THE ROLE AND RESPONSIBILITY OF AN EXPERT WITNESS

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I. INTRODUCTION

The purpose of this Article is not to provide legal analysis of the practices attorneys should use or determine what the legal responsibilities or rules of ethics are with respect to the use of an expert witness in legal proceedings. A lawyer did not prepare this Article. Instead, the purpose of this overview is to share the view from "the other side of the fence." This view is put forth by an experienced witness who has provided expert testimony in several cases and contributed support to cases from an advisory standpoint. An "expert" under federal law must be qualified as such by "knowledge, skill, experience, training, or education."[1] Judging whether skills or knowledge are adequate may be a challenge for the attorney in an area with no established resource pool. Making the right choice is a challenge not only for the context of the case and the needs of the client, but also for the rigors of the process itself.

Most expert witnesses build their reputation around a career in the field in which they testify, and very often litigation and legal matters are only a part of their professional duties. However, individuals exist who have established such a strong reputation or predominance in their field that nearly all of their activities are

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1. FED. R. EVID. 702.

centered around supporting litigation. Finding this type of individual may entail contacting universities, trade or professional associations, or on traditional interpersonal networking. Technology now brings another dimension to networking—the Internet. If one "surfs the net" for an expert witness, one finds every manner of expertise (or claimed expertise), from experts on toxicology to experts in reindeer loss. It is difficult to determine whether a given expert *already* has a deeply ingrained opinion or by just viewing a résumé, and, if so, how that established outlook will impact the case at hand. Previously taken positions or deeply ingrained viewpoints are likely to yield a witness who speaks strongly, passionately and credibly for what that professional believes in. Ferreting out that belief in advance, however, may not be easy if the practicing attorney is not familiar with the field or the professionals in it. Should the witness under consideration for support in a case hold an underlying but unspoken opinion in conflict with the claim of the client, the outlook of the witness may interfere with the factual findings of the case or the attorney's ability to build a credible case.

Rule 702 of the Federal Rules of Evidence goes on to describe an expert witness as one who "may testify thereto in the form of an opinion or otherwise"[2] and further decision or argument will be based on that opinion. However, the expert witness should support that opinion, from relevant experience, knowledge, and, most critically in my opinion, peer-reviewed findings or science. In matters of business practice or personal disputes, peer-reviewed science does not apply. However, because my experience is in the area of agricultural chemicals, science and regulations come first in the assessment, use, and evaluation of impact. Crop damage claims, toxic torts, and disputes between manufacturers require the application of good science. How exactly "good science" is defined may be elusive to the nonscientist, particularly when one is faced with the resolution of controversy or interpretation of damage or loss. Just how does an attorney discern what is good science?

There has been some recognition over the last few years that expert witnesses must somehow be further "qualified" in order to achieve the goal of good science. A given set of criteria established by regulation, however, is still unlikely to offer a set of descriptors that can assure the ethical behavior of the expert. As with most human interactions, behavior standards come from within and cannot be finitely molded by an overlying set of external standards. The attorney is and will probably always be faced with making a final determination of an expert's qualifications. Much of that determination will come from how the attorney feels after interviewing a potential witness and what the previous record of testimony the witness offers.

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2. *Id.*

II. INTEGRITY: REAL OR PERCEIVED

I have been involved as an expert witness in several aspects of agricultural science and regulation, either in legal procedures or public hearings. In all cases I have seen, one of two things happens to the opinions expressed by "an expert." In the first situation, the opinions of an expert play upon an emotional aspect that supports a forgone conclusion and are accepted regardless of their veracity. Meryl Streep did a very good job of this in her attack on apples. The public panic about Alar that resulted was an expression of the media's tendency for fear mongering and the public's uncertainty about how to interpret "risk." When such uncertainty is backed by a spokesperson who comes across as very credible, the fact that the spokesperson never had a day of toxicology training in her life carries little impact. The audience doesn't understand toxicology, but does understand uncertainty, and the way scientists speak of their research can often be interpreted as uncertainty. An approach dwelling on fear and uncertainty can be (and is) used in the courtroom. Such an approach, which detracts from the underlying findings of science, is probably one factor that led to the need for the *Daubert* ruling.[3]

In the second situation, the expert opinions are presented in such a manner as to be clarifying and robust yet nonthreatening, and are presented to remove a foregone conclusion. Several years before the "apple scare," there was a "forestry scare" associated with the use of glyphosate (Round Up®) in the Northwestern United States and Southwestern Canada. Those voicing the fear or concern purported that the compound contained dangerous contaminants. By working with the media and the public, as well as local governments in a public hearing setting, parties responding to the issue were able to explain that the impurities, dioxanes, had no relationship (other than a similar spelling) to dioxins, a group of compounds which were the subject of much concern at the time. Such a response, however, required speaking from certainty, being prepared for the counter argument, and translating technical issues to laymen's words. That combination is the tool kit of a reliable and credible witness.

