.”



- **Disengagement letter**
 - “My representation in this matter is now complete.”
 - “I am withdrawing from representation.”
 - “You fired me.”
 - “I left my firm to pursue my interest in Cuban tax law.”

The Multiple Benefits of an Engagement Letter

1. Nails down the scope of representation.
2. Nails down the fee arrangement (!)
3. Nails down the lines of communication
4. *Might* nail down what to do in the event of future conflicts (including advance consents)

Focus: The Organization as Client (a different animal)



MR 1.13: The Organization as Client

1.13 (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Who Speaks for the Entity?

- > RPC 1.13(a): “Duly authorized constituents”
- > Restatement: “Responsible Agents”
- > Other terms: “Representational Authorities” or “Authorized Representatives”

Who are these “Duly Authorized Constituents”?



Watch Out!

Don't confuse the "duly authorized constituent" with the client!!

MR 1.13—Dealing with client's constituents

(f) Duty to **clarify role** when dealing with constituents with adverse interests


(g) **Joint representation** of organization and constituents allowed, subject to MR 1.7's requirements and consent given by some other constituent besides the one being represented



Focus: Joint Representations

Representing two parties to a transaction
is like handling a...



A man in a dark suit and red tie is shown in profile, looking towards the right. In the background, a woman with red hair, wearing a black and white top, is standing with her arms crossed, looking towards the man. The background is a bright, out-of-focus office setting.

No **attorney-client privilege** to shield information from either client if they are jointly represented.

Ethical **duty of confidentiality?**

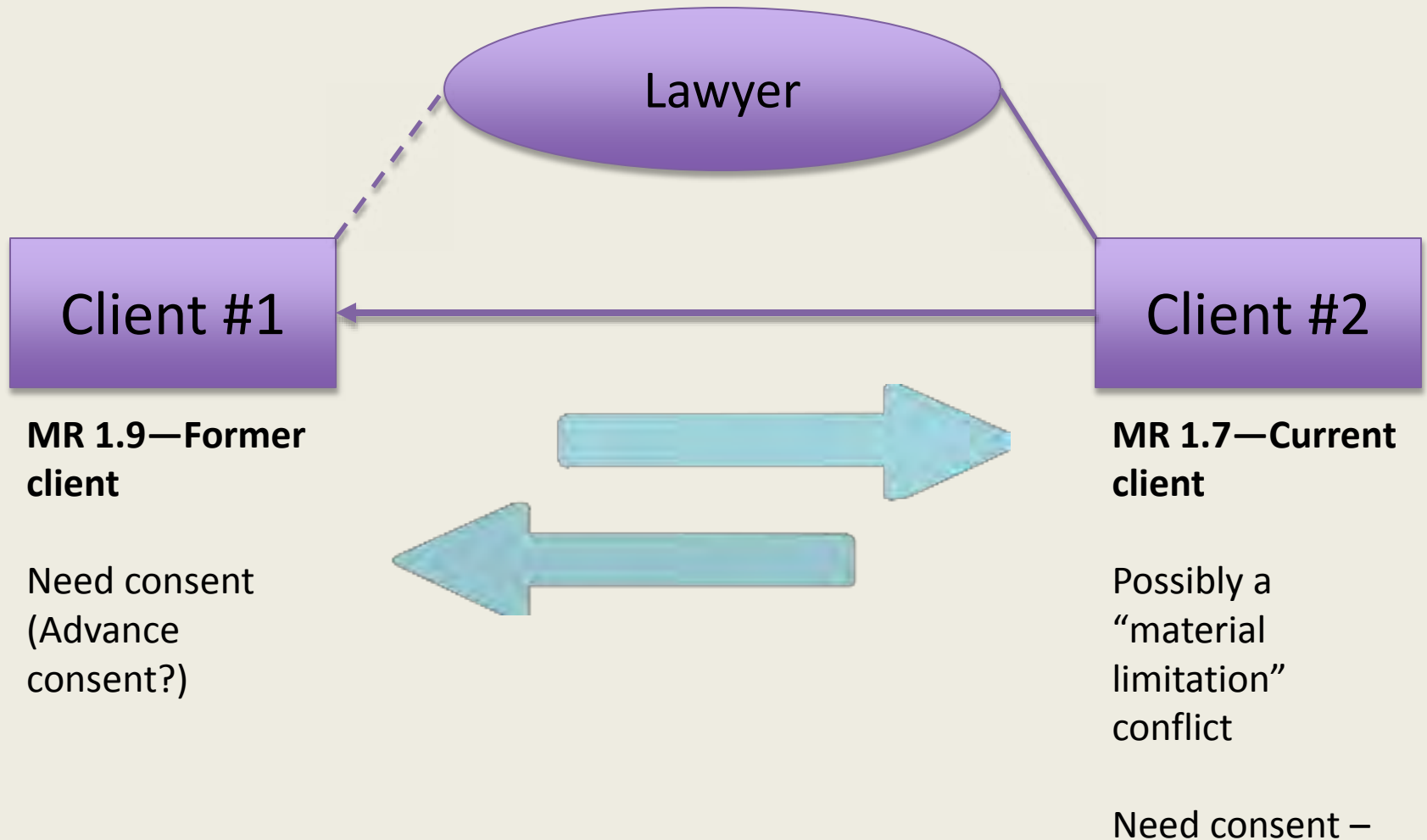
RPC 1.7 → Com. [31]

