An In-Depth Look at Direct Examination of Expert Witnesses[†]

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I.
Introduction

The Honorable Ralph Adam Fine[1] describes a trial as a "battle for your client while the jurors are those whom you must *persuade*" and he describes direct examination as a "great engine" to get at the truth.[2] Fine's theory is for an attorney to "[u]se what the jurors already know – before they hear any of the witnesses."[3] He encourages examiners to "build on this foundation of pre-trial knowledge to win your case through the expert witness; that is, use the witness to validate the points you need to make on direct-examination" starting far enough back in the logical train so that either (1) the jury knows the answer before the witness responds; or (2) the answer rings true to the jury.[4]

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[1] The Honorable Ralph Adam Fine is an appellate court judge in the Wisconsin Court of Appeals, located in Milwaukee, Wisconsin. He is also the author of The How-to-Win Trial Manual (Juris 3d rev. ed. 2005).

[2] Ralph Adam Fine, Direct and Cross-Examination of Expert Witnesses to Win, SM060 A.L.I.-A.B.A. 265, 267 (2007), adapted from Ralph Adam Fine, The How-To-Win Trial Manual, *supra* note 1.

[3] *Id.*

[4] *Id.* at 267-268.

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In accordance with Fine's theories on the direct-examination of expert witnesses, this article attempts to untangle how an expert can effectively "assist" the jury to either "understand the evidence or determine a fact in issue."[5] First, the article highlights the expert witness generally by looking at the need for expert testimony and ways to engage a competent expert. Next, the article focuses on managing expert witnesses. Third, the article explores preparing the expert witness by reviewing of testimony, demonstrative exhibits, and ways to frame questions prior to trial. Fourth and finally, this article emphasizes a four-step process to use in the direct examination of witnesses: (1) qualifying the expert; (2) establishing a basis for his or her opinion; (3) eliciting the opinion; and (4) explaining the opinion. Specifically, under the subsection entitled "Explaining the Opinion," the article provides a two-step process that counsel can utilize to maximize the effect of experts' testimonies on jurors.

[5] Fed. R. Evid. 702; Fine, *supra* note 2, at 267.

II.
Expert Witnesses Generally

A. *Need for Expert Testimony*

When preparing a case for trial, counsel must assess whether an expert's testimony will be necessary.[6] Generally, the purpose of expert witnesses is to clear up fuzzy facts or to strengthen inferences that might otherwise be confusing for the jury.[7] The decision usually involves weighing the cost of an expert with the potential advantage gained through her testimony, coupled with the difficulty in securing the correct expert for the job.[8] However, in certain instances, the law imposes a duty to present expert testimony, and the attorney is required to select an expert.[9]

A central principle in the selection of an expert witness is helpfulness, and the attorney should make a practice of asking herself whether a "witness with specialized skills, education, or training would add in some appreciable way to the jury's understanding of the facts."[10] If the answer to this question is "yes," the time and expense of engaging an expert will surely pay off at trial.[11]

Moreover, expert testimony offered to counter an opponent's expert's testimony can be valuable to point out a case's weaknesses and flaws that might not be as evident to the jury as they are to counsel. Retaining the skills of a knowledgeable, informed, personable, and straightforward expert could prove more effective in highlighting those flaws than exposing them only through a closing argument.[12]

Despite the help that expert testimony can provide, a potential for abuse also exists if an expert exaggerates, makes misstatements, or bolsters facts. To avoid these scenarios, it is crucial that attorneys remain conscious of the potential for abuse and carefully prepare for both direct and cross-examinations.

B. *Engaging the Expert*

Unlike when the attorney selects lay witnesses, "a good deal of selectivity may be exercised when it comes to experts."[13] One of the most important questions to consider when selecting one expert from many qualified candidates, is asking for what purpose you are seeking the expert's assistance. While the ultimate goal is to obtain qualified expert at the lowest possible cost, there are other factors to consider.

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[6] Kenneth M. Mogill, Examination of Witnesses § 6:3 (2d ed. 2008).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See id.* at § 6:4.

[11] *Id.*

[12] *Id.*

[13] *See id.* at § 6:6.

If an expert will be called as a witness at a trial, not only should the expert be qualified, but the expert's qualifications should mirror the issues about which testimony is sought.[14] For example, if a medical expert is required to testify about heart surgery, the expert should be qualified in this area of specialization. Not only are these qualifications important to give accurate and knowledgeable testimony, but because the witness will appear on the stand, he or she should have an appearance and demeanor with which the jury can identify.

When choosing an expert to testify, it is critical that the attorney meet the expert in person and examine her demeanor. The attorney should carefully consider the expert's behavior and ask several questions. Does this expert have any irritating personal habits? If those habits irritate the attorney, are they going to irritate the jury too? Can she communicate with real people? How does the expert express complicated scientific principles? If the attorney can barely understand her, the jury will surely struggle.

However, if the expert is not expected to testify at trial, different considerations might affect the choice of expert. In that situation, the expert's appearance and demeanor may be insignificant.[15] When an expert is used in a consulting role to advise counsel during pre-trial stages, counsel should attempt to balance the expert's qualifications against the cost of his services.[16] It might be the case that a particular expert can conduct examinations and tests at a lower cost than others, but that same expert might not be sufficiently qualified to testify at trial.

When choosing an expert, it is also important to consider that experts decipher facts that are incomprehensible to the average layman, and there is a presumption that authorities in the field will have very divergent views.[17] Because experts can often reach different conclusions based on the same evidence, it is important for attorneys to take considerable time and effort to locate an expert witness whose views are as consistent to the theory of your case as possible.

Finally, when choosing an expert, attorneys should investigate them as carefully as they would the opponent's experts. A prudent attorney must always request a resume and also references from other lawyers with whom the expert has worked.[18] Several questions are essential. How did the expert perform in deposition? In trial? Was the expert difficult to work with? An attorney's pre-retention investigation should also include the location and analysis of previous transcripts. Transcripts can be found using IDEX, Google and other searches. A prudent attorney should also look for *Daubert* challenges and whether judicial opinions cite the expert favorably or unfavorably.

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See id.* at § 6:8; *see also* Douglas Danner and Larry L. Varn, Expert Witness Checklists §§ 1:30-1:37 (3d ed. 2008).

Ultimately, an attorney should exercise great diligence and care when locating and selecting an expert, and the expert's qualifications should always be determined at the outset. Counsel should remain mindful of how the expert will come across in court and what value he or she will bring to the presentation.

III.
Managing the Expert

During preparation for a trial, it is important to properly manage an expert's work. Even an expert who is persuasive and articulate on the stand can be a poor choice if the cost is so exorbitant it breaks the proverbial bank. To ensure that the expert does not over-work the case, counsel should stay in regular communication with the expert and develop a personal relationship with him. This contact will make it easier for the attorney to touch base with the expert frequently on budget expectations and carefully monitor the work that is being done. Additionally, counsel should be specific in giving assignments so that both the attorney and the expert know what is to be done, how long it is likely to take, and what it is likely to cost.

IV.
Preparing the Expert to Testify

A. *General Considerations*

Due to the expense and importance of expert testimony at trial, the attorney must take proper care to prepare the expert. This preparation includes such considerations as ensuring that the expert understands the legal elements of the case, reviewing substantive testimony with the expert, practicing a clear explanation of exhibits, if necessary, and framing questions in a way to make the expert's job as easy as possible.

Rehearsal of question and answers in preparation for trial is as important with the expert as it is with the lay witness, and special care should be taken to ensure that the expert will adequately testify.[19]

To ensure favorable expert testimony, the attorney must be certain that the expert understands the legal elements that must be proven in order to win the case and how his or her expert testimony will support this effort.[20] It is imperative that this discussion take place at the beginning of preparation to determine whether the expert will be able to testify truthfully to opinions that will establish the elements necessary to prevail.[21]

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[19] Danner & Varn, *supra* note 18, at § 1:147; Thomas A. Mauet, Fundamentals of Trial Techniques, § 4.8 (2d ed. 1988).

[20] Deborah J. Gander, *Prescription for Powerful Expert Testimony,* 43 Trial 40, 40 (May 2007).

[21] *Id.*

Another important consideration is the expert witness's credentials and experience. Just as with a lay witness, much time should go into the preparation of an expert's testimony. However, additional time will be devoted to "developing the expert's professional background in order to qualify him to render an opinion."[22] Not only is the preliminary testimony regarding his background necessary to establish the expert's competency, but this preliminary testimony also creates credibility with the jury.[23]

B. *Reviewing Testimony*

During a preparation session with an expert witness it is often tempting to simply review the substance of the testimony and indicate that the expert will be asked about his or her education, background and training.[24] This technique is especially tempting when the expert is paid on an hourly basis. If the witness has had experience in the courtroom, this technique might prove adequate provided the witness is also very informed about the facts of the case prior to trial. However, the testimony and effectiveness of the witness will still be enhanced if the preparation session is an *actual* dress rehearsal of the in-court testimony.[25] A principal benefit of an actual dress rehearsal is that the examiner and witness can align the theory of the case. Additionally, the attorney can ensure that the expert understands the questions, and likewise that the attorney understands the answers. If counsel prepares by simulating the trial testimony, the actual examination will be superior and more persuasive than one where the expert is entirely unfamiliar with the surroundings or the procedure of the court.

In addition to practicing direct examination, preparing the witness for cross-examination in a "mock trial" setting may also prove helpful. Deborah J. Gander suggests having someone whose trial abilities you respect cross-examine your expert before the trial.[26] She further suggests that "[a] mock cross-examination with someone who can act as the expert's worst nightmare will help minimize surprises at trial. When you actually face each other in the courtroom, the preparation will help you start off strong."[27] This preparation will also ensure that the witness is not surprised and does not get flustered at trial.

A mock trial exercise is also an opportunity to identify issues with the expert's clothing. For example, is she wearing slacks and a manly blazer in a Southern courtroom where women are best perceived in a skirt? Office staff can also sit in on the exercise and offer their input on the expert's demeanor, language, mannerisms or other unhelpful quirks.

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[22] Mogill, *supra* note 6, at § 6:14.

[23] *See id.* at §§ 6:21-6:26.

[24] *See id.* at § 6:15.

[25] *See id.* at §§ 3:6-3:10.

[26] Gander, *supra* note 20, at 40.

[27] *Id.*

C. *Demonstrative Exhibits*

"Charts, models, bodily demonstrations, and in-court experiments often make up some of the most dramatic and informative parts of an expert's testimony."[28] Not only do these exhibits catch the eyes of the jury, but they also offer a break from the monotony of questions and answers between the examiner and expert.[29] Demonstration of exhibits will often require the witness to leave the stand in order to explain an exhibit, conduct an experiment, or even handle a treatise.[30] In all circumstances where exhibits are known in advance, choreographing these portions of the exam allows the testimony to have a uniform and cohesive outcome.[31]

D. *Framing Questions*

Some courts previously required that the "expert state that he holds the opinion with a reasonable degree of (e.g., scientific or medical) 'certainty'[32] or 'probability.'"[33] Although the Federal Rules of Evidence no longer require such rhetoric, many lawyers continue to follow this tradition in framing their questions.[34] In order to avoid confusing the witness, it is essential that the examiner forewarn him about the possibility of such questions. Attorneys should "[m]ake sure that the expert understands the standard of proof that their testimony must meet."[35] "For example, in the state of Florida, the 'reasonable probability' or 'more likely than not' standard is defined as more than 50 percent."[36] However, in another state, this standard could be different, and the same testimony could fail to meet the necessary standard of proof. Further, is it good practice to "arm [an] expert with any legal language that the evidence rules require, and make sure he or she is comfortable using it."[37] After the necessary time and diligent care is utilized in preparing an expert to testify, the next consideration for an attorney is the actual direct-examination.

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[28] Mogill, *supra* note 6, at § 6:18.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See, e.g.*, Measday v. Kwik-Kopy Corp., 713 F.2d 118 (5th Cir. 1983); Eberle v. Brenner, 475 N.E.2d 639 (Ill. App. Ct. 1985), *appeal after remand*, 505 N.E.2d 691 (Ill. App. Ct. 1987).

[33] *See, e.g.*, Jones v. Ortho Pharmaceutical Corp., 209 Cal. Rptr. 456 (Ct. App. 1985); Thirsk v. Ethicon, Inc., 687 P.2d 1315 (Colo. Ct. App. 1983).

[34] *Id.*

[35] Gander, *supra* note 20, at 40.

[36] *Id.*

[37] *Id.*

V.
Direct Examination of Experts

Experts are retained for the purpose of stating opinions and expressing conclusions, and because of their special knowledge, training, education, and expertise, experts have much more freedom on the witness stand than a typical lay witness.[38] Most often, the expert's purpose is to decipher something that is beyond the judge or jury's common knowledge or competency.[39]

The direct examination of experts can be divided into four stages: (1) qualifying the witness as an expert; (2) establishing the basis for the opinion; (3) eliciting the opinion; and (4) explaining the opinion.[40] A good examination of a witness will follow this sequence.

A. *Qualifying the Expert*

1. Generally

To qualify an expert witness and demonstrate her expertise to the judge and jury, introductory questions should focus on her professional background[41] and seek to accomplish two goals: (1) demonstrate to the judge that the expert possesses at least the minimum qualifications to give opinion testimony on a particular subject; and (2) persuade the jury (or fact finder) that the expert's judgment is sound and that her opinion is correct.[42] As a "rule of thumb: the introductory material must either foreshadow an argument that is consistent with a theory of the case or make the witness someone with whom the jury can identify."[43]

A primary goal of qualifying the expert is eliciting testimony that he has the requisite "education, skill, or training to qualify as an expert."[44] It is also good practice to obtain an expert whose knowledge can be derived from formal as well as practical experience.[45] These factors should be considered along with the fact that jurors must be able to identify with the expert. By making the expert a three-dimensional person (e.g., asking a series of personal questions – married, children, hobbies, etc.) and advising the expert how to avoid braggadocios language, counsel can make the expert come alive for the jury.[46] Moreover,

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[38] *See* Mogill, *supra* note 6, at § 6:20.

[39] *Id.*

[40] *Id.*

[41] Fed. R. Evid. 702; Charles Tilford McCormick, Handbook of the Law of Evidence § 13 (3d ed. 1972); Graham C. Lilly, An Introduction to the Law of Evidence § 12.1 (2d ed. 1987); Louis E. Schwartz, Proof, Persuasion, and Cross-Examination § 5:06 (1973).

[42] Mogill, *supra* note 6, at § 6:21; Robert E. Keeton, Trial Tactics and Methods § 2.22 (2d ed. 1973).

[43] Fine, *supra* note 2, at 274.

[44] Howard Hilton Spellman, Direct Examination of Witnesses § 9:7 (1972).

[45] Fred Lane & Scott Lane, Lane's Goldstein Trial Technique §§ 14.06-14.08 (3d ed. 2009).

[46] *Id.*

the jury's ability to understand that an expert engages in far more than just a daily business routine increases the chance that an expert will be viewed as a three-dimensional person the jury will relate to and trust.

A large component of developing a three-dimensional expert is humanizing him for the jury. For example, if an expert is from Africa, he might explain that he has a Southern accent because he is from four degrees south of the Equator. If the expert is an oceanographer, he should tell several Jacques Cousteau-like stories about descending to the sea floor in a submarine. Being a "local boy" could also carry weight with a jury. A Mississippi jury will likely give the testimony of a local doctor from Ole Miss greater weight than the testimony of a doctor from Harvard.

2. Education and Formal Training

If an expert witness is highly accredited in his field, the attorney should put greater emphasis on the expert's formal education, training, academic qualifications, and credentials. For example, it is more effective to elicit a medical expert's formal training while in residency than simply having him state where he attended medical school and completed his residency.

The amount of information necessary to convey to the court regarding the witness's educational background depends entirely on the circumstances of the case. This decision is a "tactical determination," dependent on whether his qualifications derive from experience he has gained since his education and training or solely prior academic achievements.[47] A combination of an impressive technical background in addition to an expert's humanity is a recipe for success. As an example, one expert was especially persuasive when he had a unique combination of four certifications that no one else in the world had. This impressive accreditation in addition to his English-explorer mustache and tales of his work in tropical jungles created a highly successful and persuasive portrayal in front of the jury.

3. Experience

While experience alone may be enough to qualify an expert witness, experience coupled with education or actual training in the expert's field will demonstrate that he is not only well-versed in an area, but that he has direct experience, as well. For example, if a law professor is called to testify as an expert to the appropriate standard of practice in a legal malpractice case, and he has experience in a clinical practice as well, his credibility will likely be enhanced. With practical experience beyond the academic credentials elicited, the expert will no longer be subjected to the question "Professor, have you never actually handled a case?"[48]

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[47] Keeton, supra note 42, at § 2.22.

[48] Mogill, *supra* note 6, at § 6.23.

4. Additional Considerations

In addition to an expert's education, training and experience, there are many other qualifications that can speak to the expert's credibility. For instance, licenses and certificates, professional associations, awards, research and publications, teaching positions, and of course prior testimony, are all relevant.[49] Many experts devote a large portion of their careers to the forensic side of their respective professions.[50] It is also effective to establish, if possible, that the witness has testified on both sides; this will demonstrate that he is not devoted to a certain side of a particular type of case.[51]

5. Offers to Stipulate to Qualifications

Some lawyers will offer to stipulate to the qualifications of an expert, in an attempt to keep the jury from hearing the expert's credentials. To avoid this tactic by the opposing attorney, advise the court that the jury will be able to adequately judge the credibility of the witness only if they know her qualifications. Having the expert testify to her qualifications is especially important when counsel anticipates arguing to the jury that its expert is better qualified than the opponent's. To invoke this argument for the expert's specific background and accomplishments there must be evidence on the record that these qualifications actually exist. At this point, counsel usually tenders a witness as an expert by stating, "Your Honor, I offer Dr. Navarro as an expert in the field of neurosurgery."[52]

B. *Establishing the Basis for Opinion*

1. Generally

In the second stage of preparing for expert witness testimony, the witness should describe the facts and data that support his opinion. Prior to the testimony, the expert must have relevant information about the subject to present at trial. If the expert gives only an opinion without disclosing facts on direct examination, he may be required to do so during cross-examination.[53] Thus, it may be more credible for the expert to present these facts at the outset of direct examination. Traditionally, it was permissible for an expert to express an opinion only if it were based on personal knowledge or a hypothetical, or a combination of the two. Under that system, the expert could not draw an opinion based on information that he acquired outside the courtroom from other sources.[54] In contrast, the modern approach liberalized the sources of information the expert may refer to, including testimony from

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[49] *See id.* at § 6:24.

[50] *Id.*

[51] *Id.*

[52] *See id.* at § 6:26.

[53] Fed. R. Evid. 705.

[54] Advisory Committee Note, 56 F.R.D. 183, 283 (U.S. 1972).

other experts, other sources normally relied upon by experts in that field, and data given to the expert outside the courtroom.[55] The following discussion addresses the various techniques an attorney can use for examining an expert under both the traditional and modern approaches.[56]

2. Using the Expert's Personal Knowledge

In instances where the expert observed the facts or conditions upon which she bases the opinion, counsel should elicit the expert's personal knowledge of these circumstances after establishing her qualifications.[57] Doing so is especially important where the expert was involved in the events that led to the trial. For example, a patient's treating physician can also be used as an expert to attest to that patient's predicted recovery.[58] The treating physician has personal knowledge of the injuries and can form an informed opinion as to the patient's prognosis. By describing a personal familiarity with the case in addition to facts that support this opinion, the expert's credibility will be magnified.

3. Asking Hypothetical Questions

If used properly, hypothetical questions can be a great tool for establishing facts that are relevant to an expert's testimony.[59] Particularly, the hypothetical question is useful to focus the jury's attention on the relevant facts that control the expert's conclusions, even where the expert might not have personal knowledge. In cases where the expert does not have personal knowledge, the hypothetical can be used to make inferences. For example, "If I *assume* A, B, and C to be true, then I can infer X."[60] Furthermore, even though the hypothetical must establish the facts of the case fairly and accurately,[61] the examiner need not mention all of the facts. This selectivity in determining exactly which facts to provide to the expert is an effective technique to control the information to which the jury is exposed.[62]

While hypothetical questions allow an attorney to choose the facts to present to the expert, the way counsel poses the question also impacts the effectiveness of the expert's testimony. When posing a hypothetical question, an attorney should remember that other witnesses must prove the facts assumed in the question. Therefore, the attorney is afforded

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[55] Fed. R. Evid. 703; Advisory Committee Note, 56 F.R.D. 183, 283 (U.S. 1972).

[56] Mogill, *supra* note 6, at § 6:28-6:33.

[57] *See id.* at § 6:28.

[58] *Id.*

[59] *See id.* at § 6:29.

[60] *Id.*

[61] *See, e.g.*, Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986).

[62] *See* Mogill, *supra* note 6, at § 6:29.

an opportunity to remind the jury of testimony that has already been given or preview testimony about to come. Furthermore, some attorneys have a great ability to relay a sense of drama and action into the hypothetical question, which builds on the idea explored below, that creating a story is an effective tool to win over the jury.

4. Expert's Opinion on Testimony of Other Witnesses

Under the modern approach, it is advisable to have the expert remain in the courtroom and listen to the testimony of other witnesses who describe the facts upon which the expert will base his or her opinion. Experts who plan to rely on the testimony of other witnesses in order to form their opinion are not typically sequestered from the courtroom during this time.[63] The attorney should always make sure that he knows beforehand what the witness will testify to, in addition to the opinion that the expert can draw from this testimony to ensure that examination goes smoothly.[64]

C. *Eliciting the Expert's Opinion*

1. Generally

The third stage of consideration for an expert witness is the actual opinion generated by the expert. In this phase of the questioning, the "witness applies [his or] her knowledge, skill, experience, training, or education to the facts known or assumed … and draws conclusions or makes inferences that are helpful to the jury."[65] This opinion is often the focal point of an expert's testimony; therefore, counsel must ensure that the testimony falls within the expert's field of expertise to render opinions on the subject matter. Moreover, it is of great importance that counsel thoroughly discusses the matter with the expert prior to trial so that the expert actually conveys the desired opinion consistent with the theory of the case.[66]

2. Never Ask "What Happened Next?"

The following excerpt from John Grisham's *The Runaway Jury*, demonstrates the flawed follow-up question, "What happened next?" which some attorneys choose to ask. At this point in the book, the plaintiff's lawyer is asking an expert witness (a former high-level tobacco company employee) to describe a long-missing document that allegedly showed that the tobacco company knew that nicotine was addictive:[67]

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[63] *See id.* at § 5:13.

[64] *See id.* at § 6:30.

[65] *See id.* at § 6:41.

[66] *Id.*

[67] Fine, *supra* note 2, at 268.

Q: And the next paragraph?

A: The writer suggested [to the president] that the company take a serious look at increasing the nicotine levels in its cigarettes. More nicotine meant more smokers, which meant more sales, and more profits.[68]

While these statements do seem powerful, many jurors will miss them, and unfortunately this *is* the way that many lawyers question.[69] The statements from the expert could be much more powerful if the lawyer did not ask, "What happened next," which undoubtedly produces a lengthy exegesis by the witness.[70] Rather, the jury needs to know the answer or likely answer to the question before the expert actually responds.[71] According to Judge Fine, a direct-examination question should not be asked unless it satisfies at least one of the following rules: (1) the jury already knows the answer before the witness responds; (2) the attorney has immediate corroboration for the witness's answer or (3) the attorney starts at a point so early in the logical train of thought that the answer rings true.[72]

There are several benefits to allowing the jury to know the answer to a question before it is even answered. First, it "cements into their minds these building blocks of the lawyer's argument, without relying on their assessment of the witness's credibility."[73] Second, the attorney must make the logical connections in incremental steps, so that the jurors are not forced to take in the whole developed testimony as one question and one answer.[74] This is especially crucial because jurors have a tendency to fade in and out, and it is possible that their "fade-out" could be during the most important part of the expert's testimony.[75] Third, by using this method rather than the "what happened next" methodology, the lawyer is allowed to repeat all of the helpful information by rephrasing questions to give a different perspective.[76] By repeating key phrases and facts, no juror should miss the highlights of the argument.

Fine demonstrates a better way to reformulate the direct examination of the tobacco witness to accomplish these three abovementioned points:

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[68] *Id*; John Grisham, The Runaway Jury (2003).

[69] Fine, *supra* note 2, at 268-267.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 271.

[73] *Id.* at 270.

[74] *Id.*

[75] *Id.*

[76] *Id.*

Q: Did you read the next paragraph as well?

Q: What was the subject of that paragraph?

Q: Did the writer of that memorandum suggest that the company do something about the nicotine levels in the cigarettes it was making?

Q: Did the writer suggest that the nicotine levels in the cigarettes be increased or decreased?

Q: Did the writer tell the company's president how increased nicotine levels would affect the number of people who smoked?

Q: Would increasing the nicotine levels in cigarettes mean more or fewer smokers?

Q: More smokers than if the nicotine levels were not increased?

Q: Would this mean more or fewer sales?

Q: Would this mean more or less profit for the company?

Q: Would the profits be substantial? [77]

In his example, Fine frames the questions so that the jury should expect to know the answer before it is repeated by the expert and breaks down each of the logical connections necessary to implant the whole opinion in the jury's mind.

3. Consistent Framing of the Questions

"Because the wording of the question might influence the expert's response, it is important not to vary the form of the question in any material way that will trouble the witness."[78] If the examiner changes the phrasing of questions from how they were rehearsed, the expert might be taken aback and ask for a clarification and might give an unexpected answer.[79] The actual trial testimony is not the time for miscommunication between the examiner and the expert.

D. *Explaining the Opinion*

1. Generally

The fourth step to consider for an expert witness is that he must be prepared to explain his opinion. Even though the expert is not required to offer an explanation, the opinion will lose persuasive effect if the jury is unable to understand the technical or scientific reason-

[77] *Id.* at 268-269.

[78] *See* Mogill, *supra* note 6, at § 6:42.

