International Association of Defense Counsel

Trial Academy

A Field Guide to the Care and Feeding of Experts: Direct Examination

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Introduction

The purpose of this paper is to provide you with one individualôs view regarding the selection, care and feeding of an expertôs direct examination at trial. There are many sources of information regarding the topics covered in this paper and I would encourage you to take advantage of as many of them as you possibly can to develop a personal and successful approach to this task. Throughout this paper, we will review several topics, including: (1) some recommendations regarding the selection of experts; (2) critical elements in developing a working relationship with the experts you select; (3) concerns and issues which will arise during the deposition of your expert; and (4) thoughts regarding the preparation and execution of a successful examination at trial.

As we proceed, it is important for you to realize that the direct examination of an expert at trial is all about the witness and not the lawyer. The witness will be telling the story, or the portion of the story which you view as being critical to your case in chief. In my view, this is far different than a cross examination, which can, in many ways, pit the wit and intelligence of the cross examiner against that of the expert being examined. In other words, and in contrast to direct examination, cross examination typically becomes more about the lawyer than the witness.

The Selection Process

First of all, I think we should clarify some preliminary issues which sometimes are not addressed because they appear so obvious. These issues can be summarized in the following series of questions: Do I need an expert? What type of expert do I need? Who should I retain? While these questions seem to be painfully apparent, they are sometimes overlooked and/or not

addressed until after an expert has been retained and a fair amount of time and money has been spent. The failure to address these issues at the beginning may result in an ultimate decision not to use an expert at trial for reasons you should have discovered before he/she was retained. You also should be aware that in some jurisdictions if you retain an expert and they are identified in discovery but not used at trial, the fact that they were not used at trial can be commented upon by your opponent and/or can be the subject of an adverse jury instruction.

An expert is an individual with specialized knowledge either through training, education and/or experience, which enables that individual to offer opinion testimony at trial for the purpose of assisting the finder of fact in understanding a particular area or issue in which the individual has an alleged expertise. Thus, you did not need an expert if the opinion testimony is such that it is within the realm of understanding of the common person.

Assuming you conclude that you need an expert, the next issue to tackle is what type of expert should you retain. Obviously this will be case dependent. During this process, keep in mind that when representing a corporation or other business entity, it is imperative that you involve your client in every step of the analysis and selection of the expert. Your client may have had prior experience with particular experts or types of experts and that input will be critical in the selection process.

Once you have concluded that you need an expert and you have decided what type of expert that you wish to retain, you next need to identify appropriate candidates. There are several resources of which I recommend you take advantage to assist you in this process. For example, make inquiries within your firm and to other colleagues outside your firm that practice in the same area as you, consult an ñexpert bankò maintained by DRI and other organizations,

make inquiries with experts other disciplines that you have used in the past for recommendations, and of course, obtain whatever information you can from your client with respect to their individual experiences as well as their industryôs experience of a particular expert or type of expert.

After you have compiled a list of potential experts, you must analyze each candidate from the standpoint of whether their personality will fit within the theme of your case and their potential effectiveness as a communicator of the portion of the story that you will tell through them. You must carefully evaluate the candidateôs strengths and weaknesses, which can be accomplished in several ways. The first and most obvious way is during an interview with the candidate. Make sure that you ask some difficult questions. Probe whether or not the expert will provide honest answers or if their responses are sufficiently pliable that you feel you may have some future difficulties with them. Ask them for a copy of their FRCP 26 list. Contact the attorneys that have retained the candidate in the past and seek honest input from them.

You should also make a point of asking the candidate about his/her *Daubert* history. Have they been challenged? How often? Which jurisdictions? Are the subject of any court opinion, and if so, where? What were the nature of the *Daubert* challenges? What were the results of those challenges? While this can be a difficult conversation to have with an expert, it nonetheless must take place. In addition, you should conduct searches on relevant data bases on your own. You can be assured your opponent will certainly do so.

Additionally, I suggest that you read any prior testimony of the candidate that you can locate. Your opposing counsel will no doubt do the same and having a general idea of the areas in which your candidate has testified in the past may help you make an ultimate determination of

whether or not to retain that individual. There are several sources for this type of information. You can inquire of expert banks, other counsel and possibly your client for this type of material. Consider requesting a copy of the expertôs transcripts to add to your file in case an issue arises. If the expert is reluctant to give you that information, that should be a warning to you that there may be something in those records about which the expert is less than enthusiastic. That in and of itself should tell you that you need to get a copy of those transcripts to review.