Joint clients end up in adverse litigation



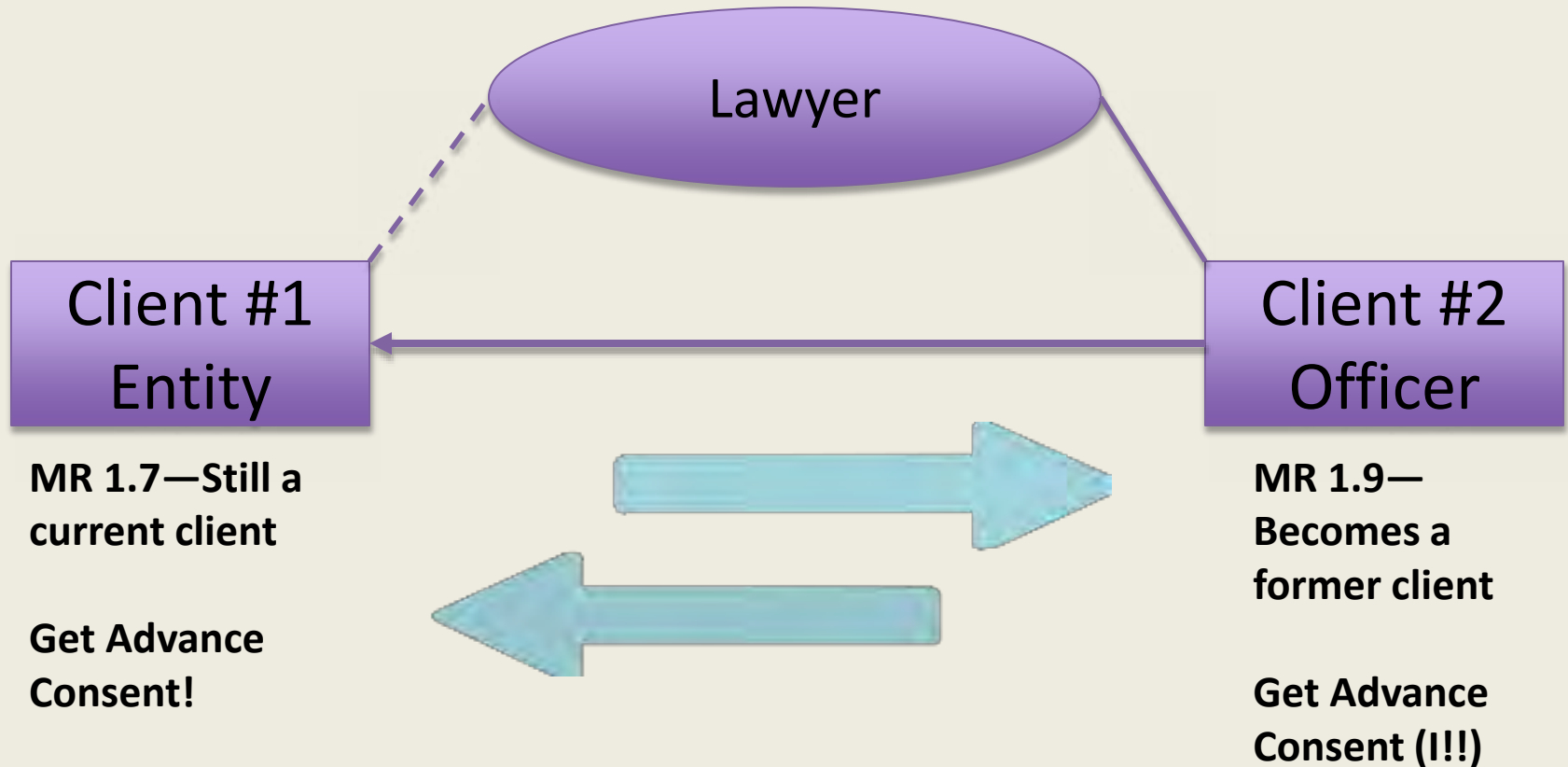
- Conflict of interest under RPC 1.7(a)(1) (and/or (a)(2))