[79] *Id.*

ing underlying the opinion.[80] One way to ensure that the explanation makes sense is for the expert and attorney to focus on turning the courtroom into a classroom.[81] Some strategies an attorney can use to create this setting include having the expert leave the stand and write on an easel, using body language to draw in the jury or having the expert converse directly with the jurors. Further, the attorney should start the questioning facing the expert, then turn to the jury for eye contact during the question and return to face the witness for the conclusion of the questions. Additionally, the expert should be prepared to speak directly to the jury for substantive answers and make eye contact with the jurors.

While experts are essential to help the jury absorb and comprehend technical matters that might be outside of the realm of common knowledge, they must be careful not to "undo the carefully prepared presentation by eliciting an impermissible vouching statement during the course of the expert's explanation."[82] For instance, in a child abuse prosecution, the state was incorrect to allow the expert to vouch for the credibility of other witnesses[83] when the witness testified, "99.5% of children tell the truth and that . . . in his experience with children, [he] had not personally encountered an instance where a child had invented a lie about abuse."[84] The testimony "improperly invade[d] the province of the jury and [wa]s particularly likely to be prejudicial where [it] [wa]s relied on in closing argument,"[85] and attorneys should be mindful of the repercussions.

2. Help the Expert Teach Through Story Telling

In a short column for the American Bar Association, Professor Jim McElhaney[86] highlights two key points an attorney should recognize for the direct examination of an expert witness in a criminal trial. Although the article pertains to a criminal trial, it can easily apply to experts in civil litigation.

a. The High Ground of Credibility

Professor McElhaney first emphasizes that the purpose of an expert is not to "put a hired gun on the stand who will argue the case for you," [87] as many attorneys mistakenly think. The problem with this mindset is that the attorney is just adding another advocate as

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[80] *See id.* at § 6:44.

[81] *Id.*

[82] *Id.*

[83] Snowden v. Singletary, 135 F.3d 732 (11th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998).

[84] *Id.*

[85] *Id.; see also* Mogill, *supra* note 6, at § 6:44.

[86] Jim McElhaney, *Put Simply, Make Your Experts Teach: Expert Witnesses Are Most Effective When They Tell the Story of Your Case*, 94-MAY A.B.A. J. 28 (2008).

[87] *Id.*

opposed to an expert, and credibility issues may arise. Similarly, the purpose for calling an expert witness is not to "fill the courtroom with incomprehensible erudition," according to McElhaney.[88] If the expert is portrayed as just another advocate for one side, jurors may be reluctant to accept what they do not understand.

Rather, McElhaney surmises, the "point of calling an expert is to put a teacher in the stand – an explainer who brings another set of eyes in the room through which the judge and jury can see the facts and understand your case."[89] He suggests that the expert should act as a guide that can lead the fact finder through the confusing elements of a case.

McElhaney proposes that when selecting an expert, attorneys should look for an individual who can act as a teacher, because that profession is seen as a fundamental symbol of credibility in our society.[90] By using someone who enjoys explaining complex issues to others and who feels "natural with a piece of chalk in their hands," the jury will likely view the expert as more credible, and the fact finder will have a greater chance of grasping difficult elements of a case. While there are many intelligent and highly qualified experts, it can be difficult to find an expert who is able to convey information in a way that a lay person can understand. While it might take time to find a qualified expert who is also an effective explainer, teaching an expert to be a good educator would likely consume an even greater amount of time.[91]

While some characteristics create an effective credible witness, there are characteristics an attorney should avoid in an expert as well. First, when picking experts, attorneys should also be wary of witnesses who caution that the case is too complex or deals with concepts that are too difficult for ordinary people to comprehend. If the expert has this attitude going into the trial, she is sure to convey this impression to the judge and jury.

Second, the expert's vocabulary is important. By using professional jargon, the fact finder will feel "uninitiated out of the inner circle."[92] Conversely, attorneys should seek out experts who like to "share secrets" with others. "Sharing secrets" means that the judge and jury will understand a concept that they did not understand prior to trial, and then they can share that idea with others. A juror who gets an idea from an expert and uses that information indicates that the juror trusted the expert enough to share the idea with others. McElhaney surmises that when jurors partake in this relay of information from experts, they are essentially buying what the expert is selling.[93]

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 28-29.

The following examples of clear and unclear ways to communicate the same concepts demonstrate the importance of ensuring the expert avoids scientific jargon.

> NO: The analytical laboratory results indicated that the levels and distribution of congeners of dioxin and dioxin-like compounds within the plaintiff's blood sample were within normal limits.
>
> YES: The blood is normal.
>
> NO: The dioxin and dioxin-like congeners in the plant's emissions were not consistent with those found in the plaintiff's samples.
>
> YES: The plant's DNA was not in the plaintiff's blood, or soil, or dust, or water. OR The fingerprints don't match.
>
> COMPLICATED: The plaintiff's expert pointed to one study where furans could theoretically convert to dioxins in a lab.
>
> SIMPLE: The defense expert explained that for furans to convert to dioxins, the temperature would have to be 980 degrees – it gets hot in South Mississippi, but not that hot!

b. Let the Witness Repeat the Story

A second strategy an attorney should follow for effective expert testimony is having the expert repeat the attorney's theory of the case. Ideally, by the time the expert testifies, the attorney has already told the story of the case in her opening statement. Stories are what both judges and jurors use to process facts. By reiterating this story through a different voice, the expert's testimony, the story may reach a fact finder that the attorney was unable to reach in her opening statement.[94] Further, the expert's reiteration gives the jury a new point of view and a different way of approaching the case, through the expert witness.

The choice of words can be effective when an attorney and expert are explaining their theory of the case. Some words help a story come alive to the judge and jury. These words include "teach," "tell," "explain," "help us understand," "help us learn," "educate us about," "demonstrate," "interpret," "untangle," or "decipher."[95] A second group of words can be used in a demonstrative way to help the jury see what the expert or attorney is saying. Demonstrative words include: "show," "see," "watch," "look at," "view," "picture," "demonstrate," "scene," or "take us there."[96] Other words, however, insult the audience's common sense and

[94] *Id.* at 29.

[95] *Id.* at 29.

[96] *Id.*

should be avoided. Such words include "indicate," "elucidate," "illuminate," "explicate," "expound," "discern," "enlarge upon," or "assist us in comprehending."[97] It is good practice for an attorney to write down and review these words prior to examining the witness so that the attorney can use the helpful words and avoid those that are unhelpful as much as possible.

Demonstrative evidence can also be in the form of visual aids. Exhibits such as anatomical charts, models depicting various parts of the body, slides, overhead projections, films, and videotapes can afford a dramatic and effective opportunity to portray the data used by experts in reaching their opinions.[98] Particularly, when overhead projections, films, or videotapes are used in a darkened courtroom, the effect can be captivating and introduce a realistic element to the testimony.

It is also great practice when an attorney is "using words of both teaching and visualization to create questions that will inspire vivid testimony from experts."[99] The purpose is for the jurors to see the facts as if there were actually an eyewitness to the case. McElhaney offers several sample questions that demonstrate this point:

> Q: Dr. Sweeney, we need you to teach us a little about the spleen so we can understand what went wrong in the hospital. Take us to the operating room and let us see what's happening.
>
> Q: Ms. Wildt, help us look at this bridge through the eyes of a design engineer. What should we be looking for in this diagram?
>
> Q: Mr. Winter, we want to understand what these delusions were doing to Joan Quigley. Give us a picture of what was going on in her mind.[100]

3. Explaining Technical Terms

Often in an effort to sound scholarly and perhaps disregard the lawyer's request to speak English, experts will use complex rhetoric and technical language when testifying.[101] When this occurs, the lawyer must ensure that the jury understands exactly what the expert is trying to explain.[102]

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97 *Id.*

98 Mogill, *supra* note 6, at §§ 5:141-5:147, § 6:46; Lane & Lane, *supra* note 45, at § 14.50.

99 McElhaney, *supra* note 86, at 29.

100 *Id.*

101 *See* Mogill, *supra* note 6, at § 6:47

102 Lane & Lane, *supra* note 45, at § 14.51.

Some experienced expert witnesses will offer an explanation by their own initiative; however, when the expert does not do so, the attorney should prompt the expert to do so.[103] The following sequence of questions, answers, and explanations from a medical expert offers an example:

> Q: What sort of fracture was it?
>
> A: It was a compound, comminuted fracture.
>
> Q: What do you mean by a "compound, comminuted fracture?"
>
> A: Well, compound means that the bone is actually sticking out of the leg, piercing the skin. Comminuted means that bits and pieces of the bone were broken off, like the bone itself was shattered into smaller pieces.

When asking the expert to explain a technical term, the attorney must do so in a way that does not insult the jury's intelligence.

> Q: Now, Dr. Berg, no one on the jury here is a doctor, and you're probably talking over their heads when you use the term "spinous process," so would you please explain that word for their benefit?

Even more simply,

> Q: Would you explain the term "spinous process" for the jury?

This question might have a condescending ring to it. To be most effective, counsel should ask the question in a way that indicates the attorney actually wants to know the answer:

> Q: What's the "spinous process," Dr. Berg?

Much to the contrary, the lawyer should not convey a false ignorance to the jury by stating something like the following:

> Q: I'm sorry, doctor, but I'm just a poor lawyer who never went to medical school, and you lost me when you were talking about that spiny something-or-other; could you tell me what you meant by that?

Presenting the question in this fashion makes the lawyer seem patronizing to the jury and disingenuous.

Lastly, is it important not to use acronyms when asking the witness questions. For example, if an attorney refers to the expert as the "CEO" of a company, she is assuming that

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[103] *Id.*

jurors will be well aware that "CEO" stands for "Chief Executive Officer." To avoid this problem, avoid the acronym. Further, if a witness chooses to use an acronym in testimony, the attorney should respond by explaining what the witness actually was referring to. For example:

Q: Where did you get your degree?

A: MIT.

Q: The Massachusetts Institute of Technology?

Q: When did you get that degree from MIT?

After the acronym is established and explained, it is typically okay to use it again, unless the acronym is lengthy and complex.

VI.
Conclusion

The care, preparation and direct examination of expert witnesses can be a tedious task. The practice of most attorneys is to brief the expert on what he will opine in court and discuss a brief synopsis of his or her background information and education. However, a diligent attorney can maximize his or her possibility of prevailing on the basis of the expert's testimony alone, if the attorney cautiously adheres to the four-step process for the direct examination of witnesses: (1) qualifying the expert; (2) establishing a basis for his or her opinion; (3) eliciting the opinion; and (4) explaining the opinion.

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Expert Witness Reports in Federal Civil Litigation: The Role of the Attorney in the Expert Witness Report's Preparation

Arthur F. Greenbaum

EXPERT WITNESS REPORTS IN FEDERAL CIVIL LITIGATION: THE ROLE OF THE ATTORNEY IN THE EXPERT WITNESS REPORT'S PREPARATION

*Arthur F. Greenbaum**

Every day across America, civil litigators in federal court work closely with experts to create required expert reports and hone expert testimony. Yet they do so without clear guidance as to the limits, if any, on their assistance. Despite an attempt in 2010 to clarify the rules in this area with amendments to the Federal Rules of Civil Procedure, that attempt has proven woefully inadequate. Today there is no consensus as to the line between proper assistance and lawyer overreaching. There are major areas of uncertainty over the means by which the degree of lawyer involvement can be discovered. While there is substantial agreement that lawyer assistance at times is so excessive that exclusion of the expert's report is warranted, or at least that that involvement is relevant to the weight to be afforded the expert's testimony, some courts so limit the inquiry into the lawyer's role in assisting the expert that applying these safeguards is near impossible. In this Article, I unpack the current doctrine laying bare the areas of disagreement. At a minimum, this arms litigants with competing arguments to assert when discovery disputes in this area arise. With the disagreements clearly identified, courts may yet come to a consensus on these issues, although the experience of the last eight years under the 2010 regime suggests that hope is a remote one. Assuming some courts will continue to frustrate attempts to uncover the extent of lawyer influence under the current rules, I propose a variety of alternatives that can check excessive lawyer involvement without creating the problems the 2010 amendments were intended to address.

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I. INTRODUCTION

Experts play a crucial role in modern litigation.[1] The range of cases in which expert testimony is allowed, or in some cases required, is immense.[2] It is the testimony of these experts that often make or break a case.[3]

In federal litigation, Federal Rule of Civil Procedure 26(a)(2)(B) requires that testifying experts[4] prepare and sign a written report as part of required pretrial disclosures.[5] The role of the report is to facilitate discovery of the opinions the expert may offer at trial. It "exposes the thought process and method of the expert in advance of oral examination. Its discipline both reduces the incentives of witnesses to

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1. Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 471 (2000) (noting that experts are "often the most important witness in civil cases"); Paul M. Mannix, *Control of Work Product: Avoiding Harmful Expert Disclosures*, 46 DRI FOR THE DEF. 30 (2004) ("The expert witness has become a fixture in modern civil litigation. Most cases involve at least some expert testimony, and generally, both the plaintiff and the defendant present an expert with an opinion favorable to their respective positions. The expert typically speaks to the crucial issues in the case and, as the expert is offered as a witness with special knowledge in the critical field, the expert's testimony is often given great weight. As a result, the outcome of the case frequently depends on which side wins the 'battle of the experts.' Thus, one of the most important tasks in preparing a case for trial is to retain, prepare, and present the most competent, persuasive, and credible expert witness possible."); David Sonenshein & Charles Fitzpatrick, *The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 REV. LITIG. 1, 3 (2013) ("As the system has become inundated with more complex litigation and cases of a more technical nature, the use of expert witnesses has increased."); William R. Stuart III, *Reconciling a Tense Coexistence: Can Federal Rule 26 Both Prohibit Ghost-Writing and Protect Expert-Related Work Product?*, 57 DRI FOR THE DEF. 20 (2015) (finding that "[e]xpert witnesses are integral to defending product liability lawsuits, and [that] it is not uncommon for a case to rise or fall on the testimony of a single expert.").

2. *See supra* note 1. *See generally* JAMES J. MANGRAVITI ET AL., HOW TO WRITE AN EXPERT WITNESS REPORT app. D (2014) (providing model expert reports for numerous different disciplines).

3. *See supra* note 1.

4. These are defined as a witness "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." FED. R. CIV. P. 26(a)(2)(B).

5. The rule requires that the report include:

(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.

Id.

present preliminary or tentative views and to tailor their opinion to an advocate's case."[6]

The drafters of the rule recognized that even though the report is to be "prepared" by the expert, the expert could be assisted by a lawyer in this endeavor. As the 1993 Advisory Committee Note to the Federal Rule makes clear:

> Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.[7]

Numerous cases have grappled with the question of how much a lawyer may assist an expert in preparing the expert's report.[8] At some point the degree of involvement is so great that the report ceases to be one "prepared" by the expert, as the rule requires, but instead is really the work of the lawyer. In such cases the expert is seen as a mere "puppet"[9] or "avatar"[10] of the lawyer rather than as a testifying expert providing independent, expert analysis. Even if the lawyer's assistance does not supplant the work of the expert, its existence may still compromise the independent analysis of the expert. The line between permissible and impermissible assistance, however, remains unclear. [11] Part II of this Article addresses this issue.[12]

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6. 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE AND PROCEDURE § 26.23[5] (3d ed. 2000).

7. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

8. *See* Johnson v. City of Rockford, No. 15 CV 50064, 2018 WL 1508482, at *4 n.1 (N.D. Ill. Mar. 27, 2018) (bemoaning that a "plethora of cases exist addressing the pernicious practice of attorneys commandeering the preparation of expert reports").

9. *See, e.g.*, KNAPP Logistics & Automation, Inc. v. R/X Automation Sols., Inc., No. 14-cv-00319-RBJ, 2015 WL 5608124, at *1 (D. Colo. Sept. 24, 2015) (deriding counsel for creating expert report filled with legal arguments outside the expert's expertise, treating the expert "essentially as a puppet through which counsel will lecture the jury on the law and why [his client] should win the case"); DataQuill Ltd. v. Handspring, Inc., No. 01 C 4635, 2003 WL 737785, at *4 (N.D. Ill. Feb. 28, 2003) (excluding expert report which included verbatim language from the party's interrogatory answers concluding, "[w]e doubt the value to the trier of fact of a hired expert's opinion when the party hiring him has put words in his mouth-or in this case, in his report-leaving him, in essence, a highly qualified puppet").

10. *See, e.g.*, Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 941 (E.D. Mich. 2014) (noting that overinvolvement of the lawyer renders the expert "merely a party's lawyer's avatar [who] contributes nothing useful to the decisional process"); *accord* HVLPO2, LLC v. Oxygen Frog, LLC, No. 4:16cv336-MW/CAS, 2018 WL 2041370, at *3 (N.D. Fla. Jan. 16, 2018) (quoting *Numatics*, 66 F. Supp. 3d at 941).

11. *See also* JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 7.55 (3d ed. 2019) (noting uncertainty as to the degree to which the Federal Rules limit exploration of the lawyer's assistance in preparation of the expert report); *cf.* MANGRAVITI ET AL., *supra* note 2, at 11

A related theme turns on how to control lawyer overreaching. In extreme cases, exclusion of the expert's report and ultimate testimony may be called for. In less extreme cases, the degree of involvement is controlled, indirectly, by the potential that the level of assistance may undercut the weight the trier of fact will give to the expert's testimony. If the expert's credibility is diminished to the degree his work is seen as the product of the non-expert lawyer's labor, lawyers have an incentive to keep their assistance within bounds. These controls are discussed in Part III of this Article.[13]

For these controls to be effective, however, one needs a way to identify the lawyer's involvement in the report's preparation. From 1993, when the expert report requirement was adopted, until 2010, this was a relatively easy task as most courts allowed discovery of report drafts and communication between counsel and the expert. Drafts, other communications, and examinations at deposition were used to uncover the role lawyers played in the creation of expert reports. In 2010, the Federal Rules were amended to prohibit discovery of draft reports and to dramatically curtail discovery of lawyer-expert communications. Notably, the amendments did not explicitly address the permissible degree of lawyer assistance but only the evidence that would be available to identify it. Significant disagreement exists over the degree to which the 2010 amendments curtail discovery of the lawyer's involvement. This is discussed in Part IV of the Article.[14]

Some have argued that excessive lawyer involvement in the creation of expert reports can be regulated through the lawyer disciplinary system. Part V of this Article addresses that approach and ultimately finds it wanting.[15]

If we are concerned about excessive lawyer involvement in the creation of expert reports, as I believe we should be, an expansive view of the restrictions on discovery imposed by the 2010 amendments makes policing such involvement very difficult at best. If that becomes the norm, it will become important to devise alternative approaches to keep lawyer behavior within acceptable bounds. Part VI of this Article sets forth some possible alternatives to control this problem.[16]

With the degree of lawyer involvement purportedly on the rise,[17] resolving these questions is of increasing importance.[18]

(noting that the amount of assistance a lawyer may give to an expert in preparing the expert report "is an extremely slippery slope").

12. *See infra* Part II.
13. *See infra* Part III.
14. *See infra* Part IV.
15. *See infra* Part V.
16. *See infra* Part VI.
17. *See, e.g.*, Steven Babitsky, *Why Having Retaining Counsel Phrasing and Writing an*

II. THE LAWYER'S ROLE IN ASSISTING IN THE PREPARATION OF EXPERT REPORTS

A. The Pros and Cons of Lawyer Involvement in the Creation of Expert Reports

1. The Need to Control Lawyer Assistance in the Creation of Expert Reports

To sustain a claim or defense, a litigant must present witnesses of an occurrence and/or tangible evidence to establish the facts. At times, however, the implications of those facts are not readily apparent. Expert testimony is necessary to help the trier of fact interpret the underlying data. For example, one might agree that a doctor took certain steps in carrying out a medical procedure but need expert testimony to determine whether those steps fell below the ordinary standard of care. To meet this end, the law allows the admission of expert testimony by those that, although lacking first-hand knowledge of the incidents underlying a claim or defense, have specialized training that qualify them to opine on the consequences of those facts. It is the specialized knowledge of such witnesses and the soundness of their methods that justify their testimony.[19]

Unlike a court-appointed expert whose task is to provide a truly objective opinion, most experts testify on behalf of a party in the litigation.[20] In theory, the experts chosen by a party to testify also have

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Expert Report Can Be a Problem, SEAK (Feb. 6, 2013), https://www.testifyingtraining.com/why-having-retaining-counsel-phrasing-and-writing-an-expert-report-can-be-a-problem (noting that "[e]xpert witnesses are getting more and more 'help' from retaining counsel in phrasing and writing their reports").

18. While this Article focuses on testifying expert/lawyer interactions in federal court, in civil actions, the same issues arise in state court civil practice. States take a variety of different approaches. *See* Elizabeth V. Tanis et al., *Expert Reports and Discovery: What You Need to Know Under the Recently-Amended Federal Rules of Civil Procedure and Select State Law*, SU017 ALI-CLE 219 (2012). *See generally* Gwen Stern et al., *Fishing Season Is Over: After* Barrick *and Amended Pennsylvania Rule of Civil Procedure 4003.5, Pennsylvania Reached the Right Decision Regarding Work Product Protections Between Attorneys and Experts*, 7 DREXEL L. REV. 329, 340-55 (2015). The issue can arise in foreign proceedings as well. *See, e.g.*, Shane Rayman et al., *Expert Evidence and the Expert's Duty to the Court*, SA007 ALI-CLE 433 (2019) (addressing testifying expert/lawyer communications under Canadian law). A separate body of law concerns expert discovery and testimony in criminal proceedings. *See, e.g.*, Paul W. Grimm, *Challenges Facing Judges Regarding Expert Evidence in Criminal Cases*, 86 FORDHAM L. REV. 1601, 1603-11 (2018). These topics, however, are beyond the scope of this Article.

19. *See* FED. R. EVID. 702.

20. *See generally* Bradford H. Charles, *Rule 706: An Underutilized Tool to Be Used When Partisan Experts Become "Hired Guns"*, 60 VILL. L. REV. 941 (2015) (discussing public perception and criticism of compensated partisan experts in litigation).

objectively analyzed the situation. It is not the expert who is partisan, but rather the partisan parties select experts who independently agree with their positions.

Nevertheless, there is certainly a real-world chance that the opinions of experts may be shaped by who employs them. Experts are "at will" employees. An unsatisfactory opinion or an uncooperative attitude may lead to dismissal or at least a decision not to call on the expert to testify. Either alternative has negative compensation implications. The desire to be hired in the future also can play a part. These financial incentives can influence an expert's testimony. A human desire to please those for whom one works and the reliance relationship the expert has on counsel to provide certain facts and assumptions may further taint the process. If the process is also shaped in partisan terms, the expert is the witness for a party and, in the current scheme, is an inside player with the lawyer, with many of their communications protected from discovery, it is likely that some independence and objectivity will be lost.[21] The greater the lawyer involvement in the creation of the expert's testimony, the more these negative influences can come into play.

If we start with the assumption that experts are allowed to testify and share their opinions only because of their specialized knowledge and ability to apply accepted principles and methods in their field, then we need to assure that their reports and ultimate testimony, if any, are a product of that knowledge and those methods. Lawyer involvement in the preparation of the expert's report or in the shaping of the ultimate testimony may undercut that paradigm. Excessive involvement may usurp the expert's role and delegitimize the resulting product.[22] Some

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21. *See, e.g.*, Easton, *supra* note 1, at 469-73 (noting these and other factors and concluding that "it is difficult to imagine a system that would lead to more biased testimony"); Letter from 37 Law Professors, to Peter G. McCabe, Sec'y for the Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 1, 2 (Nov. 30, 2008) [hereinafter Letter from 37 Law Professors] (noting these and other factors and describing them as "the prime source of the pathologies of expert testimony," while also noting that "[t]he rule that makes an expert witness's communications broadly discoverable is an expression of the basic value of expert independence. Replacing it with a rule that treated the expert more like a client for discovery purposes would send the wrong message."); *see also* Sonenshein & Fitzpatrick, *supra* note 1, at 3-16 (exploring at length the forces that lead to expert bias, concluding that "this system often leads to biased and partisan testimony from experts").

22. As the court noted in *Occulto v. Adamar of N.J., Inc.*:

> A party receiving an adversary's expert's signed report has a right to rely upon the document for what it purports to be—the expert's considered analysis of facts and statement of opinions applying the expert's special education, training and experience. Experts participate in a case because, ultimately, the trier of fact will be assisted by their opinions . . . . They do not participate as the alter-ego of the attorney who will be trying the case.

125 F.R.D. 611, 615-16 (D.N.J. 1989); *accord* Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934,

believe that this will occur with regularity absent some curb on the practice.[23]

2. The Need to Allow Some Lawyer Assistance in the Creation of Expert Reports

Lawyer involvement in the creation of expert reports and testimony has its advantages. The lawyer can define the expert's task by sharing data and assumptions to be utilized in forming opinions. This input is discoverable as it underlies whatever opinions the expert puts forward.[24] The lawyer also should play a role in assuring that the expert's report complies with the technicalities of the report rule, Federal Rule of Civil Procedure 26(a)(2)(B).[25] Most also would agree that the lawyer should play a role in assuring that the expert's report is both accurate and clear.[26] The lawyer can help assure that the language used is clear and not misleading. An additional editorial flare to make the report more persuasive is commonly thought as fairly within the game.[27]

B. Differing Conceptions of the Lawyer's Role

As the 1993 Advisory Committee Note makes clear, there is a role for the lawyer to play in assisting an expert in the creation of his testimony which is then transmitted in the required expert report. There is disagreement, however, about what that role should be.[28] Several conceptions of the lawyer's role play out in the court opinions attempting to draw the line between acceptable and unacceptable lawyer assistance.

1. Lawyer as Drafter and the Ghostwriting Analogy

The most problematic cases are those in which the lawyer simply drafts the report, without initial input from the expert, and asks the expert to sign it. Arguably, if the expert accepts the report as his or her own, that is now the expert's opinion and in the words of the Advisory Committee Note, the report "reflects the testimony to be given by the

943 (E.D. Mich. 2014) (quoting *Occulto*, 125 F.R.D. at 615-16).

