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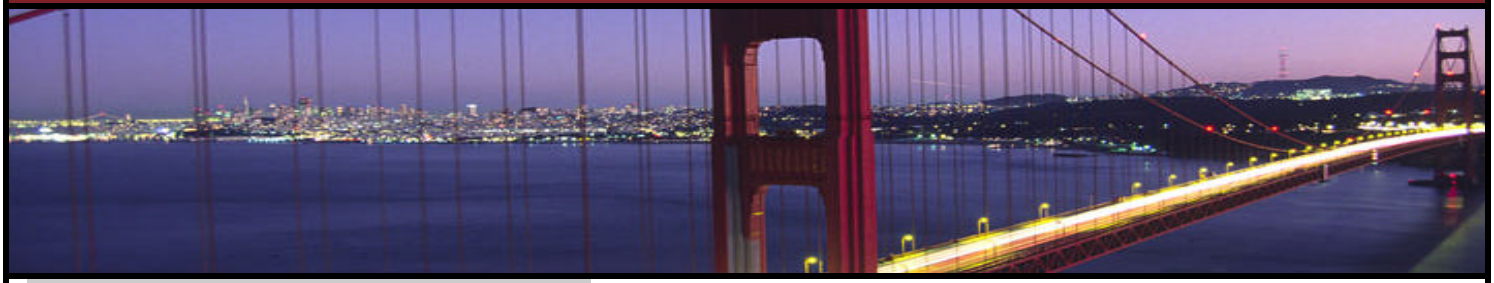

Burnham Brown represents a wide variety of clients in the retail and hospitality industry. Through an interdisciplinary approach that combines expertise and resources from multiple legal specialties, the firm is well equipped to service client needs. This group regularly provides business counseling and litigation services to clients is an efficient and cost effective manner.

Our firm has a long history of providing skilled and knowledgeable advocates in civil litigation involving a wide variety of commercial and business issues. Centrally located in Oakland, Burnham Brown is well positioned to serve clients throughout Northern California.

Thomas Downey is a member of Burnham Brown's Commercial Litigation Practice Group. His practice focuses on commercial litigation and counseling, involving environmental, health care, insurance, technology and transportation issues. He can be reached at 510.835.6716 or tdowney@burnhambrown.com.

Practical Guidelines For Working With Experts

People with specialized knowledge are regularly retained by claims analysts and trial attorneys to assist with the investigation and evaluation of lawsuits. These individuals are generally categorized as either "consulting experts" or "testifying experts" depending on the scope of the assignment and the stage of the proceeding. In many instances, but not all, a "consulting expert" may become a "testifying expert." This paper describes ten practical guidelines for working with experts.

1. Identify and retain experts as soon as possible.

It may be common sense or the latest television version of "crime scene investigation" – but it is undisputed that there is a temporal component to preserving evidence. Consequently, experts should be identified and retained at the earliest opportunity to assist with the collection and preservation of evidence. Where there is a large or catastrophic loss, the prompt retention of an expert is an essential component of an emergency response defense team. The early involvement of an expert will serve as a safeguard against incomplete or inadequate investigation of a potential liability incident. In scenarios involving product failures or commercial losses, experts with specific knowledge of equipment or component parts may be necessary to evaluate the causation issues in a multi-party or failure analysis context. Similarly, experts in relatively new fields, such as human factors and/or ergonomics, may be necessary depending on the circumstances of the case. "Human factors" is a form of engineering analysis that relates to the safe design and manufacture of consumer products. A wide range of economists are also regularly retained to assist with the evaluation of business damages or income loss claims.

When a qualified expert is retained early in the proceedings, the retaining party can use the expert as a resource to educate counsel or identify other potential experts. In addition, early retention prevents the expert from turning up in the opponent's camp later in the case.

If cost is an issue – then the retention should be limited rather than delayed. Where it appears that an expert may be needed but no

authorization has been obtained to retain the expert, certain information can still be confirmed in advance. Here, it is advisable to proceed with identification of potential experts and confirmation of availability and no conflicts. Resolution of these issues will expedite the process once authorization to proceed is obtained.

2. Develop reliable resources for identifying experts.

Because expert identification and evaluation is a cumbersome process, the value of reliable expert resources should not be underestimated. Many risk managers, claim professionals and attorneys maintain their own list of preferred experts in various fields. The scope of this information is magnified dramatically when combined with a multi-national association such as the Harmonie Group and the Canadian Litigation Council.[1] The ability to identify qualified experts promptly is an enormous asset in responding to a large loss and during litigation. This same resource can also be used to promptly collect information regarding experts disclosed by an opponent. In addition to professional networks and associations, other useful sources for expert identification include the academic arena (colleges and university faculty), jury verdict publications and reported appellate decisions. There are also a wide range of on-line resources regarding experts available through the internet.