Can you withdraw from representing one and remain the other's lawyer?



What about joint clients consisting of an *entity* and the entity's officers/employees?

(Remember RPC 1.13)



Conflicts in Joint (Insurance) Representation

Liability policies typically contain two primary duties:

- Duty to indemnify (pay \$)
- Duty to defend

Insurer hires lawyer to represent insured

Relevant rules: *RPC 1.6, 1.7, 1.9, & 1.8(f) & 5.4(c)*

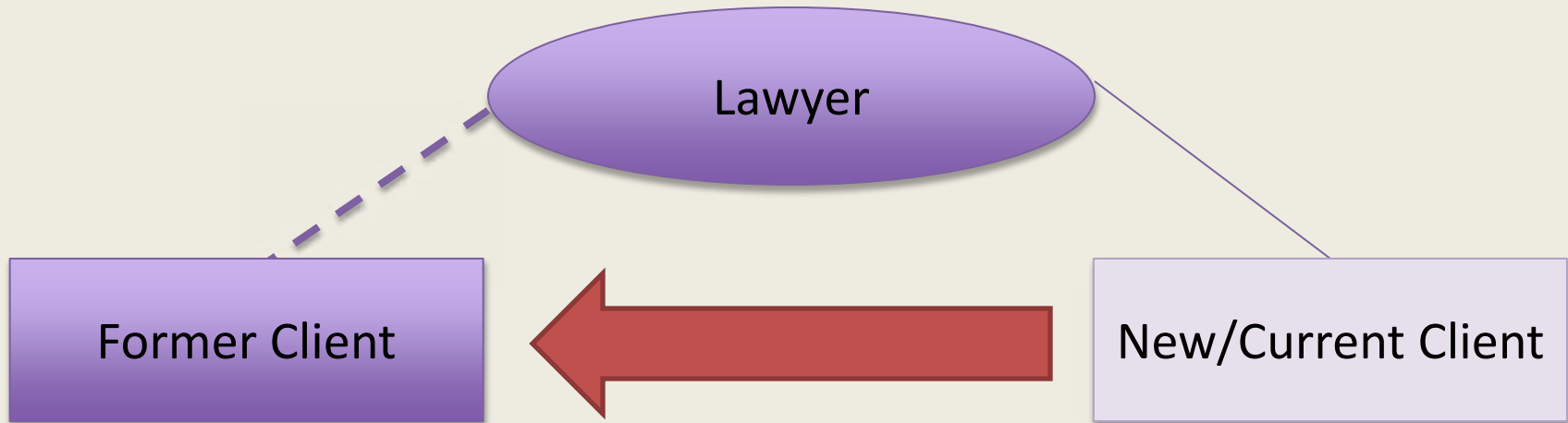
Watch out: Washington State's different.