No one enters a courtroom or hearing unbiased. But no witness should enter the courtroom with a "what do you want me to say" attitude. I would suggest when both the plaintiff and defendant happen upon an expert with a "what do you want me to say" attitude, the first situation, that of supporting a foregone conclusion, is more likely to occur. If not faced with the same approach from the opposing side, the credibility of the witness could be greatly reduced.

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3. Daubert v. Merrell Dow Pharmaceuticals, 506 U.S. 914 (1992).

III. EXPERT WITNESSES AND BUSINESS PRACTICES

An expert witness, doing business in his given area of practice or operating solely as an expert witness, cannot be expected to work for free, but neither should their interest in applying their talents be driven by greed. A recently conducted Internet survey of expert witness billing and business practices sheds some information on the common practices of expert witness.[4] Results are based on fifty-nine responses—a rather small sample, but one producing interesting results nonetheless. The survey is somewhat self-serving in that it is limited to experts providing service over the Internet. The observations shared in the general and public version of the findings are themselves a statement of the use of the Internet for expert witness matters. (Only people using the Internet responded to the survey).

The survey consisted of three parts. The questions in the first part related to the billing practices used by expert witnesses. The second part inventoried how expert witnesses "marketed" themselves. The third portion of the survey sought information about the background of the "typical" expert witness. The survey is available on the Legal Research Network (LRN) Web Page.[5] The findings are discussed below and compared to the experiences of our firm and what might be expected to be "usual" practices.

A. *Billing Practices of Expert Witnesses*

In the Legal Research Network survey, most responses indicated that billing practices were conventional hourly billing for services. Some witnesses responded to the survey by stating that they billed by day or part days, and some had unique practices. It would not seem ethical for many reasons for the expert witness to have any financial incentive associated with the size or award granted in the case for which that service is provided. However, a recent review implies that there is case precedent for the payment of expert witnesses on a "reasonable fee" basis rather than a flat-fee basis.[6] In *Pappalardo v. Parklane Hosiery Co.,*[7] the New York court approved an understanding that the three expert witnesses' fees in that case would be based on whatever fee was awarded by the court.[8] The intent underlying the decision was to devise a system by which antitrust plaintiffs could afford experts when challenging opponents with far greater resources.[9] One commentator on this case suggested this opens the opportunity for expert witnesses to operate in a contingent fee environment.[10] In my opinion, however, a professional providing expert witness services should do so within the bounds of his or her normal billing rates.

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4. *Legal Research Network* (visited Mar. 16, 1998) <http://www.witness.net/>.
5. *Id.*

Furnishing help on a contingent fee basis suggests that the witness has a vested interest in "winning" rather than a passion for revealing the facts of the matter at hand.

In the LRN survey, the average actual billing rate employed by most consultants was $157 per hour, and ranged from $60 to $350 per hour.[11] Certainly this range reflects the level of qualifications needed (a CPA for general tax testimony versus an expert in estate taxes, for example) and the level of demand placed on the expert's overall available time. In the individual survey responses, one-half of the billing rates were reported to be higher than $172.00 per hour and one half were reported to be lower. The survey results provided by LRN indirectly imply that about thirty percent of the responding audience adjusts rates on an annual basis.[12]

Billing rate levels present an interesting quandary for the attorney selecting a witness: are the rates high because the witness is in demand? Are they high because the witness is very busy in their field of expertise and considers legal matters an inconvenience? Do lower rates mean less sophistication? Obviously there is no set answer to any of these questions. Very often, evaluation of the worth provided by the witness becomes a very subjective decision. One would hope that higher rates indicate that an experienced professional can deal rapidly and effectively with the matter at hand. A potential witness who charges high rates, if worth his "salt," should be able to give preliminary overviews of a situation within his scope of expertise without needing too much time to conduct a background investigation. Certainly, when the case is formally undertaken, a need will exist for researching the proper documentation and compiling the facts surrounding the particular matters in question. An attorney should deal cautiously with a prospective, high-priced witness who cannot give at least a preliminary "statement of position" or general opinion from the start.

Attorneys usually seek an expert witness who is "close to home." In my experience, I have worked on only two cases (out of about a dozen) that *did not* require travel. Even though travel costs may be perceived as a barrier, often the specialty or experience a "distant" expert might bring offsets them. Most consultants do not change their billing rates for time away from their office.[13] However, the LRN survey noted that those experts not billing for travel time either rarely travel out

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6. Charles E. Mueller, *Restoring the* Private *Antitrust Cases: Contingent Fees for Economic Experts*, 25:4 ANTITRUST L. & ECON. REV. 1, 1-3 (1994).