23. Johnson v. City of Rockford, No. 15 CV 50064, 2018 WL 1508482, at *6 (N.D. Ill. Mar. 27, 2018).

24. *See* FED. R. CIV. P. 26(b)(4)(C)(ii)–(iii).

25. *See infra* Part II.B.3.

26. *See generally infra* Parts II.B.2–4.

27. *See infra* text accompanying note 53.

28. *See generally* Megan S. Largent, *Applying the American Bar Association's Model Rules of Professional Conduct and Federal Rules of Civil Procedure to Shane Rayman's Observations and Study of Canadian Law in Expert Evidence and the Expert's Duty to the Court*, SA007 ALI-CLE 459 (Jan. 2019) (describing the line between permissible and impermissible lawyer assistance in preparation of the expert report as "ill-defined").

witness."[29] Whether or not the expert can adequately defend that opinion becomes a question to be ferreted out by cross-examination.

Some cases can be read to approve this practice.[30] Others criticize the practice, but nevertheless do not believe exclusion of the testimony is always required.[31] Giving counsel that significant a role, however, is most often seen as improper.[32] Rule 26(a)(2) not only requires that the

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29. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

30. *See., e.g.*, Maxson v. Calder Bros., No. 4:14CV01360 AGF, 2015 WL 4715955, at *1-2, *3 (E.D. Mo. Aug. 7, 2015) (noting that "generally, when an expert reads and signs a report prepared by counsel, the report is viewed as the expert's" in case where court noted discussion between counsel and the expert preceding delivery of the report to the expert, the report was identical to those of three other experts, and included opinions on matters for which the expert was unqualified and which he later disowned); United States *ex rel.* Jordan v. Northrop Grumman Corp., No. CV 95-2985 ABC (Ex), 2003 WL 27366249, at *3 (C.D. Cal. Mar. 10, 2003) (finding that "even if much of the [expert's report] was 'fully developed' [by counsel] when it reached [the expert], [the expert's] adoption of the report is sufficient to meet the requirements of Rule 26(a)(2)(B)").

31. *See, e.g.*, Harmon v. United States, No. PX 15-2611, 2017 WL 4098742, at *9 (D. Md. Sept. 15, 2017) (finding that while counsel's drafting of two expert witness reports was "ill-advised," it did not warrant exclusion where the experts subsequently determined the reports "accurately reflected their conclusions"); Smith v. Terumo Cardiovascular Sys. Corp., No. 2:12-cv-00998-DN, 2017 WL 8186899, at *1-2 (D. Utah Aug. 7, 2017) (finding it permissible for the expert report to have been drafted by the lawyer but "strongly encourag[ing]" the adoption of a different practice in the future); O'Hara v. Travelers, No. 2:11-CV-208-KS-MTP, 2012 WL 3062300, at *9 (S.D. Miss. July 26, 2012) (acknowledging that while an attorney simply writing the report without the expert's input and then requesting its adoption by signature violates the rule, "the Court does not hold that 'ghost-writing,' by itself, is sufficient to render testimony unreliable [and thus excludable] for *Daubert* purposes, [but] it should be a factor in the Court's analysis"); Fed. Beef Processors, Inc. v. Royal Indem. Co., No. CIV. 04-5005-KES, 2008 WL 6953895, at *2 (D.S.D. July 18, 2008) (finding the failure of the expert to have any input in the report "troubling," but finding it harmless error, and thus excused conduct under Federal Rule of Civil Procedure 37, because an attachment to the report was prepared by the expert and because the expert explained, in his deposition, which portions of the report reflected his opinion). Even if the practice does not violate the Federal Rules, it still presents a risky course as the expert will be less likely to be able to explain and defend the report. *See* Stuart, *supra* note 1 (pointing out that such a report "will, by all accounts, lead to an ineffective expert who can be discredited on cross-examination").

32. MOORE ET AL., *supra* note 6, ¶26.23[5] ("The better view rejects the contention that a report prepared by counsel is the report of the expert, even if the expert 'substantially' agrees with its conclusions."). The most cited case here is *Manning v. Crockett,* where the court stated:

> [P]reparing the expert's opinion from whole cloth and then asking the expert to sign it if he or she wishes to adopt it conflicts with Rule 26(a)(2)(B)'s requirement that the expert "prepare" the report. Preparation implies involvement other than perusing a report drafted by someone else and signing one's name at the bottom to signify agreement.

No. 95 C 3117, 1999 WL 342715, at *3 (N.D. Ill. May 18, 1999). *Cf.* Anders v. United States, 307 F. Supp. 3d 1298, 1312-14 (M.D. Fla. 2018) (finding expert testimony unreliable where the expert incorporated lawyer-drafted opinions into his expert report and then lied under oath, claiming he had independently authored that portion of his report); DataQuill Ltd. v. Handspring, Inc., No. 01 C 4635, 2003 WL 737785, at *4 (N.D. Ill. Feb. 28, 2003) (excluding expert report which included verbatim language from the party's interrogatory answers and concluding, "[w]e doubt the value to the trier of fact of a hired expert's opinion when the party hiring him has put words in his mouth-or in this case, in his report-leaving him, in essence, a highly qualified puppet").

expert sign the report, but also that the expert "prepare[]" it.[33] Further, while the Advisory Committee Note contemplates that attorneys may participate in the process, their role is limited to "providing assistance."[34] Assistance implies a lesser role than serving as sole or even principal author.[35]

The analogy here is often to the concept of ghostwriting—the expert's name is on the report, but the report really reflects the efforts of the lawyer.[36] Concerns about lawyer ghostwriting have largely arisen in the context of attorney preparation of pleadings which individuals then file pro se as their own.[37] Pro se pleadings are treated leniently to compensate for the lack of legal training of most who file them.[38] That leniency would not be given to a lawyer-drafted pleading. Filing a pleading that appears as though it was drafted by the party when it was really drafted by a lawyer provides that individual an unfair and unwarranted advantage.[39]

A similar, though distinct, unfair and unwarranted advantage can occur when the expert's report is predominantly the work of a lawyer. Were the lawyer to directly offer the opinions in the report, they would not be admissible in evidence.[40] Even if they were, they would be seen as the views of a partisan untrained in the area covered by the testimony.

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33. FED. R. CIV. P. 26(a)(2)(B); *see Manning*, 1999 WL 342715, at *3 (noting that to allow "an expert to sign a report drafted entirely by counsel without prior substantive input from an expert would read the word 'prepared' completely out of the rule").

34. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

35. *See* MOORE ET AL., *supra* note 6, § 26.23[4] (noting that "the rule does not contemplate blanket adoption of reports prepared by counsel").

36. *See, e.g.*, O'Hara v. Travelers, No. 2:11-CV-208-KS-MTP, 2012 WL 3062300, at *9 (S.D. Miss. July 26, 2012) (noting that "the inherent deception involved in such 'ghost-writing' taints the proposed expert testimony to a degree that its reliability may be questioned. Although the Court does not hold that 'ghost-writing,' by itself, is sufficient to render testimony unreliable for *Daubert* purposes, it should be a factor in the Court's analysis."); McClellan v. I-Flow Corp., 710 F. Supp. 2d 1092, 1118 (D. Or. 2010) (noting that "an expert report 'ghost-written' from 'whole cloth' violates the spirit, if not the letter of the Rule").

37. Court decisions and ethics opinions are split on the propriety of ghostwriting in this context. For a recent article summarizing this split, see Debra Lyn Bassett, *Characterizing Ghostwriting*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 286, 291–96 (2015).

38. *See, e.g.*, Haines v. Kerner, 404 U.S. 519, 520 (1972) (noting that allegations in pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers").

39. *See, e.g.*, Bassett, *supra* note 37, at 300-02 (noting this as the most common concern raised by those opposed to ghostwriting in this context). *But cf.* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 07-446, at 3 (2007) (arguing that if the lawyer's input is valuable, it will be obvious on the face of the pleading and the court can decline to give special deference). Other concerns are that the practice is deceptive, and that it possibly undercuts the lawyer's accountability for the work product. *See, e.g.*, Halley Acklie Ostergard, Note, *Unmasking the Ghost: Rectifying Ghostwriting and Limited-Scope Representation with the Ethical and Procedural Rules*, 92 NEB. L. REV. 655, 659-60, 664 (2014) (collecting cases).

40. *See* FED. R. CIV. P. 26(a)(2)(B).

When the expert serves as the conduit for the lawyer's thoughts, the opinions, if the expert meets the evidentiary standards to allow the expert's testimony, are given great weight. The expert often has strong credentials which are presented to assure the admission of the expert's testimony. This may be accompanied by a judicial declaration that the person is a qualified expert based on his or her training and experience who can help the trier of fact in the matter. Such experts may have particularly honed communication skills in an otherwise technical area. Thus, a jury may give the opinions expressed by experts greater weight than those of others.[41]

In *Intermedics, Inc. v. Ventritex, Inc.*, the federal district court for the Northern District of California laid plain the concern. The court noted that:

> [W]ith respect to *expert* witnesses in particular, there is, inevitably, a dense and probatively significant interdependence between, on the one hand, the opinions and reasoning they present in testimony and, on the other, their background, experience, and personal characteristics and attributes.
>
> Given that interdependence, it would be fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an "expert" in fact was the product, in whole or significant part, of the suggestions of counsel. The trier of fact has a right to know *who* is testifying. If it is the lawyer who really is testifying, surreptitiously through the expert (i.e., if the expert is in any significant measure parroting views that are really the lawyer's), it would be fundamentally unfair to the truth finding process to lead the jury or court to believe that the background and personal attributes of the expert should be taken into account when the persuasive power of the testimony is assessed.[42]

2. Lawyer as Mere Scrivener

On the other end of the spectrum, there is near universal approval of the lawyer as scrivener.[43] In these cases the expert typically has set out the underlying facts, assumptions, findings, and opinions orally or in

41. *See, e.g.*, Easton, *supra* note 1, at 480-91.

42. Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 395-96 (N.D. Cal. 1991).

43. *See, e.g.*, Bryntesen v. Camp Auto., Inc., No. 2:13-cv-00491-BLW, 2015 WL 248002, at *4 (D. Idaho Jan. 20, 2015) (noting that "if counsel acts as a scrivener, and the expert supplies the substantive content for the written report, the report is nonetheless 'prepared' by the expert within the meaning of the rule"); Weekes v. Ohio Nat'l Life Assurance Corp., No. 1:10-cv-566-BLW, 2011 WL 6140967, at *4 (D. Idaho Dec. 9, 2011); Wilderness Dev., LLC v. Hash, No. CV 08-54-M-JCL, 2009 WL 564224, at *4 (D. Mont. Mar. 5, 2009); Crowley v. Chait, 322 F. Supp. 2d 530, 543-45 (D.N.J. 2004).

a number of memoranda and the lawyer simply records the information in proper form for an expert witness report. The lawyer is largely a transcriber, although one allowed a little grammatical license. Here the report seems clearly prepared by the expert even if the expert or his staff did not type it.

3. Lawyer as Compliance Counsel

Some cases stress that the requirements for the expert report required under the Federal Rules of Civil Procedure are rigorous and that those untrained in the law, without the assistance of lawyers, may not know how to meet them.[44] Under this conception of the lawyer's role, the lawyer should be involved, providing assistance to make sure the report is complete. The lawyer should work with the expert to assure that the report contains all that Rule 26(a)(2)(B) requires.[45] The role of the lawyer is as a quality-control agent.[46] The lawyer is to make sure that nothing pertinent is left out of the report that otherwise should be there.[47]

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44. *See, e.g.*, Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 943 (E.D. Mich. 2014) (noting that "[i]n most cases, expert witnesses are not attorneys, and they may not apprehend the required components of a report set forth in Rule 26(a)(2)(B). The retaining attorney certainly may explain the rule's requirements and coach the expert to be sure the report touches all the bases"); *see also* Manning v. Crockett, No. 95 C 3117, 1999 WL 342715, at *3 (N.D. Ill. May 18, 1999); Marek v. Moore, 171 F.R.D. 298, 301 (D. Kan. 1997) (noting that "[u]nlike the attorney, the expert witness more likely preoccupies himself with his profession or field of expertise. He may have little appreciation or none whatsoever for Rule 26 and its exacting requirements for a legally 'complete' report of the expert opinions, including all the 'data or other information' and designating all supporting exhibits . . . . [and concluding that] [t]o help ensure complete disclosure of the required information, counsel ordinarily should supervise preparation of the expert's witness report.").

45. *See, e.g.*, *Numatics*, 66 F. Supp. 3d at 942 (noting that lawyer assistance to experts "generally is limited to ensuring that Rule 26's formal requirements are satisfied"); James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC, No. 5:11–374–DCR, 2014 WL 1744848, at *6 (E.D. Ky. Apr. 30, 2014); *cf. Manning*, 1999 WL 342715, at *3 (noting that "certain kinds of help are clearly in tune with the concept of assisting the expert . . . . [such as] an attorney's assistance with the preparation of documents required by Rule 26, such as a list of cases in which the expert has testified, or fine-tuning a disclosure with the expert's input to ensure that it complies with the rules").

46. Straying beyond quality control to having an impact on the substance of the testimony may be a step too far. *See, e.g.*, *In re* Commercial Fin. Servs., Inc., No. 98-05162-R, 908-05166-R, 2005 WL 6725897, at *11 n.8 (Bankr. N.D. Okla. May 10, 2005) (stating that "[a]ssistance by counsel in drafting expert's report is expected in connection with complying with the formalities required of Rule 26 (to insure that the report contains all information required by Rule 26 and completely discloses information considered by the expert, for instance), but not with respect to the substance of the expert's opinions," although determining that excessive assistance goes to the weight of the testimony, not its admissibility).

47. *Marek*, 171 F.R.D. at 301 (noting the importance of the lawyer in assuring the report comports with Rule 26(a)(2)(B)'s requirements to avoid possible exclusion of the report if it were incomplete).

As such, "counsel's assistance is generally limited to helping the expert draft a report in a way that satisfies the requirements of Rule 26."[48]

4. Lawyer as Speaker for the Inarticulate

In explaining proper lawyer assistance to experts in preparing their reports, the Advisory Committee noted that "with experts such as automobile mechanics, this assistance may be needed."[49] The import of the comment is that some experts are not accustomed to communicating in writing and may need lawyer assistance to do so. If that is meant to be the paradigm for lawyer involvement, then lawyers, arguably, should not provide assistance when experts can prepare their own reports.[50]

5. Lawyer as Collaborator

Most of the court opinions in this area embrace the role of lawyer as collaborator.[51] The rules already contemplate that lawyers may communicate with the expert concerning "compensation for the expert's study or testimony," "facts or data" to be considered, and "assumptions" to be relied upon.[52] The cases go further and allow the lawyer to help shape the testimony itself, including presenting it in a more persuasive voice, as long as the expert "substantially participated" in the report's creation, or words to that effect.[53] A few courts shift the emphasis from

48. *Scatuorchio*, 2014 WL 1744848, at *6.

49. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

50. *See, e.g.*, Rodgers v. Beechcraft Corp., No. 15-CV-0129-CVE-PJC, 2017 WL 979100, at *6 (N.D. Okla. Mar. 14, 2017) (in evaluating whether the expert played a substantial role in creating the expert report, the court noted that "[t]he Advisory Committee Notes reference 'automobile mechanics' as a type of witness who may need assistance, and this could reasonably refer to a category of expert witnesses less familiar with writing reports or who intend to testify primarily on the basis of training or experience instead of academic requirements;" finding assistance to highly educated experts improper since "[t]he Advisory Committee Notes contemplate attorney 'assistance' in limited circumstances, but plaintiffs have not shown that this is a situation in which it was necessary for plaintiffs' counsel to completely draft the report for [the expert]"); Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 54 (S.D. W. Va. 1995) (citing language from the Advisory Committee Note to distinguish automobile mechanics from "[p]laintiffs' experts . . . primarily attorneys and claims representatives, who are experienced in writing reports and expressing opinions").

51. *See, e.g.*, Insight Tech., Inc. v. SureFire, LLC, No. 04-cv-74-JD, 2007 WL 3244092, at *8 (D.N.H. Nov. 1, 2007) (approving the lawyer and expert engaging in a "collaborative process").

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

53. *See, e.g.*, Manning v. Crockett, No. 95 C 3117, 1999 WL 342715, at *3 (N.D. Ill. May 18, 1999) (acknowledging lawyer assistance is proper, but emphasizing that the "expert must also substantially participate in the preparation of his report"); *accord Rodgers*, 2017 WL 979100, at *5 (relying on *Manning* for this proposition); Tindall v. H & S Homes, LLC, No. 5:10-CV-044 CAR, 2012 WL 3241885, at *1-2 (M.D. Ga. Aug. 7, 2012) (citing *Manning*, 1999 WL 342715, at *3); *see also In re* Asbestos Prod. Liab. Litig. (No. VI), 714 F. Supp. 2d 535, 542 (E.D. Pa. 2010) (describing the proper focus of inquiry as whether the expert "offered substantial input into what was put into the report" (quoting Crowley v. Chait, 322 F. Supp. 2d 530, 544 (D.N.J. 2004)));

substantial participation by the expert to a concern that the report's substance accurately reflect the expert's opinions.[54] In reality both are required,[55] although substantial participation should lead to opinions that accurately reflect the expert's views.

The typical scenario in which this approach is explored is where the lawyer is the drafter of the report and the question becomes whether the expert's contribution is substantial. Numerous cases have found it permissible for the lawyer to prepare the first draft of the report based on input from the expert and to draft the final report after the expert has reviewed it, made corrections as necessary, and adopted it as his own.[56]

The best analogy here is to a lawyer's coaching of witnesses.[57] While there are critics of the current witness-coaching practices,[58] substantial leeway is given to lawyers in this regard. As the *Restatement (Third) of the Law Governing Lawyers* provides:

> In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be

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Bekaert Corp. v. City of Dyersburg, 256 F.R.D. 573, 578 (W.D. Tenn. 2009); Keystone Mfg. Co. v. Jaccard Corp., 394 F. Supp. 2d 543, 568 (W.D.N.Y. 2005).

54. *E.g.*, Seitz v. Envirotech Sys. Worldwide Inc., No. H-02-4782, 2008 WL 656513, at *2 (S.D. Tex. Mar. 6, 2008) (citing *Manning*, 1999 WL 342715, at *3, for the proposition that "as long as the substance of the opinions is from the expert, the attorney's involvement in the written expression of those opinions does not make them inadmissible"); *accord* Tech Pharmacy Servs., LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017 WL 3388020, at *2 (E.D. Tex. Aug. 3, 2017) (quoting *Seitz*, 2008 WL 656513, at *2).

55. *Cf. Tech Pharmacy Servs.*, 2017 WL 3388020, at *2 (citing both standards).

56. *See, e.g.*, McDonald v. City of Memphis, No. 2:12-cv-2511-SHL-dkv, 2016 WL 8201168, at *11 (W.D. Tenn. Aug. 26, 2016); *Tindall*, 2012 WL 3241885, at *1–2, *3; Hoskins v. Gunn Trucking, No. 4:07-CV-72-WCL, 2009 WL 2970399, at *4 (N.D. Ind. Sept. 14, 2009).

57. *Cf.* Tess M.S. Neal, *Expert Witness Preparation: What Does the Literature Tell Us?*, JURY EXPERT, Mar. 2009, at 44-46, 48 (providing a literature review of how to prepare experts to testify, including the manipulation of language for persuasiveness).

58. *See generally* Roberta K. Flowers, *Witness Preparation: Regulating the Profession's "Dirty Little Secret"*, 38 HASTINGS CONST. L.Q. 1007 (2011) (discussing the need to develop clear standards governing witness preparation); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995) (discussing the characteristics and effects of witness coaching that should be considered ethical violations).

> prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear.[59]

In helping the expert prepare the report, the lawyer arguably is doing no more than "suggest[ing] choice of words that might be employed to make the witness's meaning clear."[60] That, however, understates the lawyer's role. To see this, we might draw a distinction between occurrence witnesses and expert witnesses. The former are testifying about what they observed. Permissible coaching is not to change the testimony itself, simply its presentation. With respect to experts, in contrast, the lawyer is helping the expert form the very opinions to be proffered as testimony and thus potentially plays a role in creating the very substance of the testimony to be provided.[61]

That distinction, however, may not be as stark as it appears. In preparing a lay witness, careful examination of the witness as part of the witness's preparation might in fact change the testimony itself. Indeed, that is one of the oft-cited concerns about witness coaching.[62] Further, even if the expert has not observed events about which to testify, the expert comes in with a skill set to develop, evaluate, and form opinions within his or her field of expertise. This skill set may make experts less susceptible to lawyer influence over the substance of their testimony than are lay witnesses.

Even if courts generally embrace this model, sometimes that collaboration can go too far.[63] For example, in one case, the lawyer who provided assistance was also an expert in the area. Rather than simply assisting the expert by providing some basic information and editorial collaboration, the lawyer contributed to the actual study and its conclusions. Even though the expert played a substantial role in creating

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59. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b. (AM. LAW. INST. 2000).

60. *Id.*

61. Letter from Stephen D. Easton, C.A. Leedy Professor of Law & Curators Distinguished Teaching Professor, Univ. of Missouri Sch. of Law, to Peter G. McCabe, Sec'y for the Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S. (Feb. 16, 2009) [hereinafter Easton Letter]; *cf.* Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 396-97 (N.D. Cal. 1991) (noting that "[t]he fact that so much expert testimony concerns matters that are essentially out of empirical control makes it all the more important for the trier of fact to know, accurately, the source of the testimony").

62. *See, e.g.*, Wydick, *supra* note 58, at 12; *see also* Lisa Renee Salmi, Note, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 135, 157-63 (1999).

63. *Cf.* Geders v. United States, 425 U.S. 80, 90 n.3 (1976) (noting, in the context of the propriety of a lawyer discussing matters with a client during trial, that "[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it").

the testimony and preparing the report, the lawyer's serving as a co-expert was seen as a step too far.[64]

It should also be noted that the collaborative model is not without its critics. As one court explained:

> Moreover, real harm to the truth finding process, as well as to public confidence in the integrity of our system of justice, can be done even when the influence a lawyer has on an expert's testimony is substantially more subtle and less flagrant than was the case in the "parroting" scenario that occurred in *Occulto*. If it occurs at a key analytical juncture, even a modest and subtle redirection of an expert's emphasis, focus, or line of reasoning could have a major impact on the ultimate conclusion or opinion she reaches. Such redirection could be effected (sic) through conversation, written suggestion, or even in the way counsel package and deliver information to the expert. We are aware that at least some lawyers take professional pride in their ability to indirectly "control" their experts, e.g., through the timing or sequencing of the data/information they give the experts. Thus, we need not posit gross and clumsy corruption of the process to feel substantial concern about preserving (or promoting) the reality of independence in thinking that is presented to a jury as independent.[65]

C. The Case Law in Operation

As the foregoing illustrates, there is no consensus as the proper role for lawyers in assisting in the preparation of expert witness reports. As a practical matter, however, lawyers acting as a scrivener, compliance officer, or a speaker for the inarticulate is well accepted.[66] The collaboration model also has been approved in the abstract, but at times the collaboration exceeds the limits of what is acceptable. To act as the principal drafter of the report, however, is seen by many as a step too far.[67] This Subpart moves beyond an abstract discussion of the lawyer's role and steps into the weeds of the court decisions that have addressed where to draw the line between proper and improper lawyer assistance.

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64. United States *ex rel.* Barron v. Deloitte & Touche, LLP, No. SA-99-CA-1093-FB, 2008 WL 7136868, at *4-6 (W.D. Tex. Sept. 26, 2008) (disqualifying the expert and excluding her report and testimony on this ground). Contrast that case with *Arista Records LLC v. Lime Grp. LLC*, in which the court approved assistance to the expert such as "obtaining the sample of files, categorizing the files in the sample, and implementing the statistical protocol" the expert had developed. 784 F. Supp. 2d 398, 412-13 (S.D.N.Y. 2011) (citing to the Advisory Committee Note on permissible assistance by counsel).

65. *Intermedics*, 139 F.R.D. at 396.

66. *See supra* Part II.B.2–5.

67. *See supra* Part II.B.1.

Numerous opinions acknowledge that there is no bright-line test for when lawyer involvement in the creation of expert reports goes too far. Rather it is a case-by-case determination.[68] Nevertheless, looking at those cases where courts found counsel's assistance excessive helps provide a lens through which the case-by-case determination can be made.

1. Cases in Which Lawyer Assistance Renders the Expert's Report Invalid

There are two different ways courts approach this issue. One is to focus on the comparative roles of counsel and the expert in preparing the report.[69] The other is to consider whether outside pressures influenced the expert's report.[70]

Under the first approach, one might focus on the conduct of counsel to determine if the assistance provided exceeds permissible bounds or on the degree to which the expert participated in the creation of her own report. In reality, I suspect both are considered.[71]

The second approach purports to analyze the motive of the expert. The report is considered improper if it appears the report was completed "merely for appeasement or because of intimidation or some undue influence by the party or counsel who has retained him."[72]

In practice, the courts appear to rely far more heavily on the first type of analysis than the second.[73] The concern is raised in a variety of similar ways. Thus, a problem arises where the lawyer "prepar[es] the expert's opinion from whole cloth and then ask[s] the expert to sign it."[74]

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68. *See, e.g.*, McClellan v. I-Flow Corp., 710 F. Supp. 2d 1092, 1118 (D. Or. 2010) (describing the analysis as a "fact-specific inquiry"); *accord* Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 942 (E.D. Mich. 2014) (quoting *McClellan*, 710 F. Supp. 2d at 1118); Rhinehart v. Scutt, No. 2:11-cv-11254, 2017 WL 1395887, at *5 (E.D. Mich. Apr. 19, 2017) (quoting *Numatics*, 66 F. Supp. 3d at 942).

69. Marek v. Moore, 171 F.R.D. 298, 299, 301 (D. Kan. 1997).

70. *Id.* at 302.