WA RPC 1.8(f)

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- 1) the client gives informed consent;
- 2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- 3) Information relating to the representation of a client is protected as required by Rule 1.6.

Focus: Former Clients (RPC 1.9)



Rule 1.9: Governs prejudice **to former client** from duties owed current client

1. Clearly identify clients: is there a “former” client?
2. “Same or substantially related matter”?
3. Current client’s interests “materially adverse” to former client’s?
4. Former client gives informed consent, confirmed in writing

“Matter”

Anything that is the subject of representation

- Litigation
- Transaction
- Subject on which client requests advice
- Document the lawyer was involved in producing



“Substantially related matter”

Is there a **substantial risk** that a lawyer **normally would** have learned **confidential factual information** in work on first representation of former client that **could be used adversely** against that client in the second/new representation?

Issues to watch for

- General v. specific information about client's business operations
- Client's litigation/negotiation "playbook"
- Client info is now public
- Lawyer's level of responsibility



Focus: Advance Consents (Can they really work?)

The not-so-good news:

1. Courts generally don't like advance consents to conflicts because the clients might not understand what/how conflicts would arise.
2. Clients can usually *withdraw* consents previously granted.
3. The burden is usually on the lawyers.

Advance Consents: Can they really work?

The better news:

1. Advance consents by legally sophisticated clients can work.
2. Advance consents can work when the engagement letter was clear about potential conflicts, risks, and included *examples*.
3. Advance consents can work when the consent language *isn't* tucked away in boilerplate language.

Advance Consents (Can they really work?)

4. Advance consents stick when that engagement reviewed was actually reviewed by the client's independent counsel.
5. Advance consents can be assisted by voluntary internal screening.
6. Advance consents can work if they're *signed* by responsible client representatives.

Advance Consents (Can they really work?)

Peter Jarvis' tips:

- Don't seek the Impossible or the Implausible
- Ask Clearly for What you Need but *Not More*
- Expressly Address Conflicts that Exist or are Foreseen
- Expressly Address Confidentiality Risks
- Expressly Address Potential Loyalty Risks
- Define What is and isn't "Material"

Hugh Spitzer

Hugh Spitzer is a law professor at the University of Washington School of Law, where he teaches U.S. Constitutional Law, State Constitutional Law, Local Government Law, Professional Responsibility, and Transnational Law.

He has published widely on local government law and state constitutional law topics, including a book (with the late Robert Utter) on the Washington State Constitution. He has also written about special ethics issues for government lawyers. In 2016 he retired from his law firm, but continues to do consulting work with other lawyers on issues relating to state and local law and legal ethics.

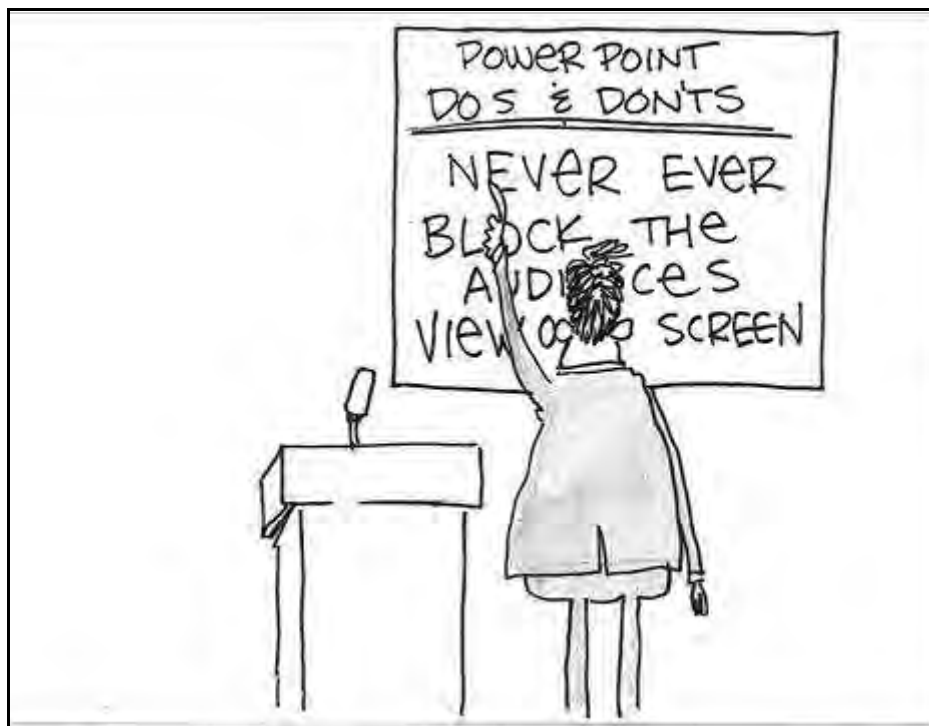
Mr. Spitzer received his B.A. from Yale in 1970, a J.D. from the UW Law School in 1974 and an LL.M. in 1982 from UC Berkeley.