7. Pappalardo v. Parklane Hosiery Co. (*In re* Shore), 415 N.Y.S.2d 878 (N.Y. App. Div. 1979).

8. *See id.* at 883, 885.

9. *See id.* at 882-885.

10. Mueller, *supra* note 6, at 3.

11. *Legal Research Network*, *supra* note 4.

12. *See id.*

13. *See id.*

of the office or the travel is close to the office.[14] Others who do charge for travel time lower their rates by thirty-three percent to fifty percent for that time spent in travel.[15] The many ways of approaching the issue of compensation for travel time are based largely on corporate philosophy and competitive practices. Travel generated by our clients' needs usually results in cross-country air travel on a variety of projects (not just expert witness services). There are a number of things one can do on an airplane from writing an article, such as this, to studying and preparing for testimony. A fair practice would seem to be that any time spent in actual preparation while on a plane is billable. Watching a movie on the plane is an elective choice and should not be passed to the client as a service charge. On the other hand, ground transportation time may reasonably be billed, especially if this time is spent driving, because one has no alternative to paying attention to the road.

About one third of the respondents to the LRN survey attach a fifty to one hundred dollar fee to deposition and court time.[16] More than three-quarters of the respondents reported that they ask for some form of retainer.[17] Though neither of these practices is among those embraced by our firm, they are understandable. Court time and deposition time are demanding and require that all other priorities be set aside, thus presenting the expert with a possible loss of business in other areas of his or her practice. An unreasonable fee or unusually high fee for court time or deposition time could be, in my opinion, an indication of an operating philosophy with more emphasis on "witness" and less on "expert."

Retainers present an issue of ethics to some degree. The LRN survey noted that retainers are a common practice, and by further examination of expert witnesses' approach to billing, one could probably find good reasons for retainers: setting up accounts, familiarizing one's self with the case, or other backgrounding exercises certainly justify a reasonable retainer.[18] However, an unusually high fee could mean that the witness is not very familiar with the area of testimony and needs undue time to "come up to speed." It appears from the survey that a reasonable retainer ranges from $1000 to $3000.[19] The average retainer was just a little more than $1200, indicating that the most frequent retainer is approximately $1000.[20]

Most expert witnesses responding to the LRN survey indicated that they pass through charges for out-of-pocket expenses and some add a mark-up fee.[21] These

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14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*

practices mirror those of any service-based organization or individual, or for that matter, those practices common in the legal profession.

One other interesting aspect of fees was the result reported for the collection of accounts. On average, eleven percent of the accounts were described as delinquent or as having some "lag time" associated with collection, with the highest figure being fifty percent. Our firm works exclusively on corporate issues, and only rarely is there a situation where an individual is responsible for fee payment. However, we have learned that offshore insurance firms, by far, present the greatest lag time for accounts receivable. They always do pay, assuming that the services rendered were those requested, but they always pay slowly. We have found that prestigious insurance firms operating offshore can take up to a year to provide payment even when that payment is by wire transfer of funds. An attorney operating under these conditions, with a witness not previously experienced in claims covered by insurance, should advise the service provider that payment may be slow. If this situation presents undue hardship to the witness, then the need for a retainer may be something that the attorney and witness wish to revisit.

B. *Expert Witnesses and Marketing Methods*

Marketing and Networking are important methods an expert witness may utilize in finding opportunities for work. Some forms of marketing also potentially benefit those looking for expert witnesses because the availability of indexes or listings of professionals facilitates their search for the desired expertise. Most experts, however, do not market their services as expert witnesses, but rather are in demand because of their specific experience or through word-of-mouth advertising. In the LRN survey, the largest response by far to marketing questions supported the fact that general networking and client referrals, in particular, were the sources of new contacts.[22] What this means to me is that the best expert witnesses are probably the hardest to find, if you do not happen to be in their area of influence or expertise, because most of their work comes from direct referrals. This then presents a dilemma for the attorney seeking a witness in a disciplinary area with which he is not "well connected." Conversely, the witness who is depending heavily upon some form of marketing specifically to develop "legal" following may not be gainfully occupied in serving clients that come from referrals.

The problem of finding credible support for your case can be approached in several ways, other than embarking on a phone call campaign searching for referrals. The first method of searching for experts in a disciplinary field is to contact a scientific or trade organization that represents the discipline of interest. However,

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22. *See id.*

this means not only contacting the right person, but also asking the right questions. The Council for Agricultural Science and Technology (CAST) cooperates with the American Bar Association (ABA) and the American Agricultural Law Association (AALA) in the development of issue roundtables. These programs, as of last year, created an avenue leading attorneys to well-versed scientific experts in all aspects of agricultural science. CAST is composed of thirty-six member societies that represent more than one hundred twenty thousand scientists in agriculture, economics, and other disciplines that interact with all aspects of agribusiness. The goals of CAST include the proper application of agricultural science as well as lending those scientific views to the evaluation of policy. Last year CAST implemented a program called "Conversations on Change," sponsored in part by the Farm Foundation and in part by the Kellogg Foundation. The purpose of this program is to better empower societies to work together and network where their common denominator is some aspect of agriculture. Certainly, one of the reasons for beginning conversations on organizational change is to reach out to audiences who need a specialty that is sometimes hard to find. Today's expanding capabilities in information technology provide a growing opportunity to join information-seekers with the proper information-providers.