71. *See, e.g.*, Bekaert Corp. v. City of Dyersburg, 256 F.R.D. 573, 578 (W.D. Tenn. 2009) (commenting that "[w]hether an expert report was prepared in a manner consistent with the mandates of Rule 26, usually turns on whether counsel's participation so exceeds the bounds of legitimate assistance as to negate the possibility that the expert actually prepared his own report, i.e. the expert must substantially participate in the preparation of his report.").

72. *Marek*, 171 F.R.D. at 302; *accord* Trigon Ins. Co. v. United States, 204 F.R.D. 277, 292 (E.D. Va. 2001) (quoting *id.*); *see also* Ameritox, Ltd. v. Millennium Health, LLC, No. 13-cv-832-wmc, 2015 WL 1520821, at *13 (W.D. Wis. Apr. 3, 2015) (quoting *Marek,* 171 F.R.D. at 302); *McClellan*, 710 F. Supp. 2d at 1118 (quoting *Trigon*, 204 F.R.D at 292).

73. *See, e.g.*, *Trigon*, 204 F.R.D. at 292; *Marek*, 171 F.R.D. at 302. *See also* notes 74-90 and accompanying text.

74. Manning v. Crockett, No. 95 C 3117, 1999 WL 342715, at *3 (N.D. Ill. May 18, 1999); *accord* Seitz v. Envirotech Sys. Worldwide Inc., No. H-02-4782, 2008 WL 656513, at *2 (S.D. Tex. Mar. 6, 2008); *see also* United States *ex rel.* Wall v. Vista Hospice Care, 319 F.R.D. 498, 510 (N.D.

It is other times noted that "preparation" means involvement in the creation of the report rather than "perusing a report drafted by someone else and signing one's name at the bottom to signify agreement"[75] or that "preparing a report implies involvement other than reviewing a report drafted by someone else and signing one's name in agreement with the contents."[76]

In reviewing the cases in which the court ordered exclusion of the expert report because of excessive lawyer involvement and insufficient expert input, several patterns emerge. The clearest cases are those where the lawyer writes the report and the expert merely signs it and adopts it as her own.[77] Here the lawyer has done way too much and the expert way too little. But the situation need not be that extreme. In a number of cases, reports have been excluded where the lawyer created a first draft of the report with no input from the expert, the expert reviewed the report before adopting it but made few if any substantive changes.[78] Absent evidence of extensive reworking of the report by the expert, this situation is a close cousin to the first.

The same problem may happen in reverse. If the expert prepares a first draft that is substantially changed substantively by the lawyer after the lawyer reviews it, that may suggest that the final report contains the views of the lawyer rather than the expert.[79]

Tex. 2016).

75. *Manning*, 1999 WL 342715, at *3; *accord* Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 942 (E.D. Mich. 2014) (quoting *id.*); Crowley v. Chait, 322 F. Supp. 2d 530, 543 (D.N.J. 2004) (quoting *Manning*, 1999 WL 342715, at *3); *see also Trigon*, 204 F.R.D. at 293.

76. United States *ex rel.* Barron v. Deloitte & Touche, LLP, No. SA-99-CA-1093-FB, 2008 WL 7136868, at *3 (W.D. Tex. Sept. 26, 2008).

77. *See, e.g.*, Stein v. Foamex Int'l, Inc., No. CIV. A. 00-2356, 2001 WL 936566, at *5 (E.D. Pa. Aug. 15, 2001) (finding Rule violated where expert played "no apparent role" in drafting the report other than signing it); *cf.* O'Hara v. Travelers, No. 2:11-CV-208-KS-MTP, 2012 WL 3062300, at *9,*10 (S.D. Miss. July 26, 2012) (applying this principle in an instance where the draft was written by the party, rather than the lawyer, and treating it as one of the factors leading to exclusion of the expert's testimony).

78. *See, e.g.*, Patent Category Corp. v. Target Corp., No. CV 06-7311 CAS (CWx), 2008 WL 11336468, at *4, *5 (C.D. Cal. July 17, 2008) (excluding testimony where first draft of report was prepared before the expert was hired and the expert made only a few changes; the court concluded, "it is clear that [the expert] did not prepare his expert reports, he did not assist defense counsel in drafting the reports, nor did defense counsel draft the reports under [the expert's] supervision. Under these circumstances, the Court concludes that [the expert's] expert testimony must be precluded."); *see also* St. Jude Med. S.C., Inc. v. Tormey, No. 11-327 (MJD/TNL), 2013 WL 3270382, at *6, *8 (D. Minn. June 26, 2013) (excluding expert where counsel wrote report before expert first saw it).

79. *See, e.g.*, Cantrell v. BNSF Ry. Co., No. CIV 12-0129 KBM/SMV, 2013 WL 8632378, at *5 (D.N.M. June 28, 2013) (excluding expert's opinions as unreliable, noting that expert's "attorney-authored final expert report contains opinions that dramatically differ from [the expert's] original one paragraph opinion letter to counsel after seeing Plaintiff just one time. . . . [s]uggest[ing] that his final opinions were formed with a litigation purpose, and the

Other factors often are cited to support the proposition that the expert did not sufficiently participate in the report's creation. In some instances, the expert admits at deposition that they did not in fact review documents upon which the expert's opinion was formed[80] or at least did not spend sufficient time reviewing them to reflect a serious consideration of them.[81] Other times the expert, at deposition, disavows certain opinions in the report,[82] is unable to defend it,[83] or reveals that it contains opinions clearly outside of the expert's expertise.[84] A close look at the timing of the expert's input also can suggest a lack of involvement. For example, in *Weekes v. Ohio National Life Assurance Corp.*,[85] the court ultimately struck the expert report and excluded the expert's testimony where counsel prepared and submitted the disclosure before the expert finalized his opinion. The court did so even though the expert had spent twelve hours on the matter and engaged in two teleconferences with counsel. The court interpreted this timing anomaly, and other factors, as "suggesting that counsel—not the expert—provided

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circumstances indicate a lack of independence [of the expert]").

80. *See, e.g.*, *id.*, at *7; *O'Hara*, 2012 WL 3062300, at *9.

81. *See, e.g.*, Rodgers v. Beechcraft Corp., No. 15-CV-0129-CVE-PJC, 2017 WL 979100, at *5 (N.D. Okla. Mar. 14, 2017); James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC, No. 5:11-374-DCR, 2014 WL 1744848, at *6 (E.D. Ky. Apr. 30, 2014) (treating limited time expert spent in reviewing and revising report prepared by counsel as a factor in finding expert lacked sufficient input to be seen as "preparing" the expert report); Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 942 (E.D. Mich. 2014) (noting among other factors in excluding the report that "[t]he plaintiff says that [the expert] represented that he spent less than eight hours reviewing technical literature, prior art references, and the patent; and he implausibly says that he reviewed nearly 2,600 pages of deposition transcripts in two to three hours"). *But cf.* Accentra Inc. v. Staples, Inc., No. CV 07-5862 ABC (RZx), 2010 WL 11459205, at *5 (C.D. Cal. Oct. 7, 2010) (finding that spending only three to four hours on a report did not make it unreliable where the "report was just over two pages and was not particularly complicated" and the expert had assistance from counsel, but acknowledging that the assistance of counsel matter could be brought up to challenge the weight of the opinion).

82. *See Rodgers*, 2017 WL 979100, at *6 (noting that the expert denied that he "personally had any knowledge supporting several of the opinions offered in the report").

83. *See, e.g.*, DataQuill Ltd. v. Handspring, Inc., No. 01 C 4635, 2003 WL 737785, at *4 (N.D. Ill. Feb. 28, 2003); Stein v. Foamex Int'l, Inc., No. CIV. A. 00-2356, 2001 WL 936566, at *5 (E.D. Pa. Aug. 15, 2001). *But see* Tindall v. H & S Homes, LLC, No. 5:10-CV-044(CAR), 2012 WL 3241885, at *2, *3 (M.D. Ga. Aug. 7, 2012) (holding that although deposition showed that expert "was unable to recognize blatant errors and misstatements in the Affidavit," could not explain a principle asserted in the affidavit, and claimed to rely on sources he did not have, it would not strike the affidavit finding instead "that these matters are more aptly considered in the context of [the expert's] credibility as a witness").

84. *See, e.g.*, KNAPP Logistics & Automation, Inc. v. R/X Automation Solutions, Inc., No. 14-cv-00319-RBJ, 2015 WL 5608124, at *1, *2 (D. Colo. Sept. 24, 2015) (deriding counsel for creating expert report filled with legal arguments outside the expert's expertise, treating the expert "essentially as a puppet through which counsel will lecture the jury on the law and why [his client] should win the case," but allowing report to stand and the expert to testify).

85. No. 1:10-cv-566-BLW, 2011 WL 6140967, at *5 (D. Idaho Dec. 9, 2011).

the substantive leadership in preparing the expert's report"[86] which warranted the report's exclusion.

While not in and of itself dispositive, substantial similarities in the language used in the expert report and language used in other expert reports[87] or in other documents[88] may suggest the lawyer has played too much of a guiding hand.

So too would be the lawyers' participation in the actual study upon which the expert's opinion is based. Lawyers are expected to provide some factual information for the expert to consider and some assumptions to rely upon, but further entanglement in the study being conducted may go too far.[89]

Ultimately, the court will look at the totality of the circumstances.[90] Multiple indicia of lawyer over-involvement and expert under-

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86. *Id.*; *see also Rodgers*, 2017 WL 979100, at *2, *6, *7 (N.D. Okla. Mar. 14, 2017) (excluding the report in part because the expert only received important documents he was to review late in the process, only began reviewing them on January 30 with the report due on February 1, and spent only one hour preparing, reading, and editing the report drafted by counsel).

87. *See, e.g.*, *In re* Jackson Nat'l Life Ins. Co. Premium Litig., No. 96-MD-1122, 2000 WL 33654070, at *1 (W.D. Mich. Feb. 8, 2000) (finding "undeniable substantial similarities" between the expert report and another expert report in an unrelated case involving the same counsel was proof that the lawyer's actions "so exceeded the bounds of legitimate 'assistance' as to negate the possibility that [the expert] actually prepared his own report within the meaning of Rule 26(a)(2)"). *But cf.* McClellan v. I-Flow Corp., 710 F. Supp. 2d 1092, 1118, 1127 (D. Or. 2010) (allowing expert report and testimony despite evidence that two expert reports were, in part, similar if not identical, among other factors).

88. *Compare DataQuill*, 2003 WL 737785, at *4 (finding that where report contained large quantities of language verbatim from interrogatory responses, the report was insufficient, as the expert was acting as but "a highly qualified puppet"), *with* Tech Pharmacy Servs., LLC v. Alixa Rx LLC, No. 4:15-CV-766, 2017 WL 3388020, at *2 (E.D. Tex. Aug. 3, 2017) (finding expert sufficiently involved in preparing his report where only five of forty-three paragraphs duplicated language from previously-filed lawyer briefs). *But cf.* Manning v. Crockett, No. 95 C 3117, 1999 WL 342715, at *4 (N.D. Ill. May 18, 1999) (finding commonalities in language between the complaint and expert's opinion, but concluding that it could not "exclude the possibility that the complaint was drawn from [the expert's] opinions rather than the other way around"). *Accord* Kenall Mfg. Co. v. Genlyte Thomas Grp. LLC, 413 F. Supp. 2d 937, 943 (N.D. Ill. 2006) (citing *Manning*, 1999 WL 342715, at *1, *2, *3, *4); Solaia Tech. LLC v. ArvinMeritor, Inc., 361 F. Supp. 2d 797, 805 (N.D. Ill. 2005) (citing *id.* at *1, *2, *3, *4); *see also* McDonald v. City of Memphis, No. 2:12-cv-2511-SHL-dkv, 2016 WL 8201168, at *11 (W.D. Tenn. Aug. 26, 2016) (finding "without merit" defendant's argument of impropriety based on its claim "that significant portions of [the expert's] report are either verbatim or incredibly similar" to another expert's report in the case).

89. *See, e.g.*, United States *ex rel.* Barron v. Deloitte & Touche, LLP, No. SA-99-CA-1093-FB, 2008 WL 7136868, at *5, *11 (W.D. Tex. Sept. 26, 2008) (excluding expert's testimony where lawyer assisting the expert acted as co-author in the report's creation). *But cf.* Gruber *ex rel.* Gruber v. Sec'y of Health & Human Servs., 91 Fed. Cl. 773, 792 (2010) (noting that "it is generally accepted that an attorney may assist a medical expert by . . . conducting research for the expert, or even by drafting portions of [the expert's] report" in complex litigation).

90. *See, e.g.*, *Rodgers*, 2017 WL 979100, at *7 (applying a totality of the circumstances test); *see also* Reber v. Lab. Corp. of Am., No. 2:14-CV-2694, 2017 WL 3888351, at *4, *6, *7 (S.D. Ohio Sept. 6, 2017) (predicating exclusion on a variety of factors); Patent Category Corp. v. Target

involvement make it easier for the court to conclude that the report should be stricken, and the expert precluded from testifying.

2. Cases in Which Lawyer Assistance Is on the Line but Permissible

Another class of cases worth considering are those that find the lawyer's conduct close to the line, but insufficiently improper to warrant striking the expert report and excluding the expert's testimony.[91] Most courts, while not endorsing the conduct, allow the testimony but note that the conduct does compromise the expert's credibility which the trier of fact may take into account in evaluating the weight to be given to the expert's opinion.[92] In short, there remains a constraint on lawyer assistance, but one less severe than a total rejection of the expert and the report. Lawyers assisting experts at the line of permissibility will have to assess whether the benefits of their substantial assistance outweigh the risk to credibility such assistance may create.[93]

The cases themselves share similarities with those where the lawyer's assistance was found impermissible. For example, in one case, counsel drafted an outline of the report before engaging with the expert.[94] In others, the expert's report bore a striking resemblance to the

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Corp., CV 06-7311 CAS (CWx), 2008 WL 11336468, at *5 (C.D. Cal. July 17, 2008) (predicating exclusion on a variety of factors); *In re Jackson*, 2000 WL 33654070, at *1 (predicating exclusion on a variety of factors).

91. *See, e.g.*, Accentra Inc. v. Staples, Inc., No. CV 07-5862 ABC (RZx), 2010 WL 11459205, at *5 (C.D. Cal. Oct. 7, 2010) (describing the facts before it as presenting "a close call"); *McClellan*, 710 F. Supp. 2d at 1127 (finding conduct "approaches the outer limits of acceptable assistance"); Howard v. Abdellatif, No. 2:05-cv-81, 2008 WL 5130109, at *1 (W.D. Mich. July 17, 2008) (finding lawyer input "may approach the limits" of what is acceptable); Lehman Bros. Holdings v. Laureate Realty Servs., Inc., No. 1:04-cv-1432-RLY-TAB, 2007 WL 2265199, at *3 (S.D. Ind. Aug. 6, 2007) (finding that the lawyer's conduct "straddles the line between attorney assistance and unauthorized attorney preparation of the report"); Crowley v. Chait, 322 F. Supp. 2d 530, 544-45 (D.N.J. 2004) (noting that lawyer's involvement "may approach the limits" of what is allowable).

92. *See, e.g.*, *McClellan*, 710 F. Supp. 2d at 1127 (finding that the lawyer's role in drafting the expert's report "approaches the outer limits of acceptable assistance" but did not warrant exclusion of the expert's testimony, though "it may undermine its weight and credibility"); Mack v. AmerisourceBergen Drug Corp., 671 F. Supp. 2d 706, 712 (D. Md. 2009) (recognizing that "expert testimony that has been influenced by a hiring attorney is often afforded less deference by a fact-finder"); *Howard*, 2008 WL 5130109, at *1 (commenting that although exclusion was not justified, the degree of lawyer assistance, which approached the limits of what is allowed, "may be fertile ground for cross-examination").

93. *See generally* Mannix, *supra* note 1 (noting that "[e]ven innocent and non-leading involvement can be spun by an effective adversary as coaching of the witness, which is likely to repulse the jury" and that "[a]t a minimum, the attorney will be placed in the unenviable position of trying to convince the jury that the expert's opinions were not improperly influenced").

94. *Accentra*, 2010 WL 11459205, at *5 (finding that although counsel prepared an outline for the report before the first meeting with the expert, the expert "was involved enough" subsequently to have "prepared" the document, even though the degree of input rendered the case a

reports of other experts.[95] What distinguishes these cases from those in the previous section is that in each there was evidence that the experts involved did in fact play a substantial role in the creation of the reports.[96] In calling these "close" cases, the courts implicitly were questioning the nature and extent of the lawyer's involvement, but ultimately felt the true focus should be on the expert's conduct. The ultimate question is whether the *expert* "prepared" the report within the meaning of Rule 26(a)(2). The degree of lawyer involvement is only relevant to the extent it undercuts the argument that the expert was sufficiently involved so as to be seen as preparing the report.[97] In these cases the experts' substantial input was shown.[98]

III. EXCLUSION AND CREDIBILITY DIMINUTION TO CONTROL LAWYER ASSISTANCE IN THE CREATION OF EXPERT REPORTS

Two remedies are usually raised to control excessive lawyer involvement in the preparation of expert reports. Where the assistance is extreme, the report and testimony by the expert may be excluded. Even if the lawyer's contribution to the expert witness report is not so extensive as to warrant its exclusion, the lawyer's participation still may undercut the credibility the trier of fact will give to the expert's opinion. In numerous instances, courts have found this a sufficient backstop to lawyer overreaching such that substantial lawyer involvement will be allowed.

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close one).

95. *See, e.g.*, *McClellan*, 710 F. Supp. 2d at 1118, 1127 (allowing in report, despite the fact that report of two experts were similar if not identical, where expert "conducted his study and formulated his opinion prior to his retention as an expert," reviewed and edited the draft, and at deposition "adopted the substance of his report and explained the basis for his opinion"); *Howard* 2008 WL 5130109, at *1 (finding that although counsel drafted reports for two experts that were "virtually identical," exclusion of the report was not required since the expert "reviewed substantial documentation provided to him before formulating his opinion, discussed his opinion 'numerous times' with defense counsel before signing an expert report, and reviewed the final expert report 'from beginning to end' before signing the report"); *Lehman*, 2007 WL 2265199, at *3 (denying exclusion, despite the fact that lawyer provided witness with a template based on the report of another expert tailored to suit the instant case, where expert was unaware of the origin of the template, had previously reviewed relevant documents and shared his opinions prior to receiving the template, and subsequently made modifications to the template and embraced the opinions as his own).

96. *See Accentra*, 2010 WL 11459205, at *5; *McClellan*, 710 F. Supp. 2d at 1127; *Howard*, 2008 WL 5130109, at *1; *Lehman*, 2007 WL 2265199, at *2, *3.

97. *See supra* note 71

98. It is unclear the extent to which these courts are simply evaluating similar conduct differently, finding it not quite as improper as exclusion courts, or whether the facts involved are slightly less egregious than those in cases where exclusion is imposed. *See supra* note 91 (discussing lawyer involvement in the preparation of expert reports at the edge of propriety).

A. Exclusion of Report and Testimony

In this area, the usual argument is that the lawyer's assistance was so extensive that the expert did not "prepare" the report, as the Federal Rules require, and therefore it should be excluded. Two different vehicles are used to justify exclusion. One is from the Federal Rules of Civil Procedure themselves. The other is from the Federal Rules of Evidence. At times the courts employ both devices.[99]

Under Federal Rule of Civil Procedure 37(c)(1),

> [i]f 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.

Where attorney assistance is too broad under the prevailing standard, the expert is seen as not having "prepared" the expert witness report as Rule 26(a)(2)(B) mandates and, hence, has not provided the information that rule requires. While justification or the harmlessness of the conduct will undercut the exclusion remedy, this often cannot be shown.

Federal Rule of Evidence 702 provides another vehicle for exclusion. Under that provision, expert testimony is allowed only if it is reliable.[100] An expert report that merely parrots the lawyer's input is not the sort of expert testimony we would deem reliable as it is not the work of a qualified expert.[101] As one party argued, "if the opinions in the expert reports are not actually the opinions of the experts, then the report fails to satisfy the requirements of Fed. R. Evid. 702 because the report

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99. The cases in this area do not address the real-world differences, if any, that stem from the approach taken.

100. *See, e.g.*, Cantrell v. BNSF Ry. Co., No. CIV 12-0129 KBM/SMV, 2013 WL 8632378, at *2, *3-7 (D.N.M. June 28, 2013) (noting that Rule 702 requires a two-step analysis—that the expert is qualified and that the opinion rendered is reliable and helpful); *see also* Inventio AG v. Thyssenkrupp Elevator Americas Corp., No. 08-874-RGA, 2014 WL 174301, at *1 (D. Del. Jan. 14, 2014) (applying a 702 analysis to analyze the propriety of lawyer assistance in preparing an expert report).

101. *See, e.g.*, *Cantrell*, 2013 WL 8632378, at *2-7; EEOC v. Rockwell Int'l Corp., 60 F. Supp. 2d 791, 794-97 (N.D. Ill. 1999) (excluding expert's report under *Daubert* where, among other things, the expert overly relied on assistance of counsel); Joel S. Feldman, et al., *Expert Witnesses in Insurance Class Actions and Individual Cases Defense Perspective*, SF50 A.L.I.-ABA 278-79, 280-85 (2000) ("Thus, if counsel drafts an expert's report without substantial input from the expert, the opinions in that report cannot be considered reliable because they are not the opinions of the expert. Likewise, if an expert writes a report simply to appease counsel or the party paying the expert, that too is not a reliable underpinning for his opinions, and the likely result would be exclusion of the report.").

must be based on the expert's own valid reasoning and methodology to be admissible."[102]

B. *Credibility Diminution*

Often, however, courts, while questioning the extent of lawyer involvement, find exclusion too harsh a remedy.[103] Although the report is allowed in discovery, and the expert is allowed to testify in a subsequent trial,[104] the credibility of the report and testimony may be affected by the lawyer's role. This can occur at two levels. At the most basic, the expert must ultimately defend his testimony. If the expert is little more than a conduit for the lawyer's views, the expert may be unable to defend her report effectively. That, in turn, will diminish its impact. In addition, proof of excessive lawyer involvement may undercut the degree the trier of fact will credit the testimony. It will be clear it is less a product of applied expertise of a well-qualified expert and more the advocacy of a lawyer who lacks the substantive expertise that supports giving weight to such testimony. As one court described it: "[A]n expert who can be shown to have adopted the attorney's opinion as his own stands less tall before the jury than an expert who has engaged in painstaking inquiry and analysis before arriving at an opinion."[105]

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102. Transcon. Gas Pipeline Corp. v. Societe d'Exploitation Section du Solitaire, S.A., No. 05-1295, 2007 WL 2712936, at *3 (E.D. La. Sept. 13, 2007).

103. *See, e.g.*, Harmon v. United States, No. PX 15-2611, 2017 WL 4098742, at *9 (D. Md. Sept. 15, 2017) (noting that "while it may be ill-advised for an attorney to take such an active role in drafting the Rule 26 report, the extreme sanction of exclusion is not warranted" where attorney drafted two virtually identical reports which the experts adopted without revision); Patent Category Corp. v. Target Corp., No. CV 06-7311 CAS (CWx), 2008 WL 11336468, at *3 (C.D. Cal. July 17, 2008) (noting that exclusion "is seldom appropriate," although finding it so on the facts before the court).

104. In one case, the court allowed the expert report to stand and the expert to testify despite finding that much of the testimony was outside the expert's expertise, was drafted primarily by counsel and amounted to "a legal brief or a patent law seminar [which is] neither normal nor proper." KNAPP Logistics & Automation, Inc. v. R/X Automation Sols., Inc., No. 14-cv-00319-RBJ, 2015 WL 5608124, at *1-2 (D. Colo. Sept. 24, 2015). Instead the court admonished counsel,

> I need not go through his 62-page report line by line and coach counsel as to what Dr. Derby can and cannot do, nor do I need to review his supplemental report. ECF No. 152-1. Counsel surely gets the drift and, since they hope to be effective advocates at trial, they will conform their questioning of Dr. Derby to the letter and spirit of this order. Otherwise, they are in for repeated interruptions of testimony, exclusions of testimony, and admonitions from the Court.

Id. at *2.

105. Occulto v. Adamar of N.J., Inc., 125 F.R.D. 611, 616 (D.N.J. 1989).

IV. PROOF OF THE DEGREE OF LAWYER ASSISTANCE IN THE CREATION OF EXPERT REPORTS

As we have seen, excessive lawyer assistance in the preparation of expert reports is cabined both by exclusion of the expert's testimony, at the extreme, and by the threat that lawyer conduct once exposed will undercut the credibility of the expert's testimony. But how does one create a record of lawyer involvement such that exclusion can be ordered or credibility undercut? The problem is exacerbated by burden of proof issues as the party seeking exclusion of the expert report bears the burden of showing excessive lawyer involvement,[106] yet the information necessary to show so is largely in the hands of the opponent.

A. The 2010 Amendments to the Expert Discovery Rules and Their Impact

When the expert report was added to the Rules in 1993,[107] this was a relatively easy task. The drafters contemplated that draft reports would be discoverable as would material shared by the lawyer with the expert.[108] Comparing drafts might show changes originating from the lawyer.[109] The lawyer's written suggestions would be known and oral

106. This is true if exclusion is sought under the Federal Rules of Civil Procedure. *See, e.g.*, Long-Term Capital Holdings, LP v. United States, No. 01-CV-1290(JBA), 2003 WL 21269586, at *4 (D. Conn. May 6, 2003); Trigon Ins. Co. v. United States, 204 F.R.D. 277, 295 (E.D. Va. 2001); *accord* Seitz v. Envirotech Sys. Worldwide Inc., No. H-02-4782, 2008 WL 656513, at *2 (S.D. Tex. Mar. 6, 2008) (citing *Long-Term Capital Holdings*, 2003 WL 21269586, at *4; *Trigon*, 204 F.R.D. at 295). However, if noncompliance is shown and the question becomes whether it will be excused under Federal Rule of Civil Procedure 37, the burden is on the party seeking to avoid exclusion. *See, e.g.*, Weekes v. Ohio Nat'l Life Assurance Corp., No. 1:10-cv-566-BLW, 2011 WL 6140967, at *5 (D. Idaho Dec. 9, 2011). In contrast, if exclusion is premised on Federal Rule of Evidence 702, the party proffering the expert has the burden of showing that the expert's testimony meets the *Daubert* test for admission. *See The* Daubert *Standard: A Guide to Motions, Hearings, and Rulings*, EXPERT INST. (Nov. 20, 2018), https://www.theexpertinstitute.com/the-daubert-standard-a-guide-to-motions-hearings-and-rulings (noting that "[o]nce a Daubert motion is filed, the party seeking to admit the testimony bears the burden of proof and must prove by a preponderance of the evidence that the expert possesses the requisite level of expertise and the testimony is based on reliable methodologies").

107. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

108. As the Advisory Committee noted when adopting the expert report requirement, "litigants should no longer be able to argue that materials furnished to their experts to be used in formulating their opinions—whether or not ultimately relied upon the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." *Id.*

109. This was a common approach prior to 2010 when such information was most often discoverable. *See, e.g.*, EEOC v. UPS, 149 F. Supp. 2d 1115, 1138-40 (N.D. Cal. 2000) (providing the expert's testimony diminished credibility in part because upon reviewing drafts of the expert's report it revealed substantial changes had been made, all at the suggestion of counsel), *aff'd in part, rev'd in part sub nom.* 306 F.3d 794 (9th Cir. 2002), *opinion amended on denial of reh'g*, 311 F.3d 1132 (9th Cir. 2002); W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., No. 98-CV-838S(F), 2000 WL

input could be explored. While the federal courts were not unanimous in reading the rule to require disclosure of all lawyer work-product shared with the testifying expert, that was clearly the majority view.[110]

Transparency was seen as the best method to both allow lawyer assistance and keep it within sensible bounds. Transparency would work as both a deterrent and a protection. Lawyers would cabin their involvement knowing it might well be discovered.[111] To the extent lawyers nevertheless exceed permissible bounds, discovery could uncover that behavior, subjecting the lawyer to reputational consequences and the expert's testimony to exclusion or credibility impairment.

By 2010, the drafters noted a growing concern by the Bar that transparency had its own costs, costs that outweighed its alleged advantages.[112] The argument against the transparency regime was several-fold. First, was an argument that there was no quantifiable evidence that transparency achieved its desired result.[113] That, however,

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1843258, at *5 (W.D.N.Y. Nov. 2, 2000) (noting from seeing lawyer input on drafts that while some changes were matters of form others were substantive thus "rais[ing] an issue of the extent to which [the expert] final report represents [the expert's] own product or that of Defendant's attorneys"); Marek v. Moore, 171 F.R.D. 298, 302 (D. Kan. 1997).

110. *See* FED. R. CIV. P. 26 advisory committee's note to 2010 amendment (indicating that "many" courts held this view); Tanis et al., *supra* note 18 (noting that "[u]nder the 1993 version of Rule 26(a)(2)(B), most courts held that everything disclosed to and considered by an expert witness was discoverable," (citing *inter alia* Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 717 (6th Cir. 2006) (finding that "the overwhelming majority of courts" had adopted a "a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts"))).

111. Easton Letter, *supra* note 61, at 13 (stressing the deterrent effect of transparency); Letter from 37 Law Professors, *supra* note 21, at 2 (stressing the deterrent effect of transparency).

112. *See, e.g.*, COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 10-11 (2009). Numerous organizations, collectively representing a wide-range of those involved in the civil litigation process, supported the amendments. Among them were the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice, the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense and Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice. *Id.* Expert witness groups, such as the American Institute of Certified Public Accountants, also weighed-in in favor of the proposal. *See, e.g.*, Letter from Patrice Schiano, Chair, Am. Inst. of Certified Pub. Accountants's ("AICPA") Forensic & Litig. Serv. Comm., and Thomas E. Hilton, Chair, AICPA's Forensic & Valuation Serv. Exec. Comm., to Peter G. McCabe, Sec'y for the Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 2 (Feb. 17, 2009). A notable exception was the input of law professors, many of whom had trial and expert witness experience, who opposed the amendments. *See, e.g.*, Easton Letter, *supra* note 61, *passim*; Letter from 37 Law Professors, *supra* note 21.

113. A major impetus for the rule revision was a report and resolution from the ABA to limit the discovery of drafts and attorney-expert communications. In the report, the American Bar Association noted that there was "no evidence, empirical or otherwise" supporting open discovery of such communication as being superior to the more limited discovery approach. *See, e.g.*, AM. BAR. ASS'N, SECTION OF LITIGATION, DISCOVERABILITY OF EXPERT REPORTS 7 (2006),

was a bit of a makeweight as there also was no empirical evidence that it did not.[114] Second, there was an ad hominem attack that the transparency approach was the product of academic theoreticians not grounded in the real world of practice.[115] More powerful was the critique of what was actually happening on the ground—lawyers and experts adapted to the transparency regime in several ways. It became common for the parties to agree not to inquire about draft reports or lawyer involvement in the creation of the expert report.[116] Where this was unavailable, experts ceased creating written drafts of their reports and elaborate processes were put in place to avoid creating a paper trail of the lawyer's input.[117] The primary impetus for this behavior was to protect opinion work product from discovery.[118]

In addition, it was alleged that much of discovery turned not on the merits of the expert's report and the expert's ability to defend that report but rather on the process of preparation itself and the lawyer's role in it.[119] Those who objected to transparency found such inquiries a costly exercise that seldom bore fruit.[120] In short, transparency was thwarted when it could be, and when it could not, little was gained by shedding light on the lawyer-expert collaborative process.[121]

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https://www.americanbar.org/content/dam/aba/migrated/litigation/standards/docs/120a_report.authcheckdam.pdf. This recommendation led to an ABA resolution in support of such discovery limits. *See* AM. BAR ASS'N, RESOLUTION 120A, DISCOVERABILITY OF EXPERT REPORTS (2006), https://www.americanbar.org/content/dam/aba/migrated/litigation/standards/docs/120a_policy.pdf.

114. *See generally* AM. BAR ASS'N, *supra* note 113, at 7 (noting only that "there is no empirical evidence of which we are aware that disclosure of draft expert reports and attorney-expert communications has improved the quality of justice, or that without that disclosure, counsel or the trier of fact has been hindered in the ability to test the merits of an expert's opinion.").

115. *See, e.g.*, COMM. ON RULES OF PRACTICE & PROCEDURE, *supra* note 112, at 13 (noting opposition to the amendments by academics, but finding their concerns "not borne out by the practitioners' experience"); CIVIL RULES ADVISORY COMM., DRAFT MINUTES 18 (Sept. 7-8, 2006), https://www.uscourts.gov/sites/default/files/fr_import/CV09-2006-min.pdf (summarizing testimony of ABA representative that those who favored open disclosure "tend to be judges and professors not involved in daily expert-witness practice," deriding their views as mere "theory").

116. *See, e.g.*, COMM. ON RULES OF PRACTICE & PROCEDURE, *supra* note 112, at 12 (acknowledging that under the 1993 discovery regime "[m]any experienced lawyers routinely stipulate[d]" to such limitations).

117. *See, e.g.*, *id.* at 10-11; *see also* David Herr & Steve Baicker-McKee, *Expert Disclosures-Review of the Expert's File-Role of Counsel in the Drafting Process*, FED. LITIGATOR, June 2013, at 15 (describing several of the common steps taken to avoid creating a paper trail of lawyer-expert interaction).

118. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, *supra* note 112, at 10, 11.

119. *See id.* at 11-12.

120. *See id.* at 10-13 (arguing that exploration into the lawyer's role in preparing the expert report was "rarely successful" and "was time-consuming and expensive").

121. A related concern was that lawyers were forced to hire two sets of experts, one set being non-testifying experts with whom conversation was largely immune from discovery and testifying experts subject to the open-discovery regime. *See, e.g.*, FED. R. CIV. P. 26 advisory committee's note to 2010 amendment. With greater protection from discovery, one expert could be used for both

In response, the drafters added restrictions on discovery in this area.[122] First, the rule extends work product protection to all lawyer communications with testifying experts except those that relate to expert witness compensation, "facts or data"[123] considered,[124] or "assumptions" relied upon by the expert.[125] If a communication contains both information falling within the three exceptions,[126] and some that does

testifying and consultative purposes.

122. For a discussion of some of the case law interpreting these restrictions, see 3 BUS. & COM. LITIG. FED. CTS. § 29:10 (4th ed. 2018).

123. FED. R. CIV. P. 26(a)(2)(B)(ii). The Advisory Committee Note states that the phrase "facts or data" should be "interpreted broadly" to include any material "that contains factual ingredients." FED. R. CIV. P. 26 advisory committee's note to 2010 amendment. To the extent facts and data are provided by an attorney, disclosure in discovery is required "only [as] to communications 'identifying' the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected." *Id.* The drafters also made clear that the phrase "facts or data" is narrower than the previously used phrase "data or other information" and does not encompass theories or mental impressions of counsel. *Id.; see also* Carpenter v. Deming Surgical Assocs., Civ. No. 14-64 JCH/SCY, 2015 WL 13662880, at *3 (D.N.M. Apr. 20, 2015) (noting that "mere stylistic edits are not discoverable communications pursuant to the facts, data, or assumptions exceptions, as [the expert] did not consider or rely on them in forming his opinion"). Whether this distinction between "facts and data" and other information can be clearly ascertained is open to debate. *See, e.g.*, William H. Gussman Jr., *Amended Expert Discovery Rules One Year Later: Has Anything Changed?*, N.Y.L.J., Jan 18, 2012, at 4, 4-5 (arguing that "[a]lmost any communication between an attorney and an expert could arguably contain a 'fact' or an 'assumption'" and recommending that lawyers "continue to be cautious in working with testifying experts, mindful that just about anything shared with a testifying expert may still be fair game in discovery"). To lessen this concern, it has been suggested as a best practice that lawyers seek to separate communications of fact and data from those containing mental impressions and theories in order to minimize any confusion. Robert J. Liubicic, *Expert Q&A on the Rule 26 Amendments: Developing Case Law*, PRAC. L.J. LITIG., Feb.-Mar. 2014, at 23.

124. As one court held with regard to material sent to testifying experts, the term "considered" should be interpreted broadly to require "disclosure of all information a testifying expert generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected." *In re* Benicar (Olmesartan) Prods. Liab. Litig., 319 F.R.D. 139, 141 (D.N.J. 2017) (quoting Synthes Spine Co. v. Walden, 232 F.R.D. 460, 463 (E.D. Pa. 2005)); *accord* Millsaps Coll. v. Lexington Ins. Co., No. 3:16CV193-CWR-LRA, 2017 WL 3158879, at *3 (S.D. Miss. July 24, 2017) (quoting *In re Benicar*, 319 F.R.D. at 141). This is true even if the expert testifies that she did not "consider" the information. *E.g.*, *In re* Commercial Money Ctr., Inc., Equip. Lease Litig., 248 F.R.D. 532, 537 (N.D. Ohio 2008) (noting that "experts have been deemed to have considered materials even when they have testified, under oath, that they did not consider the materials in forming their opinions"); *accord* Wellin v. Farace, No. 2:16-cv-00414-DCN, 2018 WL 7247056, at *6 (D.S.C. Dec. 5, 2018), *report and recommendation adopted sub nom.* No. 2:16-cv-0414 DCN, 2019 WL 466461 (D.S.C. Feb. 6, 2019).

125. FED. R. CIV. P. 26(b)(4)(C)(ii). The phrased "relied upon" is narrower than the term "considered." It "means that the expert's opinion depended upon the assumptions provided by the attorney." Johnson v. City of Rockford, No. 15 CV 50064, 15 CV 50065, 2018 WL 1508482, at *2 (N.D. Ill. Mar. 27, 2018).

126. To the extent a lawyer's communication to the expert falls into one of the three exceptions to work-product protection, must the communication itself be produced in response to an appropriate discovery request? Federal Rule 26 eliminates work-product protection for "communications" containing certain kinds of information which suggests that the communications

not, the protected information will be redacted and the remainder disclosed.[127] Second, the Rule provides work product protection for drafts of expert witness reports,[128] unless a draft is used by the lawyer to convey facts or data to be considered or assumptions ultimately relied upon by the expert.[129]

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themselves can be discovered. *See, e.g.*, Windowizards, Inc. v. Charter Oak Fire Ins. Co., No. 13-7444, 2015 WL 1402352, at *1 (E.D. Pa. Mar. 26, 2015) (requiring disclosure of the documents through which facts and data were communicated by the lawyer to the expert); United States v. Veolia Env't N. Am. Operations, Inc., No. 13-mc-03-LPS, 2014 WL 5511398, at *5, *6, *7 (D. Del. Oct. 31, 2014), *amended by* No. 13-mc-03-LPS, 2014 WL 6449973 (D. Del. Nov. 17, 2014) (requiring disclosure of the documents through which facts and data were communicated by the lawyer to the expert); Fialkowski v. Perry, No. 11-5139, 2012 WL 2527020, at *1, *5 (E.D. Pa. June 29, 2012) (requiring disclosure of the documents through which facts and data were communicated by the lawyer to the expert). Simply identifying the underlying information is insufficient. *But cf.* Davita Healthcare Partners, Inc. v. United States, 128 Fed. Cl. 584, 591 (2016) (implying that the provision in the expert report of the list of facts and data considered is sufficient to "probe and test" the expert's opinion and that further discovery would therefore not be necessary); Kurt A. Philipps, Jr. et al., 6 KY. PRAC. R. CIV. PROC. ANN., Rule 26.02 (West 2019) (arguing that only the facts considered or the assumptions relied upon need to be disclosed rather than the documents themselves).

127. *See, e.g.*, Mitchell v. Mgmt. & Training Corp., No. 3:16 CV 224, 2018 WL 4957290, at *6 (N.D. Ohio Mar. 9, 2018); Dongguk Univ. v. Yale Univ., No. 3:08-CV-00441 (TLM), 2011 WL 1935865, at *2 (D. Conn. May 19, 2011); FED. R. CIV. P. 26 advisory committee's note to 2010 amendments (noting that if a communication contains both protected and unprotected material "the protection applies to all other aspects of the communication beyond the excepted topics"); *see also In re* W. States Wholesale Nat. Gas Antitrust Litig., No. 2:03-cv-01431-RCJ-PAL, 2017 WL 2991347, at *7, *8, *10 (D. Nev. July 12, 2017) (holding that evidence notebooks prepared by counsel and relied upon by the expert do not have to be disclosed where underlying documents it contained had been disclosed and that producing notebooks which showed counsel's excerpting, organizing, and commenting on those documents would reveal lawyer mental impressions); 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2016.5 (3d ed. 2010) (stating "where the documents reviewed by the witness have already been produced, there is no justification for requiring revelation by counsel of the exact identity or sequence of materials actually reviewed").

128. FED. R. CIV. P. 26(b)(4)(B). A distinction has arisen, however, between expert notes, which are discoverable, and draft expert reports which are not. For a thoughtful decision providing guidance on how to draw this distinction, see Wenk v. O'Reilly, No. 2:12-cv-474, 2014 WL 1121920, *passim* (S.D. Ohio Mar. 20, 2014); *see also In re* Application of Republic of Ecuador, 280 F.R.D. 506, 512, 513 (N.D. Cal. 2012) (distinguishing notes, task lists, outlines, memoranda, presentations, and draft letters from draft reports); *In re* Asbestos Prods. Liab. Litig. (No. VI), No. MDL 875, 2011 WL 6181334, at *6-7 (E.D. Pa. Dec. 13, 2011) (finding that expert's notes do not constitute drafts within the meaning of the rule). While the rule explicitly protects drafts of expert reports, it is not limited to reports written by experts. If the lawyer provides a draft of the report as part of the process, it also is protected unless it conveys material subject to discovery under Rule 26(b)(4)(C). *See, e.g.*, United States *ex rel.* Wall v. Vista Hospice Care, 319 F.R.D. 498, 510-11 (N.D. Tex. 2016).

129. *See, e.g.*, *United States* ex rel. *Wall*, 319 F.R.D. at 509 ("Accordingly, reading Rule 26(b)(4) to require disclosure of those portions of a draft expert report transmitted between an attorney and an expert that identify facts, data, or assumptions provided by an attorney—even though the vehicle of communication between the attorney and the expert was a draft of a report or an attorney's revision to the expert's draft—does not undermine the purpose behind providing work-production protection to draft reports or render Rule 26(b)(4)(B)'s extension of work-product

By limiting the information available to an adversary, it makes it harder for the adversary to prove the level of lawyer assistance in order to determine its propriety or the impact it should be accorded by the trier of fact.[130] As one author described it, if one cannot discover draft reports and most lawyer-expert communications, "what will stop attorneys from ghost-writing reports in violation of the rule?"[131] Another author cautioned:

> Recent rule changes even preclude discovery of interactions between lawyers and hired gun experts. This rule change permits attorneys to secretly coach highly paid witnesses and coordinate a tailored opinion with little or no fear that opposing attorneys or the jury will ever learn of the attorney's suggestions or rewrites.[132]

To understand this new world of expert discovery and the degree discovery is limited, one needs to explore the motivations for the restrictions imposed.[133] One concern was that inquiries into the role

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protection to drafts a nullity. The discovery authorized by the Rule 26(b)(4)(C)(ii)-(iii) exceptions does not extend beyond the specific topics listed in the exceptions. The remainder of any draft report would be covered as work-product under Rule 26(b)(4)(B) and, for that matter, insofar as it is transmitted between the attorney and the expert, Rule 26(b)(4)(C)."); Commodity Futures Trading Comm'n v. Newell, 301 F.R.D. 348, 353 (N.D. Ill. 2014) ("Arguably, facts, data or assumptions provided by an attorney to the expert should not be insulated from production simply because the vehicle of communication was a draft of the report or an attorney's revision to the expert's draft."); *Mitchell*, 2018 WL 4957290, at *5 ("although draft reports are typically entitled to protection, to the extent those drafts were how Plaintiff's attorneys communicated the 'facts or data' or 'assumptions' on which [the expert] relied, such drafts would be discoverable."); Bingham v. Baycare Health Sys., No. 8:14-cv-73-T-23JSS, 2016 WL 5106946, at *3 (M.D. Fla. Sept. 20, 2016); *In re Asbestos Prods. Liab. Litig.*, 2011 WL 6181334, at *7 n.10 (endorsing the view that protecting facts or data considered by a retained expert by providing some in a draft report would be disfavored as an "obvious loophole").

130. *See, e.g.*, *Newell*, 301 F.R.D. at 352 ("The CFTC's approach would require an analysis of the degree of counsel involvement (both quantity and quality) in the drafting of the report . . . . [which] would necessarily require production of all of the drafts of the report for comparison, as well as production of all, or virtually all, communications between expert and counsel. The drafters intended Rule 26(b)(4)(B) and (C) to protect against that discovery."); Goodness Films, LLC v. TV One, LLC, No. CV 12-08688-GW (JEMx), 2013 WL 12136374, at *2 (C.D. Cal. Aug. 13, 2013) (rejecting, as inconsistent with the purpose of the 2010 amendments, a party request for production of an expert's draft report in order to determine the extent of lawyer involvement).

131. Stuart, *supra* note 1.

132. Mark I. Bernstein, *Jury Evaluation of Expert Testimony Under the Federal Rules*, 7 DREXEL L. REV. 239, 273 (2015); *cf.* Easton, *supra* note 1, at 474 n.23 (noting the importance of production of drafts and other lawyer input to effectively allow the jury to weigh the expert's credibility against that of other testifying experts); Stephen D. Easton & Franklin D. Romines II, *Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports*, 22 REV. LITIG. 355, 359 (2003).

133. As discussed in the text, there were two principal motivations behind the 2010 amendments. One might sensibly construe the amended rules in a way that achieves both goals. Nevertheless, the cases appear to choose between the two with that choice affecting the interpretation given to the amended provisions. *See infra* text accompanying notes 134-37.

counsel played in the creation of expert reports was too costly and often provided little of true value in return.[134] If that is the primary motivation, then discovery of the role played by the lawyer should be highly limited.[135]

Another motivation was a desire to allow lawyers to speak freely to experts without fear that their mental impressions, theories of the case, etc. would be revealed.[136] If this concern is the key, then discovery that does not reveal this information or otherwise inhibit such discussions might be permissible. As one court wrote: "The bright-line rule [everything shown to the expert is discoverable] is no longer valid; attorneys' 'theories or mental impressions' *are* protected, but everything else is fair game."[137]

B. Disagreement over the Means by Which Lawyer Assistance May Be Discovered[138]

Take, for example, questions about the role the lawyer played in preparation of the expert's report. If our goal is streamlining the discovery process in this area, such questions would be impermissible. If our goal is protecting lawyer mental impressions from discovery, providing gross information about the lawyer's role (e.g., the lawyer wrote the first draft after input from the expert) would be permissible. Questions about who wrote a particular paragraph might be more problematic as it shows the lawyer's thinking. Then again, actual input

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134. *See supra* text accompanying notes 119-21.

135. *See, e.g.*, *In re* Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig., No. 1:14-ml-2570-RLY-TAB, 2018 WL 6113466, at *4 (S.D. Ind. Nov. 21, 2018) (noting that "[r]equiring a party to produce more [than the information made discoverable under 26(b)(4)(C)] would directly contravene the purpose of the 2010 amendments to Rule 26 . . . ."); *Commodity Futures Trading Comm'n*, 301 F.R.D. at 352 (finding that allowing discovery of attorney input beyond facts and data relied upon would contravene the intent of the 2010 amendments).

136. *See, e.g.*, Republic of Ecuador v. Mackay, 742 F.3d 860, 870 (9th Cir. 2014) (noting that "the driving purpose of the 2010 amendments was to protect opinion work product—i.e., attorney mental impressions, conclusions, opinions, or legal theories—from discovery").

137. Yeda Research & Dev. Co. v. Abbott GMBH & Co. KG, 292 F.R.D. 97, 105 (D.D.C. 2013); *accord* Johnson v. City of Rockford, No. 15 CV 50064, 2018 WL 1508482, at *2 (N.D. Ill. Mar. 27, 2018) (citing *Yeda*, 292 F.R.D. at 105).

138. The history of the adoption of the 2010 amendments provides no clear answer to this issue. Judge Mark. R. Kravitz, Chair of the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure, argued strongly that no inquiry into the lawyer's role in assisting in the preparation of the expert's report would be allowed under the proposed 2010 amendments. He appeared to embrace the extreme position (at least in the case law) that it makes no difference who drafts the report. If the expert adopts it as her own, that is sufficient; the role of the lawyer in its preparation is irrelevant. Others disagreed on a variety of grounds. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, STANDING COMM. MINUTES, June 2008, at 34-39 (2008), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-june-2008.

as to the report itself often falls within the discoverable categories of information or data the expert considered or assumptions the expert relied upon. Once the material is in the report it is clear the expert considered it and in fact relied upon it.[139] Even if the choice to add the material reflects the lawyer's legal theories and opinions, they cease to be such when adopted by the expert. This is just like contention interrogatories. While the decision as to what contentions to allege is a lawyerly judgment, knowing which contentions the party has chosen to assert is discoverable.[140]

Given these differences, it is not surprising that the case law is mixed on some fundamental issues.[141] For example, is it permissible to ask the expert what role the lawyer played in the final report or which paragraphs the lawyer drafted?

Some courts find that it is.[142] For example, in *Johnson v. City of Rockford*, the parties fought over whether it was proper to inquire about who drafted which portions of the expert's report.[143] When raised at the expert's deposition, the opposing party instructed the expert not to answer, claiming such information was work product and therefore protected by Rule 26(b)(4)(C).[144] The court, however, held that that information was discoverable.[145] The court pointed out that, by raising the defense, the party was implicitly admitting that the lawyer drafted portions of the expert's report since the defense raised only protects attorney/expert communications from disclosure, not communications

139. *See, e.g.*, *Johnson*, 2018 WL 1508482, at *5 (articulating this analysis); Gerke v. Travelers Cas. Ins. Co., 289 F.R.D. 316, 328-29 (D. Or. 2013) (arguing that if the expert report contains analysis provided by the lawyer, it is information considered in forming the opinion—a communication expressly exempted from work-product protection).

140. *See generally* FED. R. CIV. P. 33(a)(2) advisory committee's note to 1993 amendment.

141. Perhaps because of this, one commentator cautions that even with the 2010 limitations on expert discovery, while "[l]awyers can take comfort in the protections offered by the rule, . . . they must still not become complacent." John M. Barkett, *Draft Expert Reports and Work Product*, NAT. RES. & ENV'T, Fall 2015, at 52, 53.

142. *See, e.g.*, *Gerke*, 289 F.R.D. at 324, 328; Cantrell v. BNSF Ry. Co., No. CIV 12-0129 KBM/SMV, 2013 WL 8632378, at *6-7 (D.N.M. June 28, 2013); Lehman Bros. Holdings v. Laureate Realty Servs., Inc., No. 1:04-cv-1432-RLY-TAB, 2007 WL 2265199, at *2 (S.D. Ind. Aug. 6, 2007); *cf.* GERGACZ, *supra* note 11, at § 7.55 (arguing that the amended rule limiting discovery should be narrowly construed to "accommodate the needs of justice" which are promoted by allowing discovery of the expert's role except as explicitly limited by the Rule 26(b)(4)(B) and (C)).

143. *Johnson*, 2018 WL 1508482, at *3-5; *see also* Carpenter v. Deming Surgical Assocs., Civ. No. 14-64 JCH/SCY, 2015 WL 13662880, at *5 (D.N.M. Apr. 20, 2015) (allowing counsel to "cross-examine experts about Plaintiff's counsel's involvement in the preparation of their reports"); *Gerke*, 289 F.R.D. at 324, 329 (allowing lawyer to question expert about who assisted in preparation of the report, including counsel and who authored particular paragraphs of the report).

144. *Johnson*, 2018 WL 1508482, at *2-3.