How to Avoid Tuning Out Your Audiences – the Don'ts of Visual Presentations

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The soul never thinks without a picture.

Aristotle



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If you speak it and don't show it; the auditory learners will get it, the kinetic learners might get it, but the visual learners probably won't. If you speak it and show it – the positive impact on understanding and retention is dramatic.

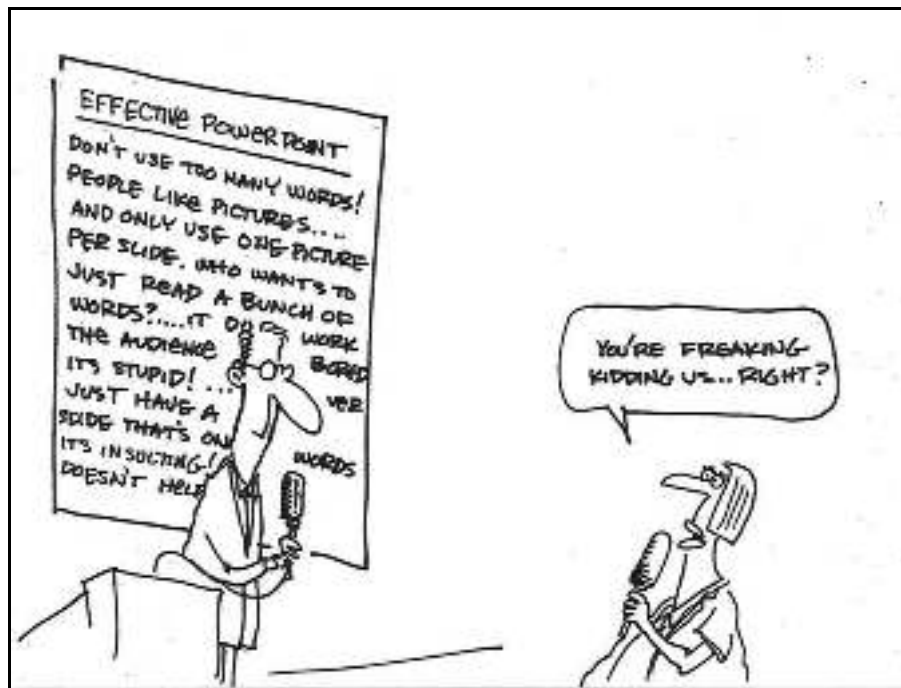
The Dual Coding Theory of memory was initially proposed by Paivio (1971). The core idea is the human mind operates with two distinct classes of mental “codes”: verbal representations and mental images. Human memory thus comprises two functionally independent (although interacting) systems: verbal memory and image memory. Imagery potentiates recall of verbal material because when a word evokes an associated image (either spontaneously, or through deliberate effort) two separate but linked memory traces are laid down, one in each of the memory stores. Obviously the chances that a memory will be retained and retrieved are much greater if it is stored in two distinct functional locations rather than in just one. *See, Nigel J.T. Thomas in the Stanford Encyclopedia of Philosophy.* <http://bit.ly/9e3HCo>.