Another good source of input for identification of potential experts is the client. In many instances, clients have experienced employees that can provide preliminary information regarding industry practices and equipment. In addition, experienced employees may often be familiar with "regional" experts regarding the specific types of equipment involved.

3. Evaluate experts thoroughly before retention and disclosure.

The selection of an expert can be one of the most important decisions made in the investigation of a claim and/or during litigation. The outcome of a many jury trials hinges on the testimony of the experts. This underscores the importance of selecting an appropriate expert witness. A basic determination is whether the proposed expert is qualified to testify regarding a particular subject and whether the expert has the ability to persuade a judge or jury.

The Federal rules provide that the purpose of expert testimony is "to assist the trier of fact" to understand the evidence or to determine a fact in issue.[2] A witness qualified as an expert may testify in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [3]

Unlike percipient witnesses, the selection of an expert presents a rare opportunity for litigants to make a discretionary selection of a witness. Although there are countless factors that can impact the selection of an expert witness, some of the major considerations are set forth below.

- Attitude
- Availability
- Education
- Experience with subject matter
- Experience with litigation
- Ethics
- Communication skills
- Conflicts of interest
- Publications
- Location
- Cost
- Technology
- Resources

It is rare that an expert witness fits the perfect model that the retaining party has in mind. However, it can be a colossal mistake to select an expert witness that is not qualified to testify on the subject matter at issue. Accordingly, it is essential for the hiring party to confirm the witness' credentials and to evaluate whether the expert is a good fit given the venue of the case and the potential jury pool involved.

Decisions regarding experts should not be based solely on the hourly rate. While the retaining party may "get what it pays for" – there are also plenty of experts that are overpriced and under qualified for the rates charged. Here, caution should be used to avoid being "penny wise and pound foolish" when it comes to hiring an expert.

Not all cases that have complex issues require a polished, trial savvy expert that has had hundreds of depositions. In some instances a knowledgeable person with many years of experience in field may appear more genuine than the "hired gun" that appears "too smooth" to be believable or trustworthy.

Notwithstanding a good recommendation, the retaining party should conduct its own evaluation of the proposed expert. In most cases, this includes a face to face meeting before the person is disclosed as an expert witness. While this may sound old fashioned and expensive, it remains the best way to evaluate how a witness will likely be perceived by others.

The retaining party should be thoroughly prepared to meet with the expert. It is much easier to converse constructively with an expert if you have a general understanding of the technical issues and a thorough understanding of the facts available to date. Here, it is particularly useful to become familiar with the terminology and vernacular used by experts.

The selection and retention of experts presents the potential for conflicts of interest. This issue should be addressed at the initial inquiry stage to avoid any future problems. One of the most significant risks associated with conflicts of interest is the potential for disqualification by the opposition. Courts will evaluate disqualification on two grounds. First, the party seeking to disqualify the expert must prove that it was objectively reasonable to believe that a confidential relationship existed. Second, it must also be demonstrated that confidential information was provided to the expert.[4] Needless to say, having an expert disqualified on a conflict shortly before trial can have a devastating impact on trial strategy.

4. <u>Confirm the scope and terms of the retention in an agreement.</u>

The retention of an expert should be confirmed in a written agreement. The agreement should set forth the basic terms of the retention, including compensation, personnel, confidentiality, conflicts and scope of the assignment.

Because expert fees can be large, compensation should be specifically addressed in terms of hourly rates for all personnel that will work on the project and an overall budget. If necessary, the proposed budget should reflect all phases of work that are contemplated. While most experts charge by an hourly fee, some have half-day minimum charges that are subject to challenge in some jurisdictions. The agreement should also describe costs and billing practices.

The scope of the assignment should also be described in general terms in the agreement. However, the retaining party may supplement this description with additional limitations and/or instructions. Such instructions are often communicated verbally to avoid inquiries from the opposition once the consultant is disclosed as an expert witness.

5. Preserve the expert's objectivity.

"Perception is reality" when it comes to expert witnesses testifying before a jury. Although an expert may not always be viewed as "neutral," it is important that the expert be viewed as "objective." The converse of objectivity is the "hired gun" syndrome – where the expert is viewed as another sounding board for the attorney that hired him or her. If the expert relies solely on information received from counsel and does not incorporate other objective sources or standards, then he or she may be perceived as selectively adopting only favorable factors.

