Expert Reports: Should Lawyers Keep Hands Off?

By Robert Ambrogi

Hands off or hands on? That is the question for litigators and experts alike as to the lawyer's role in writing the expert's report.

The answers lawyers give to that question are anything but black-and-white. Rather, many trial lawyers see their role in the report as a matter of nuance, finessed through experience. Whereas the expert is skilled in a subject, they say, the lawyer is skilled in storytelling. The lawyer's job is to ensure that the expert's report conveys both the subject and the story.

"It is an art, I want to stress," says Michael J. Abernathy, chair of the Intellectual Property Department at Bell, Boyd & Lloyd, Chicago. "You have to be involved in this without crossing the line in terms of improperly molding the expert's opinion."

Federal courts require a written expert report pursuant to Rule 26 of the Federal Rules of Civil Procedure. State court rules vary in their requirements for a report. Rule 26 explicitly states that the report is to be "prepared and signed by the witness."

But does Rule 26 mean the lawyer must give the expert *carte blanche* in writing the report? Lawyers generally agree it does not, but they do not necessarily agree on the appropriate degree of their involvement. The danger of a lawyer's over-involvement is that it opens the report to impeachment.

"I would rather have a very objective report with minimal attorney input than a report which is overly managed by counsel," says Russell Boltwood, vice president of licensing and intellectual property at UTStarcom Inc. in Alameda, Calif. "Ultimately, a report which is heavily managed by attorneys for content will not likely withstand good impeachment by opposing counsel's experts."

At the same time, under-involvement is equally risky, exposing a lawyer to loss of control of the evidence needed to make the case. Andrew R. McGaan, a litigator with Kirkland & Ellis in Chicago, recalls his fear as a young lawyer of being too hands-on with an expert and how a mentor changed his view.

"A senior lawyer at my firm once said to me: Would you rather have it come out that you played a role in the opinion or would you rather have come out an opinion in which you played no role?"

McGaan has had no qualms about playing a role in the process ever since. It is a role he likens to that of a translator, one that will require more or less of his involvement depending on the experience of the expert.

"Whether the subject is chemistry or metallurgy or antitrust, you're taking someone who's not an expert in telling stories to juries," McGaan says. "Sometimes that means helping the expert to write the report, sometimes it means helping the expert to express it orally at trial."

In no case, however, would McGaan tell the expert what to put in the report. "The expert has to own it and defend it as their own with great conviction." He approaches his relationship with the expert as one of absolute transparency. "I tell the expert, 'Everything we're doing here, I welcome you to describe to the adversary.'"

Still, there is danger in merely the appearance that the lawyer too heavily controlled the report. Inevitably, the expert will be deposed and "may be asked about every draft, every sentence, and even every comma in it," says Joseph C. Markowitz, a trial lawyer in Los Angeles. "So, after a reasonably competent deposition, if it looks like the lawyer drafted the report, his supposedly independent expert testimony is not going to look so independent, is it?"

Vet the Expert Early

If it is important to have an expert whose report stays on message, then the better route is to properly vet and prepare the expert well before the report is ever written, lawyers agree.

"The trial lawyer's involvement in the expert witness's report should come at the vetting stage," suggests Justin Strother, a litigator in Houston. "Simply put, an attorney should not hire an expert who he or she does not confidently believe will write a favorable report."

It is also important for the lawyer to help the expert understand the broader theories of the case and the law that underlies them. In particular, the expert needs to understand how the law of the case relates to the report.

"I'm not shy about saying to the expert right up front, 'This is our position, are you capable of giving an opinion that A caused B or did not cause B?'" says Andrew McGaan. "I need to know how the expert will answer these questions."

In Vermont, where Richard Cassidy practices with the Burlington firm Hoff, Curtis, Pacht, Cassidy, Frame, Somers & Katims, judges require that an expert's opinion be based on a "reasonable degree of certainty." Cassidy represented a client who alleged he had been fired in retaliation for a worker's compensation claim.

In the underlying compensation case, which Cassidy did not handle, the medical expert wrote in his report that he could not say with a reasonable degree of certainty that the client's medical condition was related to his work. When Cassidy took over the case and met with the doctor, he discovered that the doctor had misunderstood the degree-of-certainty bar to be much higher than the law required.

"With the information I gave him, the doctor’s opinion was that the condition was in fact work related," Cassidy recalls. "After his deposition was taken, the case settled for a considerable payment."

There is a lesson in that story for all lawyers who work with expert witnesses, Cassidy believes. "The moral of the story is that you don't have to be a cynical manipulator to want to have considerable input into the expert's report. Great mischief can occur if you don’t have such input."

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