To use less scientific terminology: seeing is believing.

However, this does not mean you should put your entire outline up on a screen. Here is the hardest yet simplest lesson for attorneys to follow in creating a trial slide show: Do not display visuals filled with words.

If you show a visual filled with words, then Paivio's dual processing channels cross wires. While you are speaking, the audience will be reading. They will have to tune you out to read. Or they will have to ignore the printing to listen to what you are saying.

Comprehension and retention will significantly decrease. It is actually better to show no visual, than to show one filled with words.



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1. The Tragedy of a Horrible PPT.¹

Setting: A room full of lawyers eager to learn about PPT.

Set up: Presentation projected onto a giant screen. I am the speaker. My back is turned to the audience. Am facing the screen. Reading every single word (verbatim) in this series of slides. Into a microphone. In a monotone. As quickly as I can.

To get the full effect, you may now take over my roll. And give this speech.

¹ For a selection of commentaries on the perils of PowerPoint, see the writings of Edward R. Tufte, professor emeritus of political science, computer science and statistics, and graphic design at Yale. (www.edwardtufte.com). For a selection of critiques on the musings of Professor Tufte, see: *Five Experts Dispute Edward Tufte on PowerPoint*, Cliff Atkinson (2004), www.sociablemedia.com/articles_dispute.htm

Karen Koehler

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**Communication Experts
all agree: PowerPoint is
poorly used and
preformatted templates
are mostly to blame.**

When words fill a slide, the audience tunes out

- Sure it is a handy outline the attorney can read from, but the negatives far outweigh the positives
- Judges don't care to be read to
- Educational research shows retention drastically decreases if words are spoken and shown at the same time
- This is because people have dual processing channels (visual/verbal). They can pay attention to only a few pieces of information in each channel at a time while actively processing it

Highlighting words doesn't cure the problem

- Even if you distinguish words with
 - CAPITALS, underlines or *italics*,
 - **bold** face or bigger **type**,
 - filling an entire slide with typeset will usually be a waste of persuasive effort.
- There are better ways to use words and these will be described and shown later.

Careful editing is needed

- The general rule is no more than 3 or 4 chunks of data per slide
- Extraneous information needs to be edited
- Otherwise the mental energy of the audience will be wasted
- One example involves use of logos
- Other than self edification, the logo wastes one "chunk" each time it is shown.

If you use the default “slide layout” function

- The presentation will be
 - Predictable
 - Monotonous
 - Boring
 - Mind Numbing
 - Nonpersuasive
- Instead use the blank or single headline presentation formats

Headlines

- Headlines lead the audience through the story
- They should be short
- But if they are too short they don't work
- People don't think in terms of disjointed words
- People think in sentences
- So the headline must be a short sentence no more than 2 lines long

One cool feature of powerpoint is that you can use visual clips



- If you go up to the tool bar, you can use the "insert" button to tack on clips or pictures from files. You can also go to the bottom where there are clip buttons.
- However, resist the urge to be cute. 😊
- Clips can be obnoxious and distracting.
- The more you use, the less impact they will have.



Great Photos can be ruined by displaying too many at once



It doesn't help to show an important document without highlighting



Prototype Powerpoint overload has now occurred

- Your eyes should be glassy
- You haven't retained a visual picture of what I've said except how awful this all is
- And you're mentally bracing for the next boring predictable slide.

The “show” undermined the presentation

- Because I’ve been focused on looking at and reading the slides
- I’ve failed to truly communicate
- I’ve neutered my personal charisma
- I’ve lectured instead of persuaded
- All in all, this type of presentation is worse than a total waste.

2. Beyond bullet points by Cliff Atkinson.

My children began putting together PPT presentations as third graders. The first presentation I put together was in 1999. It was for a 20 minute speech and took me almost eight hours. I thought it looked great. In retrospect - it is mediocre. We all need to start somewhere. There is no substitute for spending time experimenting and working (playing) with the medium.