There can also be an unfavorable inference if an expert is retained by the defense in a disproportionate number of assignments. Here, a jury may also become skeptical of experts that are frequently retained by the same entity or counsel. One way to avoid this issue is to use different experts and avoid using one particularly expert in too many similar engagements.

Another advantage of using different experts is the development of numerous resources that will be available when others are not. In addition, experts will frequently approach projects with different methods that will expose the litigants and counsel to other techniques in use in the industry.

6. Use caution when communicating with an expert.

All communication with an expert should be handled with care. As a general matter, information provided to an expert witness is discoverable by the opposition.[5] Consequently, the party retaining an expert should assume that all communications with the expert will be disclosed to the opposition at some point in the future. This risk of potential disclosure requires the retaining party to avoid or limit recorded communications with an expert.

The modern age of e-mails and voice mails presents new forms of recorded communication that becomes part of an expert's file. The expert should be instructed at an early stage to communicate verbally unless instructed otherwise. This approach will prevent preparation of unwanted written material that may be subject to discovery. Here, the retaining party should not provide the expert with a written description of the case strategy and the expert should be cautioned not to provide a written report until requested.

Where written communication is used with an expert it should be on a formal basis. Overly friendly or social exchanges with an expert may be used by an opponent to suggest the retained expert is biased and not objective in his or her opinions.

The retaining party should also use caution in the type of information provided to an expert. As noted above, virtually all experts are expected to have fundamental technology skills that enable them to communicate with the party that hired them and to analyze data in electronic formats. However, the retaining party should avoid providing open ended access to company or firm records. In the modern era of electronic storage and retrieval, an expert's access to client files can become problematic if a court permits the opposing party to have similar access.

7. Keep control of the assignment.

The retaining party should keep close control of the assignment. Although the initial written retention agreement will describe the general scope of services the expert will provide, further guidance regarding the specific tasks involved will be needed. One good example is the area of tests and experiments. Experts frequently recommend tests to confirm or refute proposed theories. There are numerous disadvantages to experts applying tests, including both the cost and the uncertainty of the outcome. It is not uncommon for experts that proceed with "tests"

that inadvertently confirm the theory of the opposing party. These problems can generally be avoided with an early instruction for "no tests" until further notice.

Because expert testimony is most valuable if it is perceived as "objective," the retaining party should avoid overly "controlling" the assignment. For example, if the expert only reviews information provided by the retaining counsel, he or she appears to be less "neutral" without incorporating independent sources of information. Periodic conversations with a retained expert regarding the basis of his or her opinions is an excellent way to stay in tune with the expert's work without an undue influence perception.

8. Protect privileges regarding attorney work product.

The attorney work product doctrine protects an attorney's rights to prepare cases for trial with sufficient privacy to encourage full investigation of both favorable and unfavorable aspects of the case. This doctrine also protects work performed at the direction of counsel in anticipation of litigation.[6] While this protection applies to the work of a retained expert (i.e. investigator, reconstruction engineer), it is substantially reduced once the retained expert is disclosed as a witness that will provide expert testimony.

Accordingly, it is also a good practice to have consultants retained by counsel and have the expert's opinions communicated directly to counsel to preserve the work product privilege. In the event that there is no litigation pending, the attorney work product privilege may be preserved by counsel forwarding correspondence to the expert confirming retention to assist counsel in investigation and analysis of potential litigation.

Most jurisdictions recognize two levels of work product protection, one is an absolute privilege and the other is a conditional privilege. The absolute privilege applies to any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories.[7] The conditional privilege applies to objective material, such as scientific tests, that the attorney obtains in preparation for litigation but does not include in the attorney's own subjective input or analysis. Information protected by the conditional privilege is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing the party's claim or defense or will result in an injustice.[8]

As with any other privileged information, the protection of the work product rule does not apply to privileged information on which an expert relies in forming an opinion. Both federal and state courts recognize a general rule that discovery of non-trial witness experts is precluded in accord with the attorney work product doctrine. When an expert is retained as a consultant purely to assist and advise the attorney and not to be called as a witness at trial, the expert's reports, opinions, knowledge and identity are conditionally protected. However, in limited circumstances, a party may show good cause to exist for the discovery of an expert's report if it was reasonably certain that the consultant expert would be a witness – even if that expert had not yet been designated as a trial witness.[9] Similarly, there is no provision for discovery of information concerning an expert before the expert is actually disclosed as a trial witness. In some instances, an expert that is disclosed, but later withdrawn prior to deposition, the work product doctrine remains applicable to protect disclosure of the retained consultant's work. [10]

There are a few noteworthy differences with the federal work product doctrine. Federal Rule 26(a)(2)(B) requires a testifying expert to submit a report that includes a complete statement of all opinions to be expressed and the basis of the opinions; and the data and other information considered by the witness in forming the opinions. This broad disclosure requirement includes material that was not relied on as support for the opinions. The courts have reached different conclusions in analyzing the balance between the broad discovery provided by Rule 26(a)(2) and the protection of attorney work product in Rule 26(b)(3).[11] Although most courts have held that work product related to "facts" is discoverable, some courts have permitted discovery of attorney work product related to "opinions" (i.e. the attorney's

mental impressions and conclusions) communicated to the expert. This highlights the importance of monitoring the material that an expert considers in developing an opinion and the scope of information communicated by counsel to the expert.