The efforts of CAST and other professional societies, when mature, could lead to the establishment of Internet-based bulletin boards or expert referral networks available through electronic means. The advantages of such information resources are multiple, but one of the most obvious is that the information provided is reliable and not profit-driven. It is interesting to note that the LRN survey was probably driven by that organization's interest in a for-fee Web Page that would distribute information on expert witnesses listed by their service. For the attorney, however, this gives no assurance of capability or philosophy. An organization such as CAST, however, has a described mission of balanced science in the assessment of agricultural issues and draws on a large academic as well as private sector pool of professionals who are well known and respected in their fields of practice.

Interestingly, the LRN survey had twenty respondents who reported having a Web Page.[23] Six respondents reported that no work had yet come from that posting.[24] Fourteen respondents reported that work had come from the posting, ranging from two to ten cases.[25] Certainly information technology presents an opportunity to make the search for an expert witness more comprehensive–but not necessarily easier. The Web does not filter out "junk science" nor does it have directional highways to given disciplines. CAST and other efforts, however, are laying the groundwork for such directional information paths.

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23. *See id.*
24. *See id.*
25. *See id.*

C. *Characteristics of an Expert Witness*

The average age of an expert witness is fifty, with a range of 35 to 70, as reported by the LRN survey.[26] The average age suggests that experience over time is a critical component of the qualifications of an expert. The survey made no inquiry as to professional degrees, certifications or other qualifiers of professionalism. Such a review of established certifications could be misleading simply because often no single certification or professional title can describe a "qualification." The best heart surgeon in the world, for example, may be a poor witness in a malpractice trial for a variety of reasons. One of those reasons may be the inability of the surgeon to communicate effectively his or her knowledge in a manner that the layman can understand. Another reason might be that the surgeon enters the courtroom with a strong positional bias that is evident to listeners. A third reason could be that the surgeon is intimidated by the courtroom situation. Cross examination can be a very intimidating process, and many witnesses sure of their profession, become confused by the challenges presented to their opinions. Such circumstances are particularly likely with technical issues.

Scientific professionals often tend to think that their opinion, because they "know it is based on the facts," is unchallengable. Faced with a courtroom challenge, or the intensity of cross examination, many good technicians will appear inept at defending their position. Poor defense of a good position will not bring "the right" decision. Consequently, interpersonal skills, communication and strong technical or scientific basis all must work together to allow an expert witness to serve well in a legal situation.

IV. CONCLUSIONS AND COMMENTARY

Even though I have relied heavily on the LRN survey in constructing the text of this Article, I am not promoting that service. In fact, it is interesting to note that the service describes itself as a resource but includes curriculum vitae on only 1300 experts. This is certainly far short of the pool of talent available and possibly represents only those people who are not doing very well by referral and reputation. The potential of an organization such as CAST to deliver information over the Internet for networking in agriculture and for other organizations to refer experts in their respective disciplines in this manner will certainly promise a more systematic and perhaps more reliable way to access a professional network.

One other comment, not necessarily related to the above discussion, needs to be made on the role of an expert witness and how that role is impacted in particular

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26. *See id.*

by our changing electronic world. In our business, we custom design databases for the management of case information for each major project in which we participate. We are often dealing with reams of information and data. Organized properly and searchable electronically, this tool allows us to synthesize and evaluate new facts quickly or compare new materials to aspects of the information already examined. We have found that organization of case materials in this fashion gives us a tremendous advantage if and when testimony is required. Thus, an expert witness dealing with large amounts of data will now and in the future be required increasingly to be "computer knowledgeable" as well as knowledgeable of his own profession. This is also true for the practicing attorney who must understand the implications of how data can be accessed, compiled, and ultimately delivered in a manner that will accurately and effectively support the facts of the case.

Computer literacy, information management, and optimum use of new communication tools, such as the Internet, are rapidly changing the pace and form with which we do business. As information technology becomes more powerful, there is more information to sort and thus more reason to approach case evidence and preparation with the *management* of information in mind. Twenty resources speaking a unified opinion are certainly more credible than a single resource speaking a differing position. Simplifying this concept, however, as more and more information reaches us through new retrieval processes, will present a continuing challenge to the interactions that take place during the development and maturity of a legal issue brought to the realm of the courtroom.