Because so few attorneys used PPT, I thought I was doing a really good job. That is until I heard a presentation by Cliff Atkinson at a seminar in 2007. Cliff is a slide presentation guru. He wrote *Beyond Bullet Points: Using Microsoft PPT to Create Presentations that Inform, Motivate, and Inspire*. © 2005 Cliff Atkinson. Microsoft Press. What he said (and showed) revolutionized the way I use visual slide shows at trial.

Cliff says that when PPT was created, this was the amount of research that went into determining whether the templates were effective educational constructs: zilch.

3. Better PPT by Stephen Kosslyn, Ph.D.

Dr. Kosslyn is the Dean of Social Science and John Lindsley Professor of Psychology at Harvard and an Associate psychologist in the Department of Neurology at Massachusetts General Hospital. In 2011 he wrote a book: Better PowerPoint®.

The book is filled with explanations and advice. His rules have names. Which are great. Except perhaps only the boomers can intuitively grasp the “Mr. Magoo Rule.” Here is a synopsis of Chapter 7 on use of color and texture to organize and emphasize.

- Limit colors of text. No more than two colors should be enough.
- Use colors that are clearly distinct – the hues need to be separated and not capable of confusion.
- Avoid red/blue and red/green in adjacent regions. This can cause focusing difficulties especially for the color blind population.
- Avoid text or graphics in a deep heavily saturated blue/cobalt blue. This color prevents the eye from focusing on the image properly (it will fall slightly in front of the retina) and appear blurred around the edges.
- Be considerate of the inherent messages of color in the U.S. See the study of Joe Hallock, <http://joehallock.com/edu/COM498/credits.html>

Concept	Blue	Red
Trust	34	6

Security	28	9
Speed	1	76
High quality	20	3
Reliability/dependability	43	3
Fear/terror	0	41

This book like Cliff's is geared toward the general user of PPT. Much involves corporate or educational settings. So you have to pick and choose your way through them.

Logistics and other final random thoughts

1. Check out the courtroom ahead of time and figure out where the screen and projector should go.
2. Get advance permission from the bailiff for the set up.
3. Use a projector that's bright enough so you don't have to dim the lights (jurors will fall asleep if you do that)
4. Use a remote mouse
5. The mouse should have a "black screen" button
6. Having the screen black focuses the attention on you and should be used periodically to drive points home.
7. Use your laptop or table as a monitor, situating it so you can glance at it w/o having to turn your head back away from the audience to look at the screen
8. Always have a backup plan.

9. If it takes longer than two minutes to fix a glitch and a recess isn't available, go to that other plan.
10. Don't talk to the screen.
11. Some people stand in front of the screen (not obstructing it but in front of it newscaster style) and never look at the screen. Other people interact with the screen. There is no rule governing this other than – don't talk to the screen.
12. There is a “notes” view that allows you to view your notes on the computer monitor so you don't need to talk to the screen or shuffle paper notes.
13. The slides should match up with what you are talking about without using the same words
14. If you show a document, blow up and highlight the important part of it
15. Words must be big enough for the audience to read
16. Don't use all capitals.
17. The general rule is no more than three to four chunks of data per slide
18. Avoid more than one photo per slide unless you are comparing pictures
19. Crop photos
20. Don't use templates
21. Headlines should be short complete sentences
22. Rarely use headlines
23. Don't interact with every slide
24. Interact with some of the slides
25. Contrast should be bright and clear

26. If you are trying to color code slides - remember, men in particular may be colorblind
27. Special effects should rarely be used
28. Same for clip art
29. Get photos and images of real things from the case file and from the internet
30. If it is too cute or basic, it will be seen as condescending
31. If you modify a photo to make a point, type out a disclaimer at the bottom of the slide, i.e. "This photo has been altered"
32. Pause before/after presenting a dramatic/humorous slide; or risk the audience forgetting what else you say
33. Try out the slide show on others before you show it to a judge/jury
34. Use more than a few, but not too many slides. A couple per minute.
35. If the judge requires you to show the other side your slides, then make sure you do so. There won't be a problem if you are simply showing evidence or things you disclosed prior to trial. Other images may require a bit of discussion, negotiation, or motion practice.