9. ***Prepare the expert for the discovery process.***

Experts can also be very useful resources in the discovery phase of litigation. Where technical information is needed from the opposition, experts can assist in drafting specific discovery requests and/or responding to requests received from the opposing party. In addition, the new Federal Rules of Civil Procedure describe specific obligations for litigating parties in the context of electronically stored information or EDD (electronic discovery data).[12] Here, expert input may be necessary to evaluate the availability of electronically stored information and to assist with preparing for depositions of technical personnel. In matters involving a large volume of material that is stored in many different media forms, both the producing party and the requesting party are frequently required (out of necessity) to retain information technology specialists to identify and reproduce the material.

A disclosed expert is also subjected to discovery from the opposing party. The discovery process and the rules of evidence should be explained thoroughly to the expert. An expert should be thoroughly prepared for deposition. In most jurisdictions, all opinions that are offered at trial must first be disclosed in deposition. Consequently, it is important for the expert to complete all work necessary to fully describe the opinions and basis of the opinions during the deposition. A failure to provide full description of opinions may lead to exclusion of important evidence at trial.

10. ***Develop an appropriate trial presentation with the expert.***

Experts are essential to the pre-trial preparation of a case and the actual trial proceedings. In the pre-trial stage, an expert can serve as a valuable resource in the evaluation of technical evidence and in the development of an evidentiary presentation. The presentation of live testimony from experts is often one of the highlights in a jury trial. One way to secure prompt feedback regarding an expert and the expert's opinions is to hold a mock trial. Constructive feedback from the mock jury panel can help identify inconsistencies or weaknesses in expert witness trial testimony.

A testifying expert should be thoroughly prepared to present testimony in a direct and understandable fashion. While most experienced experts have mastered the interpersonal communication skills necessary to make an impression on a jury, the methods of trial presentations are frequently changing. As a result, counsel should work closely with the testifying expert to develop a presentation format that is appropriate for the anticipated jury pool. In most instances, this will include the use of technology to present visual aids that will supplement the testimony. Jurors are often intrigued by technology and influenced by presentations that assist them in visualizing the factual background of a case. Accordingly, counsel should work with the expert to develop an evidentiary "presentation" that is appropriate for the anticipated jury. Computer generated graphics and animated images are effective tools for holding the jurors' attention. Note, however, counsel should keep close control of such productions to avoid having early versions or inconsistent draft presentations turn up in discovery.

Finally, the information described above provides practical guidelines for working with experts. There is no perfect formula for all circumstances since the facts of a case and the jurisdictional rules may vary. Professionals working with experts should confirm the current status of procedural rules applicable to experts in the state and local jurisdictions.

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[1]For more information regarding The Harmonie Group and The Canadian Litigation Council, see www.harmonie.org and www.clcnow.com

[2] F.R.E. 702.

[3]*Daubert v. Merrill-Dow Pharmaceuticals, Inc*., 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999).

[4]*Stencel v. Fairchild Corp.* (CD Cal. 2000) 174 F. Supp. 2d. 1080; *Wang Labs., Inc. v. Toshiba Corp*. (E.D. Va. 1991) 762 F. Supp. 1246.

[5]Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 395.

[6]Cal. Code Civ. Pro. section 2018.020. Cal. Evid. Code sections 953; 912.

[7]Cal. Code Civ. Pro. section 2018.030(a).

[8]Cal. Code Civ. Pro. section 2018.030(b).

[9]Cal. Code Civ. Pro. section 2034.010 – 2034.730.

[10]*Shooker v. Superior Court*, 111 Cal. App. 4th 923, 930 (2003).

[11]Musselman v. Phillips, 176 F.R.D. 194, 201-02 (D.Md. 1997); B.C.F. Oil Refining, Inc. v. Consolidated Edison Co., 171 F.R.D. 57, 63-66 (S.D.N.Y. 1997).

[12]Fed. Rules of Civ. Proc. §26(b)(2)(B).