145. *Id.* at *6-7.

from others.[146] The court then asked the expert to identify, for in-camera inspection, which portions of the report were written by the attorney.[147] That, in turn, allowed the court to analyze which portions of the report contained facts considered and assumptions relied upon, information unprotected by the work-product doctrine.[148] In a colorful conclusion, the court explained why such inquiry should be allowed:

> The Defendants should be allowed to cross-examine the Plaintiffs' expert with the fact that somebody else typed portions of his report. Perhaps the Plaintiffs have a good reason why somebody else typed portions of Mr. Libby's report. Maybe Mr. Libby's hand was bitten by a dog, smashed in a car door or had a piano keyboard cover slammed onto it. If so, then Plaintiffs' counsel will be able to elicit that fact on redirect examination. Maybe the reason for having somebody else type portions of Mr. Libby's report is not as good. For example, maybe Mr. Libby failed to comprehend the Plaintiffs' counsels' belief of the import of certain facts, data, and assumptions, and, consequently, counsel decided to include those into the report, lest Mr. Libby not be able to testify to them. Fed. R. Civ. P. 37(c)(1). The charade regarding "preparation" of expert disclosures and reports contained in Rule 26 surely does not go so far as to allow counsel to write an expert's report—or portions of it—and then hide that fact from the jury. Cross examination will allow the jury to determine how much weight to give to Mr. Libby's opinions.[149]

Another argument in favor of disclosure is that the work-product protection only applies to attorney/expert "communications" and knowing that the attorney participated in the report's drafting does not reveal a communication.[150] Further, permitting counsel through deposition questions to identify the role opposing counsel played in the

146. *Id.* at *5 n.2.

147. *Id.* at *3.

148. One could argue that any material in a report written by the lawyer and adopted by the expert is material relied upon and therefore unprotected by the work-product doctrine. As the court commented: "Counsel cannot argue that [the expert] did not consider the facts or data or rely upon the assumptions when this information is contained in the final report." *Id.* at *5. On the other hand, if the underlying facts and data and assumptions have already been disclosed, the further information of how the lawyer reformulated that into testimony may still warrant protection. As the 2010 Advisory Committee's note to Rule 26 provides, "[t]he exception applies only to communications 'identifying' the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected." FED. R. CIV. P. 26 advisory committee's note to 2010 amendment; *cf.* WRIGHT ET AL., *supra* note 127, at § 2016.5 (stating "where the documents reviewed by the witness have already been produced, there is no justification for requiring revelation by counsel of the exact identity or sequence of materials actually reviewed").

149. *Johnson*, 2018 WL 1508482, at *7.

150. Knowing that the lawyer participated in the drafting is one thing. Knowing precisely which sentences in the report are the lawyer's work, in contrast, certainly reveals a communication.

creation of the expert report allows a party to uncover the degree of lawyer involvement while keeping the lawyer-expert communications themselves protected from discovery.[151] Allowing such discovery seems essential if we are to adequately police the boundary between legitimate assistance of counsel and the impermissible usurpation of the expert's role.[152]

In contrast, other courts believe inquiry about the lawyer's role in the authorship of particular portions of a testifying expert's report is off limits.[153] They see this as just the sort of time-consuming and costly inquiry the 2010 amendments concerning discovery of testifying experts were adopted to avoid.[154] Arguably, as long as we know the facts and data considered and the assumptions relied upon, along with the expert's ability to defend the report, including inquiry about communications from non-lawyers, that should be sufficient for the trier of fact to

151. *See, e.g.*, Carpenter v. Deming Surgical Assocs., Civ. No. 14-64 JCH/SCY, 2015 WL 13662880, at *5 (D.N.M. Apr. 20, 2015) (finding that the availability of deposition examination about the lawyer's role obviates the need for the communications themselves).

152. *See* David Herr & Steve Baicker-McKee, *supra* note 117, at 21-22 (advocating that rule should be read "to allow opposing counsel to explore during the deposition who wrote which parts of the expert report . . . . [so that], at trial, counsel can argue to the jury either that opposing counsel drafted the expert report or that the expert cannot even identify which parts the expert drafted and which parts counsel drafted").

153. *See, e.g.*, *In re* Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig., No. 1:14-ml-2570-RLY-TAB, 2018 WL 6113466, at *4-5 (S.D. Ind. Nov. 21, 2018) (prohibiting inquiry into who typed which portions of the expert's report as beyond the limited discovery allowed under Rule 26(b)(4)(B)); John Wiley & Sons, Inc. v. Book Dog Books, LLC, No. 13cv816, 2015 WL 5022545, at *1 (S.D.N.Y. Aug. 17, 2015) (holding that question posed to expert, and objected to by counsel, as to whether counsel wrote report "runs afoul of the 2010 Amendments to Fed. R. Civ. P. 26(b)(4)(B) and (C)," but that inquiry about input by others is permissible); Medicines Co. v. Mylan Inc., No. 11-cv-1285, 2013 WL 2926944, at *3, *5 (N.D. Ill. June 13, 2013) (upholding counsel's objection at deposition to questions about the authorship of the expert's report); *see also* 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY § V, Rule 26 (2019) (arguing that allowing "discovery into the role that the lawyer played in the development of the expert's opinions. . . . would undermine the whole purpose of the amendment, which is to allow lawyers to freely and openly interact with their retained experts"); Easton Letter, *supra* note 61, at 6 (fearing that "[u]nder the amended Rule 26, some might consider it improper to ask the expert about the extent of [the lawyer's] influence"). One case goes even further by prohibiting questions asking as a general matter whether the expert relied upon assumptions provided by the attorney. Sarkees v. E. I. DuPont de Nemours & Co., No. 17-CV-651V, 2019 WL 1375088, at *6 (W.D.N.Y. Mar. 27, 2019). However, the exact import of the case is unclear in that it seems to allow such questions if they are directed to each specific opinion expressed rather than to the report as a whole. *Id.* And, it can be read to suggest that even the general question might be relevant if other evidence suggested that such reliance had taken place but was not otherwise disclosed. *Id.*

154. *See, e.g.*, *In re Cook*, 2018 WL 6113466, at *4-5 (finding the question of whether one might depose the expert as to who typed which portions of the final report a "closer question," but ultimately determining the inquiry improper since "the 2010 amendments to Rule 26 sought to end extensive and burdensome discovery into communications between counsel and testifying experts").

evaluate the testimony.[155] Implicit in this approach is acceptance of substantial lawyer participation in the expert report's creation, or at least a reluctance to police it.[156] This "Don't Ask; Don't Tell" approach can be seen as a sub rosa way to decide the permissible degree of lawyer involvement—i.e. anything goes. While there may be ramifications to unbridled lawyer involvement in the expert's report preparation, such as an expert being unable to support the report on examination, the degree of lawyer involvement itself would be irrelevant.

A third position, in between the first two, would condition the scope of discovery on the extent to which other information points to the possibility of substantial lawyer involvement in the preparation of an expert's report.[157] The degree of involvement that would have to be shown to open up discovery is unclear, but it must be more than mere speculation that the lawyer was excessively involved.[158] Nevertheless, indirect indicia could be used to suggest substantial lawyer involvement which may trigger further discovery.[159] For example, one may scrutinize the time records of the expert "as evidence of the amount of effort that

155. *See, e.g.*, FED. R. CIV. P. 26 advisory committee's note to 2010 amendment; *cf.* Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) (stating, in a case predating the current Federal Rule, that "[e]xamination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory").

156. *Cf. In re Cook*, 2018 WL 6113466, at *3-4 (disallowing inquiry into whether the lawyer prepared portions the report even in the face of substantial circumstantial evidence that the lawyer did so).

157. *See, e.g.*, Gerke v. Travelers Cas. Ins. Co. of Am., 289 F.R.D. 316, 328 (D. Or. 2013) (allowing expanded discovery of lawyer-expert communication "when the record reveals the lawyer may have commandeered the expert's function or used the expert as a conduit for his or her own theories"); *see also Sarkees*, 2019 WL 1375088, at *6-7 (denying further discovery when "[n]othing so far suggests that plaintiffs' counsel drafted or significantly edited any part of [expert's] reports," suggesting a different outcome if there were); *cf.* Largent, *supra* note 28, at 3 (noting that in Canada "[w]here there is a factual foundation supporting a reasonable suspicion that counsel improperly influenced an expert or their opinion, draft reports and details of communications with counsel will be producible"). *But see In re Cook*, 2018 WL 6113466, at *3-4 (finding that even though there was substantial circumstantial evidence to show that the lawyer played a heavy role in drafting the expert witness report, discovery is still limited to "the facts and data [the expert] considered and the assumptions [he] relied on, in accordance with Rule 26(b)(4)(C)(ii) and (iii)").

158. *See, e.g.*, Carpenter v. Deming Surgical Assocs., Civ. No. 14-64 JCH/SCY, 2015 WL 13662880, at *3 (D.N.M. Apr. 20, 2015) (finding "[s]peculation that Plaintiff's counsel may have influenced the experts' opinions . . . an insufficient basis to overcome the experts' sworn testimony that the edits simply involved missing billing information, formatting, misspellings, typographical errors, and organizational changes," reasoning that "[i]f expert-attorney communications were discoverable any time these communications led to the modification of an expert report, attorneys would be discouraged from providing experts with their mental impressions about the clarity, conciseness, and understandability of the expert reports. This is exactly the type of result the 2010 amendment was intended to avoid.").

159. Those opposing this approach would argue that the indicia suggesting lawyer involvement are sufficient on their own to undermine the credibility of the expert, so that additional inquiry into the lawyer's role is unnecessary.

he/she has devoted to the report."[160] Where it appears disproportionately low given the extent of the report provided, it supports an inference that someone else, probably the lawyer, had a substantial role in its preparation.[161] The same might be true if the expert is unable to explain certain language in the report or how he came to his opinion.[162]

The seminal case endorsing this approach is *Gerke v. Travelers Casualty Insurance Co.*[163] A number of courts, however, have strongly criticized *Gerke* as being a product of the court's pique at counsel's conduct of the case[164] and the court's reliance on case law superseded by the 2010 amendments to the expert discovery rules.[165] In declining to follow the decision, these courts have found it inconsistent with the policies underlying those amendments.[166]

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160. *District Court Sanctions Ghostwriting of Expert Reports*, AKIN GUMP (Dec. 23, 2014), https://www.akingump.com/images/content/3/4/v2/34585/District-Court-Sanctions-Ghostwriting-of-Expert-Reports.pdf; *see also* Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 942 (E.D. Mich. 2014).

161. *See, e.g. Gerke*, 289 F.R.D. at 328 (finding that limited time expert spent on reviewing the file and writing the report "create[s] a genuine question whether [the expert] came to these additional opinions and analyses so quickly because they were suggested or given to him by Plaintiff's counsel").

162. *See, e.g.*, United States *ex rel.* Wall v. Vista Hospice Care, 319 F.R.D. 498, 503 (N.D. Tex. 2016) (party relied on expert's inability to "articulate the methodology that she used" and her inability to remember what corporate documents she read or how she summarized them to argue that counsel must have been involved in the preparation of the expert report to a degree that supported further discovery); *see also* Stern et al., *supra* note 18, at 358 (arguing that under Pennsylvania rule limiting discovery, inquiry about whether an opinion expressed is that of counsel or the expert is likely to be allowed "if there are terms or phrases that appear in the expert's report which are more consistent with 'lawyer related' language, as opposed to words more commonly used by an expert in a given field"); *id.* at 362 (opining that a question as to whether counsel supplied certain language should be allowed if the opinion expressed is "completely outside the expert's area of expertise"). Of course, if this information alone undercuts the credibility of the expert's report and testimony, one could argue that knowing about the lawyer's involvement in the process is unnecessary. *Cf.* Medicines Co. v. Mylan Inc., No. 11-cv-1285, 2013 WL 2926944, at *5 (N.D. Ill. June 13, 2013) (finding extensive discovery opportunities along with the ability to offer rebuttal witnesses and to cross-examine the expert sufficient without ordering the expert to disclose which paragraphs of the report were written by counsel).

163. 289 F.R.D. 316 (D. Or. 2013).

164. *See, e.g.*, Carpenter v. Deming Surgical Assocs., No. CV 14-64 JCH/SCY, 2015 WL 13662880, at *4-5 (D.N.M. Apr. 20, 2015) (noting that "[t]he judge's displeasure with Plaintiff's counsel's conduct appears to have prompted the court to adopt a parsimonious reading of the work product protections Rule 26(b)(4) affords to attorney-expert communications"); Commodity Futures Trading Comm'n v. Newell, 301 F.R.D. 348, 351 (N.D. Ill. 2014) (noting that the *Gerke* court "was dealing with what it concluded was inappropriate behavior of counsel").

165. *Commodity Futures Trading Comm'n*, 301 F.R.D. at 351, 352; *Carpenter*, 2015 WL 13662880, at *5.

166. *See, e.g.*, *Carpenter*, 2015 WL 13662880, at *5 (holding that *Gerke* is inconsistent with "[t]he Advisory Committee comments and the plain language of Rule 26(b)(4)"); *Commodity Futures Trading Comm'n*, 301 F.R.D. at 352 (holding that "this court respectfully disagrees with [*Gerke's*] interpretation of the amendment to that rule"); *see also* John Wiley & Sons, Inc. v. Book Dog Books, LLC, No. 13cv816, 2015 WL 5022545, at *1 (S.D.N.Y. Aug. 17, 2015) (approving the

Assuming we are to open up discovery, the question is how far it should be extended. At a minimum this might allow questioning the expert about the lawyer's role. Attempting to get the communications themselves or draft reports that reflect the lawyer's input may still be a step too far given their explicit protection from discovery in the Federal Rules.[167]

A similar approach is recognized in the 2010 Advisory Committee Note, that the work product protection given to most lawyer-expert communication could be overcome by a showing of special need and undue hardship.[168] However, the Note also cautions that the instances where this standard could be met would be rare due to the extensive discovery already allowed.[169] In several cases, trial courts have been cautious about finding special need in the simple desire to enhance cross-examination and have rejected undue hardship claims because sufficient information is available through examination of the expert at a deposition.[170]

When we cannot even state with certainty what kinds of questions we can ask, if any, about the role a lawyer has played in the creation of a testifying expert's report, we have a situation crying out for clarification in the Federal Rules.

Magistrate Judge's rejection of *Gerke* as "unpersuasive"); Goodness Films, LLC v. TV One, LLC, No. CV 12-08688-GW (JEMx), 2013 WL 12136374, at *2 (C.D. Cal. Aug. 13, 2013) (declining to follow *Gerke*).

167. *Carpenter*, 2015 WL 13662880, at *5 (denying discovery of lawyer communications to the expert as insufficiently necessary since counsel could "cross-examine Plaintiff's experts about Plaintiff's counsel's involvement in the preparation of their reports").

168. FED. R. CIV. P. 26 advisory committee's note to 2010 amendment (referencing the availability of Rule 26(b)(3)(A)(ii) to obtain lawyer communications otherwise protected).

169. *Id.*; *see also* Sara Lee Corp. v. Kraft Foods Inc., 273 F.R.D. 416, 421 (N.D. Ill. 2011) (citing FED. R. CIV. P. 26 advisory committee's note to 2010 amendment).

170. *See, e.g.*, Powerweb Energy, Inc. v. Hubbell Lighting, Inc., No. 3:12CV220(WWE), 2014 WL 655206, at *5 (D. Conn. Feb. 20, 2014) ("Preparing for cross examination is not a sufficient 'substantial need' to overcome work-product protection. If it were, every party could compel documents properly withheld by claiming a need to prepare for cross-examination. This is especially true where defendants had the opportunity to test the bases of Mr. Burkert's opinions through deposition testimony."); Medicines Co. v. Mylan Inc., No. 11-cv-1285, 2013 WL 2926944, at *5 (N.D. Ill. June 13, 2013) (rejecting the argument that there was a substantial need to know about counsel's possible authorship of parts of the expert's report given extensive discovery otherwise available). *But see* Reliance Ins. Co. v. Keybank U.S.A., No. 1:01CV62, 2006 WL 543129, at *3 (N.D. Ohio Mar. 3, 2006) ("[G]iven the inconsistent testimony offered by [the expert], together with Swiss Re's suggestion that its attorneys drafted the expert reports, Key has a substantial need for the notes [exchanged between the expert and counsel, as they] are essential to permit Key to effectively cross-examine [the expert] . . . . [and given the expert's] less than forthright testimony . . . [Key] has no other means to obtain the information [so that] . . . . even assuming the notes are otherwise protected by the work product doctrine, Key is entitled to them pursuant to Rule 26(b)(3).").

C. *Best Practices in an Age of Excessive Uncertainty*

Until that clarification is accomplished, lawyers need to think about what practices will best prepare experts while avoiding the downside if the degree of their participation becomes known.[171]

As the safest course, one author recommends that "experts prepare their own reports and that attorneys limit involvement to ensuring compliance."[172] Others caution that attorneys "not take a significant role in drafting the report."[173] Because of the vulnerability expert credibility is to attack for over-involvement of attorneys in preparing expert witness reports, one group of authors advise that an "[e]xpert[] . . . should not permit counsel to write, significantly alter, or dictate the opinions expressed in their reports,"[174] since "[t]he more influence counsel has on the report, the more vulnerable the expert becomes."[175]

Nevertheless, the law seems to allow greater assistance:

> as long as the attorney does not change the substance of the opinion of the expert witness [and] [a]ny changes . . . [are] freely authorized and adopted by the expert as his or her own, and not merely for some appeasement or because of intimidation or undue influence by the party or counsel.[176]

To the extent lawyers decide to take a permissible but significant role in assisting in the preparation of the expert's report, based on the case law, the following appears to be the safest advice on providing assistance without the threat of exclusion or substantial credibility impairment.

The lawyer should get input from the expert before creating a first draft.[177] This helps show that the underlying opinion is the expert's

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171. *See, e.g.*, Tanis et al., *supra* note 18 (recommending that "[f]or now, counsel and experts would be wise to heed the advice of the American Institute of Certified Public Accountants: 'Experts should not rely on the protection of these new amendments to open the floodgate to unabated communication with retaining counsel. Opposing counsel will continue to retain some avenues to discover communications between experts and retaining counsel although the Committee recommended that these avenues be restricted to rare use, for example, due to 'undue hardship.' Accordingly, as before, it will continue to be important for experts to exercise good judgment and educate their professional staff as the amendments are implemented'").

172. Stuart, *supra* note 1.

173. *District Court Sanctions Ghostwriting of Expert Reports*, *supra* note 160.

174. MANGRAVITI ET AL., *supra* note 2, at 12.

175. *Id.* at 13.

176. MOORE ET AL., *supra* note 6, at § 26.23[5].

177. *See, e.g.*, Tindall v. H & S Homes, LLC, No. 5:10-CV-044(CAR), 2012 WL 3241885, at *1 (M.D. Ga. Aug. 7, 2012) ("The Court is not convinced, however, that counsel's assistance and involvement in drafting the report is completely prohibited—even if the assistance involves preparing the entire first draft—so long as there is 'prior, substantive input' from the expert

rather than the lawyer's which the expert may feel some pressure to adopt.

The expert should thoroughly review and make changes or corrections to that first draft. Even if the first draft does a nice job of capturing the expert's opinion, revision is helpful to show the expert's continuing involvement in the preparation of her own report.[178]

Although cost considerations may tempt lawyers and their clients to limit the time spent on the project by the expert, that may well be shortsighted. The hours expended should be commensurate with the task. This provides another factor to show that the expert's involvement was real and meaningful.[179]

As in any situation, the expert needs to understand and be able to support statements made in the report. Where lawyer assistance is extensive, however, the need for such command of the document is heightened to fend off attacks that the report is really the product of the lawyer not the expert.[180]

V. EXTERNAL CONTROLS ON EXCESSIVE LAWYERS ASSISTANCE—PROFESSIONAL DISCIPLINE

Both courts[181] and commentators[182] have raised the issue of whether excessive lawyer assistance poses ethical concerns.[183] Arguably,

witness."); Accentra Inc. v. Staples, Inc., No. CV 07-5862 ABC (RZx), 2010 WL 11459205, at *5 (C.D. Cal. Oct. 7, 2010) (noting the need for expert input before counsel prepares the first draft of the report); Linq Indus. Fabrics, Inc. v. Intertape Polymer Corp., No. 8:03-CV-528-T-30-MAP, 2004 WL 5575053, at *1 (M.D. Fla. June 21, 2004) (finding lawyer assistance acceptable where the "expert expresses his opinions to counsel before the report is generated and remains involved in the editing of the report"); Manning v. Crockett, No. 95 C 3117, 1999 WL 342715, at *3 (N.D. Ill. May 18, 1999) (stating that "[a]llowing an expert to sign a report drafted entirely by counsel without prior substantive input from an expert would read the word 'prepared' completely out of the rule"). *But cf. Accentra Inc.*, 2010 WL 11459205, at *5 (although finding the conduct approaching the limits of what Rule 26(a)(2)(B) allows, the lawyer's production of an outline of the report before meeting with the expert did not require exclusion where the expert subsequently was involved in preparing the report).

178. *See, e.g.*, Hoskins v. Gunn Trucking, No. 4:07-CV-72-WCL, 2009 WL 2970399, at *2, *4 (N.D. Ind. Sept. 14, 2009) (finding the expert was substantially involved in the creation of his testimony evidenced by his making substantive changes to the lawyer's draft report).

179. *See supra* text accompanying notes 80-81 (discussing exclusion or credibility impairment when insufficient time has been spent by the expert in preparing the report).

180. *See supra* text accompanying notes 82-84 (discussing exclusion or credibility impairment when expert cannot support statements in the expert report).

181. *See, e.g.*, Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 941 (E.D. Mich. 2014) (finding counsel's drafting of the expert report for the expert "a remarkable breach of ethics").

182. *See, e.g.*, MICHAEL CALLAHAN & COLIN NEWBOLD, FAMILY LAW UPDATE § 3.02[A] (2018) (noting that "[a] finding by a court of inappropriate participation in an expert's report can lead to both ethical sanctions and/or non-admittance of the testimony"); Keith A. Call, *Ghostbusting Experts*, 28 UTAH B.J., 32, 33 (2015) (noting that "the court's description [of lawyer conduct in the *Numatics* case] is hauntingly similar to the ethical rules' prohibition on "conduct that is prejudicial

discipline through professional conduct rules may provide an alternative way to police lawyer behavior in assisting experts in the preparation of their reports.[184] As one commentator put it in defending a Pennsylvania rule that bars the discovery of attorney/expert communication in most circumstances, "[w]hile the opponents of the current rule fear that experts would write opinions that are not factually sound and based solely on what an attorney told the expert to write, the Model Rules of Professional Conduct prevent that improper result."[185]

That, I believe, is a vain hope. Professional discipline is unlikely to control the problem for at least two reasons. The first is that it is unclear that lawyer assistance in preparing an expert's report presents a clear violation of existing professional ethics rules.[186] Second, even if the conduct does violate these rules, it is unlikely it will be robustly regulated through the disciplinary system.[187]

To the extent excessive lawyer involvement is likely to hurt one's client's case by undercutting the credibility of the expert or having the expert disqualified, engaging in such conduct could violate the duty of competence.[188] This concern, however, is more theoretical than real. Given that some assistance is not only proper but contemplated, and the fact that the line between permissible and impermissible degrees of assistance is not clear, most lawyer conduct that is called into question will simply reflect a judgment call, not a lack of competence.[189] Further, unless the excessive involvement violates a clear norm and is done

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to the administration of justice"); Stuart, *supra* note 1 (raising ethical issues surrounding excessive attorney assistance in preparing expert reports). *See generally* Largent, *supra* note 28.

183. Of course, if the lawyer's assistance results in the creation of false evidence, that constitutes a particularly egregious violation of one's ethical duties. *See generally* MODEL RULES OF PROF'L CONDUCT r. 3.4(b) (AM. BAR ASS'N 2013) (prohibiting a lawyer from falsifying evidence or assisting a witness in doing so); MODEL RULES PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2013) (prohibiting a lawyer's "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation"). Even assistance that produces truthful evidence, however, has been seen to raise ethical concerns. That is where the ethics implications become less clear.

184. *Cf.* Largent, *supra* note 28, at 1 (noting that "while the Federal Rules may evolve with regard to the depth, breadth, scope, and reach of permissible discovery, the obligations the Model Rules [of Professional Conduct] impose on the attorney remain largely the same and serve as a guiding light to the shifting 'norms' of federal discovery").

185. Stern et al., *supra* note 18, at 355.

186. *See supra* text accompanying notes 188-96. In this Subpart, I focus on whether excessive lawyer assistance violates the Model Rules of Professional Conduct. While the Model Rules have no legal effect, they are just a model promulgated by the ABA, they have had a major influence on state codes of professional responsibility. As such they are illustrative of the kinds of rules that might be implicated by such lawyer conduct.

187. *See infra* text accompanying notes 195-200.

188. MODEL RULES PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013).

189. *Cf.* Largent, *supra* note 28, at 4 (acknowledging that the point at which lawyer assistance in the preparation of the expert's report crosses the line and becomes unethical is unclear).

repeatedly, the matter would likely not be serious enough to draw disciplinary attention.

A second concern involves the duty of candor to the tribunal. If the lawyer serves as the unacknowledged author of what is purportedly a report prepared by the expert, this could constitute "mak[ing] a false statement of fact or law to a tribunal."[190] This prohibition extends to failure to disclose certain information where failing to do so "is the equivalent of an affirmative misrepresentation."[191] Producing a report that is purportedly the expert's work but is actually the lawyer's, might be seen to violate this provision. This concern has been raised by those who oppose lawyer ghostwriting of pro se pleadings.[192] Nevertheless, given the explicit recognition in the Advisory Committee notes that lawyers may assist in the creation of expert witness reports, and given the common knowledge that they do so, it is hard to see how silence on the extent of that participation creates an "affirmative misrepresentation."[193]

To the extent the lawyer's conduct involves "knowingly disobey[ing] an obligation under the rules of a tribunal" an ethics violation will be present.[194] But given the present uncertainty about the line between permissible and impermissible conduct, showing that the lawyer "knowingly" violated the discovery rules through his assistance will be a difficult task.[195] That said, if the requirements before a

190. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2013)). Such conduct might also violate Rule 8.4(c)'s prohibition against "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2013). Rule 4.1 prohibits a lawyer from "knowingly" making "a false statement of material fact or law to a third-person." MODEL RULES OF PROF'L CONDUCT r. 4.1(a) (AM. BAR ASS'N 2013). As discussed in the text, the "knowingly" aspect of the test may be hard to meet. It is also doubtful that failure to disclose the degree of lawyer involvement constitutes a "material fact" within the meaning of the rule. *But cf.* ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 39, at 2 (defining "material" as "material to the merits of the litigation"). Applying the ABA definition, knowledge of the degree of the lawyer's involvement might be material as it potentially affects the credibility of the expert's testimony.

191. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. [3] (AM. BAR ASS'N 2013).

192. *See, e.g.*, Bassett, *supra* note 37, at 291-92.

193. While this is true in the usual case, situations in which the lawyer writes the entire report and the expert merely signs it might be treated as a violation. Then again there are some courts that say even this is permissible, in which case nothing misleading has been done. *See supra* note 30 and accompanying text. More clearly, if the expert lies about the lawyer's role in a deposition or at trial in which the lawyer has called the expert to testify and the lawyer does not take reasonable measures to correct it, the lawyer's lack of action might constitute a violation under Model Rule 3.3(a)(3).

194. MODEL RULES OF PROF'L CONDUCT r. 3.4(c) (AM. BAR ASS'N 2013).

195. *Cf.* Largent, *supra* note 28, at 6 (noting that "in the ever-changing rules that govern discovery, adherence to the Model Rules, especially MRPC 3.4(c) not to 'knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists' can be tricky").

particular tribunal are clear, whether through case law, local rule, or standing order, failure to follow them might be seen as a violation. The outcome would depend on how disciplinary authorities construed the phrase "rules of the tribunal."

To the extent we see such conduct as undermining the role of the expert as a witness, that may violate the prohibition on "engag[ing] in conduct that is prejudicial to the administration of justice."[196] But given the substantial disagreement as to the proper scope of lawyer involvement, this would be a stretch.

While there are arguments to treat excessive lawyer assistance in creating expert witness reports as professional misconduct, it is unlikely that this will occur with any frequency. As has been noted in other contexts, disciplinary enforcement of lawyer litigation misconduct is often a low priority for disciplinary authorities.[197] In fact, I have found only one disciplinary case addressing the ethics of lawyer assistance in the drafting of expert reports.[198] It has either seldom been raised or

196. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2013); *see also* Call, *supra* note 182, at 33.

197. *See, e.g.*, Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 765-66, 815 (2004). In this article Professor Joy discusses the interplay between Federal Rule of Civil Procedure 11 and professional discipline. He found that although both treat the same abuses, most Rule 11 cases never lead to public sanction in the disciplinary system. He offers a number of explanations including, inter alia, that:

> [L]awyer disciplinary agencies are unable or unwilling to control litigation conduct; . . . the legal profession has determined that trial judges are more effective in controlling litigation conduct in pending matters; [and] . . . prevailing standards for enforcing lawyer discipline and standards for imposing lawyer sanctions downplay imposing public sanctions for litigation conduct.

Id. at 807; *see also id.* at 809-10 (noting that "data supports the view that lawyer discipline is primarily focused on client-centered issues; abusive litigation conduct, such as frivolous filings, does not commonly trigger complaints leading to lawyer discipline").

198. The one disciplinary case I found addressing this matter is *In re Donziger*, 80 N.Y.S.3d 269 (App. Div. 2018). It should be noted that in that case ghostwriting the expert's report was part of a litany of misconduct of which ghostwriting was only a small part. *Id.* at 269 (lawyer suspended from practice for engaging in "judicial coercion, corruption of a court expert and ghostwriting of his report, misrepresentations concerning the expert's independence, obstruction of justice, witness tampering, improperly threatening criminal prosecution, and judicial bribery"). To the extent this matter is analogous to lawyer ghostwriting of pro se complaints, there are numerous ethics opinions which split on when, if ever, the practice violates the ethics rules. *See* Basset, *supra* note 37, at 291-93 (describing the split). There also are cases in which discipline was imposed for ghostwriting pro se complaints, although often other more serious misconduct was also involved. *See, e.g.*, Iowa Supreme Court Attorney Disciplinary Bd. v. Rauch, 746 N.W.2d 262, 265 (Iowa 2008) (revoking lawyer's license for numerous ethical violations including ghostwriting a pro se complaint); *cf. In re* Mungo, 305 B.R. 762, 770-71 (Bankr. D.S.C. 2003) (admonishing lawyer for engaging in ghost-writing of pro se pleading but warning that suspension or disbarment from practice before the court might be ordered in future cases now that the court's position on ghost-writing was made clear in this opinion).

publicly pursued in materials reported in easily accessed databases. In the absence of clear guidance as to the line between proper and improper conduct, it seems unfair to punish lawyers for their actions in this context.[199]

It should also be noted that in none of the court cases I reviewed concerning lawyer assistance in creating an expert's report did the court sanction the attorney for this behavior, other than through exclusion of evidence.[200] A verbal admonition is the most that appears in the cases.[201] If the courts before which this behavior occurs do not more forcefully sanction the lawyers involved, it seems improper to use license restriction as the means to control this issue. That is not to say that lawyer self-reflection is inappropriate here—lawyers should consider whether the extent of their assistance seems professionally proper[202]—but only that the norms are unlikely to be enforced through disciplinary sanctions.

VI. ALTERNATIVE CONTROLS ON EXCESSIVE LAWYER INVOLVEMENT

The present situation with its disagreement about how much lawyer assistance is too much, or at least gives rise to credibility concerns, and about how, if at all it can be inquired into, is untenable. Perhaps the courts will come to some sort of consensus on these matters, but the experience of the last eight years provides little hope in that regard.

There are, however, a number of alternative ways to help manage these issues through amendments to the Federal Rules that do not undermine the core concerns underlying the 2010 regime.[203] Robust control of excessive attorney assistance in preparing expert reports can

199. *Cf. In re* Liu, 664 F.3d 367, 372-73 (2d Cir. 2011) (refusing to discipline attorney for ghostwriting a client's complaint given that the court lacked any rule or precedent explicitly governing attorney ghostwriting, some authorities nationally permit the practice, and there was an absence of evidence that the attorney was attempting to mislead the tribunal).

200. *But cf.* Indiana Ins. Co. v. Hussey Seating Co., 176 F.R.D. 291, 294-95 (S.D. Ind. 1997) (where costs were assessed for mishandling the expert report, but the extent to which counsel's criticized role in the report's drafting was the impetus for the sanctions is unclear).

201. KNAPP Logistics & Automation, Inc. v. R/X Automation Sols. Inc., No. 14-cv-00319-RBJ, 2015 WL 5608124, at *2 (D. Colo. Sept. 24, 2015); *In re* Mungo, 305 B.R. 762, 770-71 (Bankr. D.S.C. 2003).

202. *Cf.* Wydick, *supra* note 58, at 27-28 (noting that the boundaries of proper witness preparation are, for the most part, controlled by a "lawyer's own informed conscience"); *see also* Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 553-54 (2009) (noting that the underenforced duty to report rules for both lawyers and judges still spur self-reflection when considering whether to report).

203. Given the broad array of constituents that supported the 2010 expert discovery amendments, *see supra* note 112, it is unlikely that they will be substantially changed.

be achieved without devolving into excessive discovery battles or costly in-camera review.[204]

A. Discovery Conference Consultation

One approach is to leave the question of the degree to which the role of the lawyer can be explored to the parties.[205] Rule 26(f) could be amended to make this a subject of discussion at the mandatory discovery conference.[206] If the parties cannot agree amongst themselves as to the scope of permissible discovery on this topic, the court might assist during a scheduling or pretrial conference.[207] The potential drawback to this approach is that it allows the parties to deprive the trier of fact of information that the trier might find relevant in assessing the expert's testimony if, for example, the parties agreed not to allow inquiry about the lawyers' roles in assisting in the expert reports. While information is routinely withheld from the trier of fact by the lawyer's choices, as the lawyer decides what evidence to put on and what line of questioning to pursue, we might decide the inherent deception in presenting the expert as a neutral, unsullied by the lawyer's involvement in the creation of the expert testimony, goes too far.[208]

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204. One concern expressed over approaches that require courts to determine if particular documents should be discoverable once some level of need is established is that the in-camera review process is costly and inefficient. *See supra* text accompanying notes 142-48; *see, e.g.*, Stern et al., *supra* note 18, at 329, 338-39, 356.

205. *See, e.g.*, *In re* Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig., No. 1:14-ml-2570-RLY-TAB, 2018 WL 6113466, at *5 (S.D. Ind. Nov. 21, 2018) (enforcing party agreement "that allows them each to withhold communications between counsel and expert witnesses, even if Rule 26 permits the other side to discover them"); *In re* W. States Wholesale Nat. Gas Antitrust Litig., No. 2:03-cv-01431-RCJ-PAL, 2017 WL 2991347, at *3 (D. Nev. July 12, 2017) (discussing stipulations and proposed order by the parties concerning expert discovery); Reliance Ins. Co. v. Keybank U.S.A., No. 1:01 CV 62, 2006 WL 543129, at *1 (N.D. Ohio Mar. 3, 2006) (discussion of parties' agreement to share all drafts of expert reports); *see also* Gregory P. Joseph, *The Temptation to Depose Every Expert*, LITIG., Winter 2014, at 38, 39 (suggesting that the best course in this area of uncertainty is for the parties to reach an agreement limiting the scope of discovery to providing the report and the expert for deposition; but author does not address the scope of allowable questions at the deposition).

206. *See generally* FED. R. CIV. P. 26(f)(3). Arguably, these issues are already the subject of discussion since the Rule requires the parties to discuss "what changes should be made in the limitations on discovery imposed under these rules or by local rule." *Id.* But, we are addressing an area where those limitations are uncertain, so this provision may not apply. In any event, it would be best to explicitly call this matter to the attention of the parties through a rule change.

207. *See generally* FED. R. CIV. P. 16.

208. This, however, is probably not the case. Prior to the 2010 amendments to the Federal Rules, parties routinely agreed to opt out of the extensive discovery of lawyer-expert communication. *See supra* text accompanying note 116.

B. *Expert Report Disclosure*

A second approach would be to add additional requirements to the expert report rule itself requiring the expert to spell out the respective roles the expert and lawyer played in the report's creation. This is similar in policy to the present requirement that compensation information be provided in the report.[209]

In numerous cases in which courts have expressed concern over the comparative roles of the lawyer and the expert in preparing the expert's testimony, courts have expressed that this can be controlled by credibility determinations by the trier of fact[210] as excessive lawyer involvement can undercut the credibility afforded the expert and her testimony.

The Federal Rules of Civil Procedure already address one ground on which the trier of fact might discount the weight of an expert's testimony—financial bias. Rule 26(a)(2)(B)(vi) requires that the expert include in her report "a statement of the compensation to be paid for the study and testimony in the case." Rule 26(b)(4)(C)(i) allows discovery of communications between counsel and the expert that "relate to compensation for the expert's study or testimony." The rationale for allowing this inquiry, which is not directly relevant to the substance of the testimony, is "to permit full inquiry into such potential sources of bias."[211] While many expert reports simply provide the hourly rate being paid to the expert,[212] the rule is not so limited.[213] It requires disclosure of, and allows inquiry about, the "compensation to be paid for the [expert's] study and testimony in the case."[214] Details such as the number of hours spent are discoverable as well,[215] unless there is some fear that the discovery is being undertaken for an improper purpose.[216]

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209. FED. R. CIV. P. 26(a)(2)(B)(vi).

210. *See supra* Part II.B.

211. FED. R. CIV. P. 26 advisory committee's note to 2010 amendment. *See generally* Michael H. Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 IND. L.J. 35, 41 (1977) (noting that impeachment on this ground is "universally recognized"); *see also* Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 TENN. L. REV. 909, 940-47 (2000).

212. *See, e.g.*, MANGRAVITI ET AL., *supra* note 2, at 359 (noting in its examples that as little as the hourly rate may be enough and quoting an expert—"It is sufficient to list the magnitude of your flat fee or the hourly rate.").

213. *See, e.g.*, Cary Oil Co. v. MG Ref. & Mktg., Inc., 257 F. Supp. 2d 751, 756 (S.D.N.Y. 2003) (noting that "[w]hile most expert reports disclose the expert's hourly rate, the plain language of the rule clearly refers to the expert's 'compensation,' which encompasses more information than simply a billing rate").

214. FED. R. CIV. P. 26(a)(2)(B)(vi), (b)(4)(C)(i).

215. *See, e.g.*, Innovention Toys, LLC v. MGA Entm't, Inc., No. 07-6510, 2012 WL 12990384, at *6 (E.D. La. Oct. 17, 2012) (finding that "the parties must be apprised of the number of hours that their opponent's expert witness has billed in order to gauge his financial interest in this

Since the overinvolvement of lawyers similarly can undercut the value of the expert's testimony, similar disclosure should be required. Rule 26(a)(2)(B) should be amended to require a statement of the hours spent by the expert in conducting the study and resulting report,[217] including what the hours were spent on and a statement of the role lawyers played in the process.[218] While more intrusive, the rule could require the expert to identify every sentence in the report that was created by the lawyer rather than the expert.[219]

To accompany this rule change, courts should provide jury instructions noting that lawyer involvement in helping prepare the expert's testimony is not improper, but that it can be considered in determining the weight to give the expert's testimony.[220]

C. Certification of Conduct

A third approach would be to have the expert and/or the lawyer certify that they played their proper roles. First, we would need to define what the proper roles should be. For argument, let us adopt the role definition most courts articulate allowing lawyer assistance so long as the expert played a substantial role in the report's preparation.[221] Rule 26(a)(2)(b) could be amended to require that the expert include in the report a statement that he played a substantial role in the report's creation.[222] Rule 26(g) could be amended to require that the lawyer

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matter"); *see also* Ampersand Chowchilla Biomass, LLC v. United States, 136 Fed. Cl. 589, 591 (2018) (confirming this general principle, but allowing redaction of certain protected information).

216. *See, e.g.*, *Cary Oil*, 257 F. Supp. 2d at 757 (shaping scope of discovery about compensation because of the court's concern "that such disclosure requests could be abused" in the case before it).

217. Since this information may already be available as part of the compensation inquiry, an amendment may not be necessary, but the rule would be stronger if the requirement were explicit and the degree of detail defined.

218. In the ghost-writing context in which lawyers prepare pleadings for pro se litigants, at least one court has allowed it as long as "the attorney signs the document and discloses thereon his or her identity and the nature and extent of the assistance that he or she is providing to the tribunal and to all parties to the litigation." FIA Card Servs., N.A. v. Pichette, 116 A.3d 770, 784 (R.I. 2015).

219. *Cf.* Iridex Corp. v. Synergetics, Inc., No. 4:05CV1916 CDP, 2007 WL 781254, at *5 (E.D. Mo. Mar. 12, 2007) (requiring a declaration from counsel as to the authorship of each set of revisions).

220. *Cf.* ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL § 11:96 (2019) (discussing jury instructions relating to expert compensation and the possible bias that may be inferred from that fact). *See generally* Betty Layne DesPortes, *Jury Instructions on Expert Testimony*, *in* WILEY ENCYCLOPEDIA OF FORENSIC SCI. at 1, 2 (Allen Jamieson & Andre Moenssens eds. 2009); David F. Herr & Jason A. Lien, *Judicial Instructions Relating to Expert Testimony*, SM060 A.L.I.-ABA 447, 451-55 (2007).

221. *See supra* notes 51-53 and accompanying text.

222. It should be noted that the advisory committee rejected a similar proposal during their

certify that the expert played a substantial role in any expert report provided pursuant to Rule 26(a)(2)(B).

There are, admittedly, some problems with this approach. Defining exactly when the expert has played a substantial role in the report's preparation may be hard to articulate, but the best practices standards articulated previously could be a start.[223] A second concern is that certification requirements rely on the good faith of the certifiers. If all discovery of the lawyer's role is curtailed in favor of this approach, finding violators would, in most cases, be impossible. Nevertheless, we often rely on actors proceeding in good faith in the litigation system.[224] Finally, the substantial participation test was developed with the added protection that more details could be learned on discovery and used for impeachment. Here the impeachment protection is lost. Nevertheless, if the predominate reason behind the 2010 amendments was to eliminate virtually all inquiry into lawyer-expert communication, this would provide some protection while honoring that desire.

VII. CONCLUSION

Experts play a crucial role in modern civil litigation. They prepare their testimony with input from the attorneys who hire them. Neither proposition is remarkable. But beyond those two propositions, the world of expert-attorney interaction becomes murkier.

At its core, we really have not decided on the proper role lawyers should play in assisting experts in the creation of their expert reports and ultimate testimony. Instead most courts have acquiesced in allowing significant attorney involvement so long as the expert can be seen as being substantially involved in the creation in her own report and testimony. We largely leave it to the trier of fact to determine the degree to which the lawyer's involvement undercuts the credibility of the expert.

At the same time, we have limited the extent to which we can discover the comparative roles of the expert and attorney, thus making it harder for the trier of fact to evaluate the impact of their interactions.

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work leading up to the 2010 discovery amendments. The question was whether to require experts to certify that the report was "prepared by the witness." ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 1, 13, Nov. 8-9, 2007, https://www.uscourts.gov/sites/default/files/fr_import/CV2007-11.pdf. That, however, was coupled with the thought that if the witness could not certify, the lawyer's draft would become discoverable. My proposal does not go that far.

223. *See supra* Part IV.C.

224. *See* Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 118-22 (2018) (endorsing the principle that discovery compliance lies, in the first instance, with the disclosing party, without court or opposing party direction, and is enforced through the Rule 26(g) certification process).

Even with some limited direction from the Federal Rules about what "communications" between counsel and the expert can be explored, there is substantial disagreement over what kinds of questions may properly be asked about the process of their interaction.

Within the current framework of the Federal Rules, one resolution would be to abandon the inquiry. Let expert testimony stand or fall by the extent to which the expert can support the opinions expressed. Another would be to allow expansive discovery about the process so that the trier of fact can have a global sense of the degree of lawyer participation while protecting the substance of that input. The former abandons a needed protection from lawyer overreaching. The latter raises the specter of substantial discovery costs the 2010 amendments to the Federal Rules attempt to avoid.

Given this, it may be time to try new approaches. Party negotiation about the degree of discovery to be allowed, required disclosures about the extent of lawyer involvement, or sworn certifications about the lawyer's and the expert's role, all provide possible ways out of the current morass while both limiting excessive lawyer involvement and avoiding exorbitant discovery costs.

BY MATTHEW D. TAGGART

How to Prepare for and Manage the Depositions of Expert Witnesses

LAWSUITS ARE OFTEN WON OR LOST on the basis of expert witness testimony. The cases in which experts testify range from the very ordinary (such as traffic collisions) to truly extraordinary (such as the competitive effects of a proposed merger). Expert witnesses are plentiful, and the best of them distill complex material and connect with the jury. In criminal cases at least, jurors may suffer from the "*CSI* syndrome" and conclude from the exaggerated role of forensic science in television police dramas that clear scientific or technological answers exist for a trial's factual questions.[1] Prosecutors and civil lawyers alike lament that this growing misconception has unduly raised their burdens of proof.

But hiring an expert is not enough to resolve this issue. Counsel must carefully vet the expert and see him or her through discovery, and, in particular, deposition. Parties cannot simply rely on expert witnesses to win cases. Trial lawyers need to be adept at assessing the weight of expert testimony and assuring that the testimony clears evidentiary hurdles. To a large degree, the success of a lawyer in meeting these challenges will depend on how effectively the lawyer conducts the expert witness deposition. Both the novice and the seasoned practitioner benefit from staying abreast of the constantly evolving rules of practice and procedure relating to expert witness depositions and discovery.

Timing of Expert Discovery

Counsel must understand the procedures for expert discovery. Because this phase usually occurs close to trial, there is little room for error on counsel's part, and the federal and state rules differ.

Under the federal rules, once a party has identified an affirmative or rebuttal expert and issued the required expert report (90 days before trial for affirmative experts and 30 days for rebuttal experts), any party may take that expert witness's deposition.[2] In California, by contrast, expert disclosures are not mandatory, and written expert witness reports tend to be the exception rather than the rule. Under the Code of Civil Procedure, a party must formally demand expert discovery, using precise terminology and arcane procedures. Specifically, a party must propound a formal demand for exchange of expert witness information in order to obtain discovery of expert witness identities and the subject matter of testimony.[3] This demand also triggers the propounding party's obligation to make reciprocal disclosures, whether the other party has issued its own request or not. The expert demand must be made at least 10 days after the initial trial date is set or 70 days before the trial date, whichever is later.[4] In federal court, expert discovery may occur relatively early in a case, but in California there is no statutory right to serve a demand for expert witness information until the trial date is set.[5]

The expert witness information itself must be exchanged 20 days after service of the demand or 50 days before trial, whichever is later.[6] By contrast, rebuttal experts are disclosed via supplemental expert witness lists 20 days after the normal exchange of information occurs. Even more strange, in California the expert demand may, but need not, include a request for "the mutual and simultaneous production for inspection and copying of all discoverable reports and writings."[7] Although standard forms used by California counsel usually contain such requests, there is no obligation on the part of a designated expert witness to prepare and submit a written report. This anomaly of California law heightens the importance of the expert witness deposition, which is quite often the only avenue for opposing counsel to obtain detailed information about the expert's background and opinions.

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California's deadlines for taking expert depositions and discovery also vary significantly from the federal rules. Expert depositions are exempted from the normal "discovery cutoff" 30 days before trial. Parties may depose experts from the time they are identified up to 15 days before trial, and a motion to enforce discovery regarding expert

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depositions may be heard up to 10 days before trial, instead of the normal cutoff in existence for other, nonexpert discovery motions.[8]

Counsel should be aware that California law does grant the trial judge one avenue for requiring expert witnesses to sit for deposition earlier than the expert designation date. In one case, *St. Mary Medical Center v. Superior Court,*[9] the court of appeal determined that "under the proper circumstances, the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication where there is a legitimate question regarding the foundation of the opinion of the expert."[10] This case remains good law but seldom is invoked. Early depositions remain relatively rare in California practice. Regardless, if an expert declaration in summary judgment papers appears vulnerable to attack, counsel should consider immediately demanding a deposition of the declarant. This way, counsel may obtain evidence that can result in the striking of the expert declaration for lack of foundation.

Preparing the Expert for Deposition

The starting point for defending expert depositions is for the lawyer to understand his or her role: to identify with precision what the expert's specific opinions are and to prepare the expert to explain those opinions without either being rattled or committing substantive errors. This may sound easy, but like all witnesses, experts—even the most experienced and highly paid ones—require careful preparation.

Most attorneys, especially big-firm attorneys, will get a crack at defending an expert long before they are entrusted with taking the expert's deposition. Besides, defending—or preparing—the expert is probably the more important skill, as expert failures in discovery are more often the result of inadequate preparation than cunning examination.

Experts know what they are there to do, and are usually already very good at it. Nearly always, highly paid experts, who often charge $500 an hour or more, have testified many times in complex and high-profile disputes and have been deposed at least as many times. They do not need an attorney to tell them how to do their job or to teach them about the substance of their field, even if an attorney could.

Rather than teach the expert about his or her area of expertise, a lawyer should help the expert with the task of being a witness. As with a lay witness, counsel should remind the expert that the most important rule of testifying is to tell the truth. This rule should be obvious to any lawyer, and experts are no exception. Problems relating to an expert's qualifications, methodology, or physical appearance are exacerbated if the expert tries to play cat-and-mouse with the examiner or, worse yet, shades the truth.

Counsel should also explain the deposition process to the expert, even if it seems unnecessary at first. Just as with a lay witness, counsel should cover logistics, up to and including where the expert will sit at the table, and answer any questions about the deposition. If the deposition will be videotaped, counsel should remind the expert especially to be cautious about tone and facial expressions, as jurors commonly are affected by such matters, however unimportant they may be to an intellectual titan. Further, in this age of YouTube, counsel should consider obtaining a protective order to prevent the video deposition from being posted on the Internet.[11] Acrimonious litigants will occasionally edit and post video depositions to harass and embarrass witnesses, even experts. Although it is possible to seek relief after a video deposition has been made public, the damage already done may be irreversible. Opposing counsel will usually agree to a protective order, since their own witnesses may be protected thereby as well.

Preparing an expert witness includes the normal advice counsel would give to any witness. The expert must listen to the question asked and answer only that question. Remind the expert to not guess, to go slowly enough that the court reporter does not become annoyed, and to speak in firm, assured, but not-too-eager tones. Opposing counsel will surely pose a few loaded, vague, misleading, or argumentative questions. If the expert cannot answer a question because some critical factual predicate or assumption is missing, the expert should either simply state that he or she is unable to answer the question as posed or supply the missing essential information needed to answer the question and answer the question as modified. What the expert must be careful never to do is to answer the question that he or she thinks the questioner meant to ask, or to answer the question that he or she thinks the questioner is about to but has not yet asked.

Before getting into the substance of the expert's testimony, counsel should ask if he or she has any questions, and before going into deposition, counsel should ask the witness whether there is anything counsel should know that the expert has not already told him or her. As witnesses begin to concentrate before giving testimony, they may remember something that they forgot to mention before. The expert may remember an article that he or she wrote years earlier that does not jibe with the expert's current testimony. The expert may remember a case in which he or she testified in which the client lost or a case from which the expert was excluded or disqualified. The expert may remember a learned treatise that contradicts his or her opinion. All such information will be crucial to the expert's credibility and to whether the judge or jury credits his or her opinions at trial. It is better to ask early than to find out when it is too late.