The end.

Karen Koehler

Karen Koehler is a trial attorney at www.stritmatter.com. Her practice focuses on major injury and death cases and includes all tort practice fields. Her personal website www.karenkoehler.com, details some of her high profile cases including the civil rights wrongful death case brought against the City of Seattle for the death of Kristopher Kim during the 2001 Mardi Gras Riots; the Owen family death and injury tree fall case that was brought against the State of Washington in 2013; the Ethel Adams v. Farmers case that resulted in passage of a new UIM law in for innocent bystanders in road rage cases in 2005; and the civil rights educational deprivation case of disabled student Jose Garcia against the Grandview School District in 2015. Her most recent trial in 2017 involved a toddler who left an unsecured shopping center play area and was struck and killed by a car.

Karen is a past president of the Washington State Association for Justice where she also won its Trial Lawyer of the Year award. Her blog "The Velvet Hammer"TM made the ABA top 100 for six years. She has written multiple books for Thompson West the best known of which are Litigating Minor Impact Soft Tissue Cases and Litigating Major Automobile Injury and Death Cases. She has produced two videos - Preparing for Deposition and Preparing for the Defense Medical Exam distributed through Trial Guides. Karen founded the Spinal Cord Injury Association of Washington. www.sciaw.org. She has spoken for a majority of state TLAs and frequently for AAJ. She is a prolific user of social media. Twitter: k3velvethammer. Karen is the mother of three 20 something year old daughters and a Brittany named Nala.

Magistrate Judge Dimke

Magistrate Judge Dimke was appointed to an eight-year term on January 14, 2016. Prior to her appointment, she served as an Assistant United States Attorney in the Eastern District of Washington from 2012 to 2017, and in the Western District of Washington from 2007 to 2012. From 2004 to 2007, she was a trial attorney in the Criminal Division, Fraud Section of the United States Department of Justice in Washington, D.C. Judge Dimke clerked for the Honorable Richard C. Tallman, Ninth Circuit Court of Appeals from 2003 to 2004, and for the Honorable Alan B. Johnson, in the District of Wyoming from 2002 to 2003. An eastern Washington native, Judge Dimke grew up in Clarkston, Washington. She graduated from Pepperdine University in 1999, *magna cum laude*, and from Vanderbilt University School of Law, *Order of the Coif*, in 2002.

Lonny R. Suko, Senior Federal U.S. District Court Judge

B.A. in Political Science, June 1965, Washington State University; J.D., June 1968, University of Idaho College of Law; Law Clerk to Honorable Charles L. Powell, Chief Judge, Eastern District of Washington, 09/68-08/69; Associate, partner and shareholder in Lyon, Weigand, Suko and Gustafson at Yakima, WA, 9/69-7/95; United States Magistrate Judge, 1995-2003; Federal U.S. District Court Judge, 2003-2013; Senior Federal U.S. District Court Judge, 2013-current.

Robert H. Whaley, *United States District Judge*

Judge Whaley currently serves as a Senior United States District Judge in the Eastern District of Washington. He was nominated by President Clinton on May 24, 1995, and confirmed by the United States Senate on June 30, 1995, and appointed by the President on June 30, 1995. Judge Whaley served as chief judge from August 1, 2005 to July 12, 2009.

Prior to his federal judicial appointment, Judge Whaley served as a Superior Court Judge in Spokane County from 1992-1995. Early in his legal career, Judge Whaley was a trial attorney with the Department of Justice in the Land and Natural Resources Division. He served as an Assistant United States Attorney in the Eastern District of Washington for two years in the early 1970's and was in private practice for twenty years before being appointed to the Superior Court bench.

Judge Whaley went to undergraduate school at Princeton University and earned his A.B. in 1965. He graduated from Emory University School of Law in 1968, and served in the U.S. Marine Corps. He has three children, and four grandchildren. His youngest daughter just recently passed the bar.