Especially with videotaped depositions, counsel should remind the expert about the importance of personal appearance and demeanor. Live testimony is the focus of trial. Video depositions are essentially trial proceedings, because some and perhaps all of the deposition may be admissible at trial. Because truth at trial is always subjective, the witness's credibility is the paramount concern for the trial lawyer. In an excellent trial treatise, author and lawyer R. Shane Read argues that jurors form an impression within minutes, and sometimes seconds, of seeing someone new; they also tend to absorb subsequent information in accordance with those powerful first impressions.[12]

Jurors find it hard to side with people they dislike, whether those people are rude, gruff, arrogant, or unmindful of courtroom decorum. The best witnesses are likeable and charismatic. Hence, in preparing an expert witness, counsel should resist the temptation to jump into the details of the expert's opinions and instead take the time to refocus the expert on the importance of the manner in which the expert comes across in testifying. Counsel should be mindful that many experts are impatient by nature, sometimes prone to lose their temper when their ideas are doubted by nonexperts. But, in the end, if an expert loses his or her temper in deposition, the client pays the price.

The Expert's Report

Another step in trial preparation is to review the expert's report with the expert. By the time the expert's report has been disclosed, the expert already should know exactly what opinions he or she is offering in the case, and the underlying methodology, documents, and facts supporting those opinions. The expert report is the road map for the expert's deposition, and the preparation can closely follow the report. Reviewing the report with the expert will enable counsel to determine the extent to which the expert is conversant with the facts.

In theory, by the time the expert has been retained, counsel should already be confident that the expert can testify competently and credibly about the specific opinions he or she will give in the case and the underlying reasons or methodologies supporting those opinions.

Federal Rule 26(a)(2), which was significantly amended in 2010, provides that the

report must contain:

- A complete statement of all opinions the witness will express and the basis and reasons for them.
- The facts or data considered by the witness in forming them.
- Any exhibits that will be used to summarize or support them.
- The witness's qualifications, including a list of all publications authored in the previous 10 years.
- A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.
- A statement of the compensation to be paid for the study and testimony in the case.[13]

In California, the Code of Civil Procedure deals with the expert's report:

> If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings…all parties shall produce and exchange…all discoverable reports and writings….[14]

Additionally, the Code of Civil Procedure addresses "supplemental expert witness lists," or rebuttal experts. The statute does not separate the basic disclosures from the expert report but rather requires late-disclosed rebuttal experts to provide both at the time they are identified to the other parties.[15]

Experts and Privilege

The days of waiting to designate an expert until the eve of trial are over. Experts must be hired much earlier in the life of a case, especially if they are to be properly vetted and prepared. Those who wait until the last minute often make the mistake of designating their clients or a client's employee as testifying experts, for the sake of convenience or to save litigation funds. But this designation is extremely risky, as it may lead to a waiver of the attorney-client privilege as soon as any testimony is presented.[16] Generally, since an expert witness is not a client of the trial counsel, no privilege protects their communications. This rule has been extended to situations in which the designated expert happens to be the client or an employee of the client.[17] Many lawyers are not aware of this trap.

Counsel must also discuss the expert's prior testimony in other cases and, if possible, obtain transcripts of that prior testimony. This relates to the expert's report, since the expert is required to include cases in which he or she has testified in the last four years. At trial, the court will surely permit the other party to inquire as to any prior testimony by the expert in other cases involving similar issues.[18]

Counsel can either trust experts who say that their testimony in prior cases does not undermine their opinions in the instant case, or counsel may review the transcripts of the prior testimony to see what they reveal. If there is any prospect that the prior testimony may undercut the current opinion, counsel should obtain the transcript to be safe.

Before the advent of e-mail, the Internet, and electronic document repositories, it was standard practice for professional experts to discard deposition transcripts from prior engagements. Experts did so to prevent their testimony from coming back to haunt them. Today, transcripts are readily available from a variety of sources.

Even if the prior testimony does not directly undercut the expert's credibility in the current case or involves different legal issues, counsel should still read the transcripts to better understand the expert's style and tendencies when testifying and to fix bad habits if necessary. The transcripts will reveal ways in which the expert's current testimony can be improved.

Next, counsel should obtain copies of everything the expert has considered or reviewed in formulating his or her opinion. This step overlaps with the review of the expert report and is always necessitated under the Federal Rule of Civil Procedure 26(a)(2) and typically but not always under Code of Civil Procedure Section 2034.250.

Naturally, an expert's credentials are vitally important. Indeed, that is often the only thing to which the jurors will pay attention once the court permits an expert to testify. But credentials alone are not enough. Counsel must be familiar with the factual foundation for the expert's opinion. Counsel must be satisfied that there is sufficient factual support for the opinion and, in the language of Federal Rules of Evidence, that "the witness has applied the principles and methods reliably to the facts of the case."[19]

From the perspective of the examiner, the expert deposition may be conceived in terms of a physical structure, such as the tower in a game of Jenga.[20] Like a player in a Jenga game, the examiner will try to remove the factual blocks that make up the structure of the expert's opinion, hoping ultimately that once the underlying factual blocks are removed, the entire structure will topple over.

Trial consultant David Malone recommends that counsel have the expert clarify the core concepts—or pillars—supporting the expert's opinion.[21] If the challenge does not threaten the structural support for the opinion, the expert can simply testify that the challenge does not affect his or her opinion. This will help the expert from being rattled by immaterial lines of questioning and to sidestep irrelevant attacks.

Counsel cannot fully understand the strengths and weaknesses of the expert's testimony without assessing the underlying factual support. Even if collateral questioning in deposition does not technically undermine the expert's opinion, counsel cannot hope to effectively defuse such questioning on redirect without mastery of all the underlying support for the opinion.

Counsel must show the retained expert witness only those documents that counsel is prepared to show the other side. While many young attorneys take it as an article of faith that a lawyer can hand a document to a friendly witness without that document ever becoming discoverable, because of an unspecified "privilege," federal and California courts have squarely rejected this theory. Federal courts construe Rule of Evidence 612 (regarding refreshing a witness's recollection) to require the production of any documents that are used in deposition preparation "to refresh memory for the purpose of testifying."[22]

Among the most complex issues in deposition preparation is how to balance the need to familiarize deponents with the many technical issues in the case, specifically including documentary evidence, without creating discoverable material for the other side. This complexity derives from the tension between the protection afforded to the attorney's strategy under the work product doctrine and the evidentiary rules requiring production of materials used to refresh the witness's recollection. The federal rules codify the Supreme Court's decision in *Hickman v. Taylor* stating that a party may not discover documents and tangible things prepared in anticipation of litigation or for trial by an attorney and his or her agents without a showing by the party seeking the discovery that it has a "substantial need" for the materials and cannot obtain them by other means without undue hardship.[23]

The present doctrine of refreshed recollection, codified at Federal Rule of Evidence 612, provides that materials used to refresh a witness's recollection regarding events concerning which the witness once had knowledge but has had a lapse of memory must be produced to the other side.[24] Failure to produce may result in the witness's testimony being stricken.[25]

Courts have held that although selection of documents to prepare a witness implicates the attorney's theory and mental impressions of the case—referred to as "core" work product—the doctrine must yield to the opposing party's fundamental right to cross-examine adverse witnesses.[26] This issue is illustrated by *International Insurance Company v. Montrose Chemical Corporation*. In this California case, two insurance companies were in litigation over indemnity obligations for hazardous waste pollution in several cites.[27] The plaintiff, International Insurance, appealed a sanctions order against it for discovery abuse.

Richard Power, an independent claims adjuster, had analyzed Monsanto's claim on International's behalf.[28] According to Montrose, his initial communication with International acknowledged coverage. At his deposition, Power was represented by International's attorney at International's expense.[29] During the deposition it became apparent that International's attorney had shown him documents to refresh his recollection.[30] After establishing that Powers had spent one to two hours reviewing International's documents in preparation for his deposition, Montrose asked International to produce the documents he had reviewed. International refused, and Power was a no-show on the third day of his deposition. Montrose moved to compel production of the documents that Power had reviewed.

The Second District Court of Appeal rejected International's argument that in order to obtain production of the documents Montrose had to establish which "particular writing" the witness had used to refresh his recollection on a "particular subject" included in the witness's actual testimony:

> Evidence Code Section 771 requires the production of documents used to refresh [the witness's] memory with respect to any matter about which he testifies, no more and no less. After testifying that he had no specific recollection about how he learned that International would pay for an attorney to represent him in these proceedings, [the witness] was asked by Montrose's attorney whether, in preparation for the deposition, [the witness] had looked at documents to assist him in remembering events that took place in the past. [The witness] answered affirmatively, explaining that he spent one or two hours reviewing documents and that, after his review, he had a "fresher recollection of what had taken place" than he had prior to the session. [The witness] also explained that, without all of the documents in front of him, he could not recall which ones actually refreshed his recollection and which did not, and that "anything [he] looked at probably gave [him] some benefit of refreshing [his] recollection."[31]

On the other hand, truly privileged documents that are shown to a client or other person covered by the attorney-client privilege do not lose their protection merely because they are used to prepare that person for his or her deposition.[32]

The risk of disclosure of documents used in deposition preparation is precisely why experienced lawyers commonly eschew written communications with their experts. As trial expert Michael Schwartz once said, although one must always produce discoverable material, one need not create it. Counsel can avoid doing so in one of two ways. First, counsel may choose to consult the otherwise nondiscoverable documents themselves and question the witness based upon the documents' contents, without referring the witness to the document.

Second, perhaps more commonly, counsel may decide not to exchange documents with the expert at all, other than the documents counsel plans to produce to the other side. This way, counsel may communicate orally with the expert, but discovery is narrowly circumscribed to the expert disclosures and whatever materials the expert reviewed on his or her own, independent from counsel (which are not privileged anyway), thereby limiting documentary discovery.

Note that in 2010, the federal rules were substantially amended to expand work product protection for certain types of communications between an attorney and a testifying expert. Before the amendment, Rule 26(a)(2)(B)(ii) required disclosure of "the data or other information" that the expert considered in forming his or her opinion, leading opposing counsel to insist on obtain-

ing attorney-expert communications and draft reports.[33] The new language—"facts or data"—clarifies that the report need only include the factual materials relied upon by the expert, not communications with counsel and draft reports. The new rule protects any form of communication between an attorney and an expert except communications that 1) relate to expert compensation, 2) identify facts or data that the attorney provided and that the expert consulted in forming the opinion, or 3) identify assumptions that the attorney provided and that the expert relied upon in forming the opinion.[34]

After counsel has reviewed the expert's opinion in detail, counsel should consider conducting a mock cross-examination. Having already spent a great deal of time preparing his or her opinion and going through that opinion with counsel in preparation for his or her deposition, the expert may not wish to participate in so-called murder boards. However experienced an expert is, expert and attorney will not be able to fully understand what needs more preparation without the test of a mock cross-examination.

In some instances, counsel can simply examine the expert briefly throughout the stages of preparation, asking a few tough questions at the conclusion of each stage. In other instances, however, particularly in a large and complex case in which the expert will testify for many hours or even days, a full simulated cross-examination is essential. Jury consultants or mock juries may be included in the process if sufficient dollars are involved, such as in a large class action case. The expert is being well compensated, so counsel should not let a desire to please the expert prejudice the client's case by skipping this crucial final step.

At the Deposition

Any party may depose any designated expert, and the general rules governing depositions apply equally to experts. If the witness is well prepared, defending the deposition will be easy. The main responsibility will be to object to improper questions to preserve the record for trial and possible appeal.

The following three steps will help the client to get the most out of an expert's deposition testimony. First, an attorney should prevent the expert from being an advocate. Advocacy is the attorney's job, not the expert's. Remind the expert immediately before the deposition to appear neutral and to avoid openly advocating for the client. The expert cannot be credible while favoring one side. It is counsel's role to present the expert's testimony by sequencing examination effectively. The witness's role is merely to answer the questions and not try and narrate why the client should win.

Second, the attorney should get out of the way once the deposition starts. The attorney has already picked a qualified expert, who in turn has carefully considered the facts. The attorney has diligently prepared the expert for deposition, including with a grilling in a mock cross-examination. Once the deposition begins, however, the attorney will not help the expert or the client by interrupting.

Third, counsel must decide whether to cross-examine the expert. As an attorney would normally do on redirect at trial, the expert's attorney should give the expert an opportunity to flesh out statements that may have been taken out of context or to cover additional facts that diminish the damaging testimony that the noticing party elicited.

Parties often move for summary judgment or summary adjudication based upon deficient expert testimony, especially in mass torts, products liability, Proposition 65, and large personal injury actions. Deposition testimony may be essential to create the genuine issue of material fact that are needed to avoid or overcome this type of motion and spare the client's precious resources.

In complex litigation, clients demand high-level performance from their legal coun-

sel and retained expert witnesses. All too often, counsel hire expert witnesses with minimal vetting or strategizing. This is risky. A good opposing lawyer can do serious damage at the expert deposition stage, and the damage may be irreversible. Knowledge of the complex rules of expert depositions and intensive preparation before the deposition can minimize, if not altogether nullify, the risks inherent in the expert deposition process. ■

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[1] *See, e.g.*, Katherine Ramsland, The CSI Syndrome, http://www.trutv.com/library/crime/criminal_mind/psychology/csi_effect/1_index.html (last visited June 14, 2012).
[2] *See* FED. R. CIV. P. 26(b)(4)(A), (a)(4)(B).
[3] CODE CIV. PROC. §§2034.010 *et seq.*, §2034.230(a).
[4] CODE CIV. PROC. §2034.220; *see also* CODE CIV. PROC. §2016.060.
[5] CODE CIV. PROC. §2034.210.
[6] CODE CIV. PROC. §2034.230(b). The deadlines are extended by 2, 5, or 10 days depending upon whether service is by express mail, regular mail, or is out of state.
[7] CODE CIV. PROC. §2034.210(c).
[8] CODE CIV. PROC. §2034.030. Experts disclosed on a so-called supplemental expert witness list may be deposed even beyond the deadline. CODE CIV. PROC. §2034.280(c).
[9] St. Mary Medical Ctr. v. Superior Court, 50 Cal. App. 4th 1531 (1996).
[10] *Id.* at 1540.
[11] Paisley Park Enters. v. Uptown Prods., 54 F. Supp. 2d 347 (S.D. N.Y. 1999) (video deposition of musician Prince ordered subject to strict controls over dissemination).
[12] R. SHANE READ, WINNING AT TRIAL 4-5 (NITA 2007) (citing Jeffrey Zaslow, *First Impressions Get Faster*, WALL STREET J., Feb. 16, 2006, at D4).
[13] FED. R. CIV. PROC. 26(a)(2).
[14] CODE CIV. PROC. §2034.270. *See also* CODE CIV. PROC. §2034.210(c).
[15] CODE CIV. PROC. §2034.280(a).
[16] Shooker v. Superior Court, 111 Cal. App. 4th 923 (2003).
[17] *Id.*
[18] Braun v. Lorillard, Inc., 84 F. 3d 230, 238 (7th Cir. 1996). *See* Fed. R. Civ. P. 26(a)(2)(B)(v), advisory committee's notes to 1993 amendments.
[19] FED. R. EVID. 702(3).
[20] *See* Chalais v. Milton Bradley Co., 1996 WL 312218 (S.D. N.Y. 1996) (description of Jenga game and its noninfringement of plaintiff's patent).
[21] DAVID M. MALONE, DEPOSITION RULES 83 (2005).
[22] FED. R. EVID. §612(b).
[23] FED. R. CIV. P. 26(b)(3). *See generally* Hickman v. Taylor, 329 U.S. 495 (1947) (Information obtained or prepared by or for attorneys for use in litigation is protected from discovery under the work product doctrine.).
[24] FED. R. EVID. §612.
[25] EVID. CODE §771.
[26] *See, e.g.*, International Ins. Co. v. Montrose Chem. Corp., 231 Cal. App. 1367, 1372 (1991).
[27] *Id.* at 1370.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1372.
[32] *See, e.g.*, Sullivan v. Superior Court, 29 Cal. App. 3d 64, 68 (1972).
[33] FED. R. CIV. P. 26(a)(2)(B)(ii), (b)(4), advisory committee's notes to 2010 amendments.
[34] FED. R. CIV. P. 26(b)(4)(C).

103 PROPRIETY OF COMPENSATING A NON-EXPERT WITNESS IN A CIVIL ACTION

Replaces Formal Opinion 44.
Adopted December 19, 1998.

Introduction and Scope

Attorneys routinely compensate expert witnesses in civil actions for expenses incurred by the experts in preparing for and testifying at trials, hearings and depositions and for the experts' time expended in testifying and preparing to testify. Often, non-expert witnesses in civil actions also ask to be compensated for their expenses incurred and for their time expended in testifying and preparing to testify. This opinion addresses the issue of whether an attorney ethically may compensate a non-expert witness in a civil action for the expenses incurred by the witness in testifying at a trial, hearing or deposition and for the time expended by the witness in testifying and preparing to testify at a trial, hearing or deposition in a civil action. This opinion does not address the issue of witness compensation in a criminal case.

Syllabus

An attorney ethically may reimburse a non-expert witness in a civil action not only for expenses incurred in testifying at a trial, hearing or deposition, but also for the reasonable value of the witness's time expended in testifying and in preparing to testify, so long as such reimbursement is not contingent upon the content of the witness's testimony or the outcome of the case and is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

Analysis

Rule 3.4(b) of the Colorado Rules of Professional Conduct provides that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

Comment [3] to this Rule states:

> With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

This Colorado Rule and its Comment [3] track Rule 3.4(b) of the Model Rules of Professional Conduct (1983, as amended) and its Comment [3] identically on this issue. The American Bar Association Standing Committee on Ethics and Professional Responsibility has published a formal ethics opinion interpreting Model Rule 3.4(b). ABA Formal Opinion 96-402 (8/2/96). In that opinion, the ABA reasoned as follows:

> Reading Comment [3] literally, compensating a witness for loss of time which he could have devoted to other pursuits does not constitute payment of an "expense" incurred by the witness. Nor, on the other hand, does compensating a witness for his loss of time amount to paying him a "fee for testifying." Indeed, the precursor of Model Rule 3.4, DR 7-109 of the Model Code of Professional Responsibility, expressly permitted "reasonable compensation to a witness for his loss of time in attending or testifying," [footnote omitted] and there is nothing in the history of Rule 3.4 to indicate that the drafters of the Model Rules intended to negate this concept by using the language that they did. In addition, such compensation is implicitly authorized by certain statutes and court decisions. See, for example, 18 U.S.C. Section 201 (j), which provides that payment to lay witnesses for "the reasonable

> value of time lost in attendance at any such trial, hearing or proceeding" do not violate federal bribery statutes. The Committee therefore concludes that payment for loss of time is not prohibited by Model Rule 3.4.

The Colorado Bar Association Ethics Committee agrees with the reasoning of the ABA.

The precursor of the Colorado Rules of Professional Conduct, the Colorado Code of Professional Responsibility, was identical on this issue to the Model Code cited in the ABA Opinion. DR 7-109(C) stated:

> A lawyer shall not pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
>
> 1) Expenses reasonably incurred by a witness in attending or testifying.
>
> 2) Reasonable compensation to a witness for his loss of time in attending or testifying.
>
> 3) A reasonable fee for the professional services of an expert witness.

Colorado statutes specifically provide for the payment of fees and mileage expenses to witnesses. C.R.S. §§ 13-33-102(1) through 102(3) set forth fees that witnesses shall receive for their attendance in various courts in Colorado. C.R.S. § 13-22-102(4) provides that witnesses called to testify regarding opinions founded on special study or experience in any branch of science or to make scientific or professional examinations and state the result thereof shall receive additional compensation. C.R.S. § 13-33-103 sets forth mileage fees that witnesses shall receive. These statutes do not prohibit compensation to witnesses in excess of the amounts specified.

Furthermore, compensating a witness for a reasonable amount of time spent preparing to testify, such as time spent reviewing and researching records that are germane to his or her testimony or time spent in pretrial interviews, is not prohibited by Rule 3.4, so long as it is made clear to the witness that the compensation is not for the substance or efficacy of the witness's testimony, but solely to compensate the witness for the time he or she expended in order to give testimony. ABA Formal Opinion 96-402 (8/2/96); State Bar of Arizona Committee on the Rules of Professional Conduct, Formal Opinion 97-07 (10/31/97); State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion RI-117 (2/24/92); Illinois State Bar Association, Advisory Opinion 87-5 (1/29/88). *Compare* Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 95-126 (9/26/95) (disfavoring compensation to non-expert witnesses for time invested in preparing for testimony).

There are, however, ethical limitations on compensating witnesses. Rule 3.4 explicitly prevents an attorney from offering an inducement to a witness that is prohibited by law. Furthermore, compensation paid to a witness must be reasonable so as to avoid affecting, even unintentionally, the content of the witness's testimony. ABA Formal Opinion 96-402 (8/2/96).

In *People v. Attorney A*, 861 P.2d 705 (Colo. 1993), an attorney, in an effort to save his client's privilege to drive, improperly offered to have his client plead guilty in a criminal case to the original charge of driving under the influence of alcohol, rather than the lesser charge of driving while ability impaired, if the arresting officer would agree not to appear at a license revocation hearing arising from the client's refusal to submit to a blood-alcohol test. The Colorado Supreme Court ruled that the attorney should be disciplined because his conduct was prejudicial to the administration of justice, in violation of DR 1-102(A)(5) of the former Code of Professional Responsibility.

In *People v. Belfor*, 591 P.2d 585 (Colo. 1979), the Colorado Supreme Court suspended an attorney for one year for paying a judgment that had been entered against a witness in a separate civil action as either a gift to the witness to induce him to provide testimony favorable to the attorney's client, or a loan with a contingency that it would be forgiven if the witness testified favorably. The Court found that the attorney's conduct violated DR 7-109(C), as well as several other provisions, of the former Code of Professional Responsibility.

Colorado statutes also make it a crime to bribe a witness, intimidate a witness or tamper with a witness. *See* C.R.S. §§ 18-8-701 through 18-18-708.

Other jurisdictions have held that in certain circumstances the compensation paid to non-expert witnesses was improper. In *Committee on Legal Ethics of the West Virginia State Bar v. Sheatsley*, 452 S.E.2d 75 (W. Va. 1994), the court publicly reprimanded an attorney for acquiescing in the payment of money to a witness in a racial discrimination case if the case was decided favorably to the attorney's client, or if all proceedings were voluntarily withdrawn by the complainant.

In *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F.Supp. 1516 (S.D. Fla. 1994), the court held that an insurer's attorneys violated Rule 3.4(b) by acquiescing in and actively assisting in the payment of substantial sums to two fact witnesses in a case involving insurance coverage for the theft of over $9 million worth of gold. One witness negotiated payments totaling $260,000 for his participation in the civil action, including $95,000 for giving two depositions, $65,000 for living expenses, and $100,000 as a reward for original information. The other witness was paid $25,000 for giving a deposition, $25,000 for original information, $22,000 for living expenses, and $72,000 for agreeing to appear to testify at a criminal trial. Payment was contingent on three conditions: (1) the testimony had to be truthful; (2) the testimony had to be material; and (3) the testimony had to be helpful to the insurer in the defense of the civil action. *Id*. at 1524-25. The court stated that Rule 3.4(b) clearly prohibits a lawyer from "paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice." *Id*. at 1526. The court concluded that the insurer's repeated payments of substantial sums of money to the witnesses had an effect on the testimony they gave. That the insurer's willingness to pay was contingent on the condition that the testimony had to be helpful to the insurer in its defense of the civil action made "even more pronounced the subversive and egregious nature" of the insurer's and its counsel's actions. *Id*. at 1526.

In *Wagner v. Lehman Brothers Kuhn Loeb Incorporated*, 646 F. Supp 643 (N.D. Ill. 1986), the court ruled that an attorney violated DR 7-109(C) of the Code of Professional Responsibility by acquiescing in his client's agreement to pay a witness up to 20 percent of his potential recovery in return for the witness's testimony. *Id.* at 656.

In determining the reasonableness of the compensation paid to a witness, the attorney must determine each situation on an individual basis, based on all relevant circumstances. ABA Formal Opinion 96-402 (8/2/96). As stated by the New York State Bar Association Committee on Professional Ethics:

> We must attempt to draw the line between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to "influence" witnesses to "remember" things in a way favorable to the side paying them.

New York State Bar Association Committee on Professional Ethics, Opinion 668 (6/3/94). For this reason, compensation to a witness ethically may not be contingent upon the content of the witness's testimony or the outcome of the case.

What is a reasonable amount may be determined easily for a witness who is paid on an hourly basis and who actually has lost wages due to time away from work. If the witness is salaried and is paid by his or her employer despite missing time from work, the attorney paying the compensation should attempt to determine if the employer, rather than the witness, should be reimbursed for the witness's time away from work.

The determination of reasonableness may be more difficult where the witness is self-employed, retired, or unemployed. This Committee will not attempt to define what is reasonable compensation in all circumstances, as that is a fact-specific determination that will vary from case to case. Ethics opinions from other jurisdictions, however, provide some guidance on the matter. "Possible objective bases upon which to determine reasonable compensation might include the witness' rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity." California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1997-149 (1997). Reasonable compensation may be determined by considering what the individual could expect to be paid in the ordinary course of his or her profession or business. New York State Bar

Association Committee on Professional Ethics, Opinion 668 (6/3/94). However, "a fee that is too high will tend to appear as an improper, unethical inducement," and "a fee may appear unreasonable if the fee is so high that the witness is 'better off' than she would have been if she spent the time otherwise earning an income rather than testifying or preparing to testify." State Bar of Arizona Committee on the Rules of Professional Conduct, Formal Opinion 97-07 (10/31/97).

An attorney should keep in mind that compensation paid to a witness may be discoverable in the course of the litigation, and evidence thereof may be admissible at trial. Even though compensating a witness ethically may be permissible in a civil action, such compensation is not necessarily advisable in any and all circumstances. Furthermore, this committee expresses no opinion on the legal question of whether compensation paid to a non-expert witness is recoverable as an item of costs. *See Cherry Creek School District v. Voelker*, 859 P.2d 805, 812-14 (Colo. 1993); *Crawford v. French*, 633 P.2d 526 (Colo. App. 1981).