If the expert has received graduate degrees, thoroughly investigate the subject of any thesis that the expert has authored or research conducted. If the expert has published, it will be important for you to determine which publications have been peer reviewed and which have not. Obtain copies of the material and include it in your file. If the list of publications is reasonably modest, read each of the publications with care. If the list of publications is extensive, however, which oftentimes it is, inquire of the expert which are the works that have even marginal association with the task being assigned in your case and then read each and every one of those articles. You can be certain that your opposition will be doing so in the hopes of finding information which may arguably be contrary to the opinions that will be expressed on your clientôs behalf by your expert and/or may tend to give credence to the opinions being expressed by your oppositionôs experts. You must to be equally familiar with your expertôs publications.

If the expert that you are considering is someone who is new to you and you have not been able to generate a sufficient body of information regarding the individual, there are several services that you can take advantage of in order to independently confirm your expertôs training, background and experience. One source is through the IADC, another is the DRI, and other services such as IDEX, which will search their data base for information on the testimony of any

expert. Other preliminary matters which should be reviewed include bias-related topics, such as how often has the individual testified on behalf of your client or the industry to which your client belongs, how often has the individual testified for you or other members of your law firm, and whether the witness has ever testified for ñthe other side.ò

It should come as no surprise that experts are expensive. Regardless of whether you are representing a corporate client or an individual, it will be important for you to obtain as much information as is reasonable from the expert regarding the potential budget for the amount of work involved in your particular case. Whenever possible, try to get an approximation or a range from the expert as early in the selection process as you can. Many corporate clients now require an expert budget and place a great deal of pressure on counsel to make sure that the expertôs activities fall within that budget. This also enables counsel to avoid the ñsticker shockò that may occur should the clientôs expectations with respect to expert fees be less than reasonable.

The Care and Feeding of Experts

Once a decision is made as to the type of expert to hire, the interviews have been conducted and the expert has been selected, there are a few guiding principles which will assist in a smooth and hopefully beneficial relationship with the expert.

The *first* item that you must consider is the frequency and type of communication you intend on having with the expert. While jurisdictions differ, by and large the communications that you have with your expert must be viewed as potentially discoverable. If you treat everything that you say and do with the expert as potentially discoverable, your life will be a lot easier.

A word about e-mail and experts. If you communicate with your expert using e-mail, avoid the casual time in which e-mail is often phrased. The e-mail should be written as if it were to be read to a jury, opposing counsel or the court. The obvious reason that it very well might. Also when working with larger consultant groups or organizations, make sure you understand their policies regarding retention and production of email. Some organizations transcribe voicemails into an e-mail format and place it in the file. Some also maintain e-mail between various members of the consultantôs internal team. Having a clear understanding of the manner in which e-mail will be addressed can avoid potentially embarrassing or sanctionable situations.

Establish specific tasks and a time line for both yourself and the expert regarding any assignments in the case. For many clients it is also helpful to use the time line and task overview as a tool to establish a budget for the expert. More and more sophisticated clients are becoming fairly aggressive in maintaining their economic exposure to consultants. Establishing a budget early, and reviewing it often, can help to prevent future problems.

It also can be helpful in certain circumstances to formalize the retention of the expert by way of correspondence. The correspondence should be sufficiently self-serving in the event your opposition attempts to introduce it as an exhibit during trial. It should merely reflect that the expert has been retained at a specified hourly rate in order to provide independent consulting services regarding the analysis of an issue defined broadly within the scope of their training, education and experience.

I believe in preparing a ñcare packageò for each expert that is retained. The care package should include documents and file material which is particularly important to that individualôs area of expertise. Anytime an important event occurs during the life of the file, subsequent to the retention of the

expert, make sure that consideration is given as to whether or not the expert should receive the material that has been generated. If one is to err, err on the side of providing too much information rather than too little. Experts should have sufficient background and experience to know what is particularly critical to their analysis and that which is not. If you begin to edit what is forwarded to the expert, you will face the ñpuppetò theme on cross examination – namely, the accusation that the lawyer controlled everything the expert had and the expert simply regurgitated that which the expert was provided by the lawyer. This can be a damaging position to be in at the time of trial and one that should be avoided.

If the expert is going to be involved in any sort of testing or experimentation, several new issues arise. First, budgeting the expertôs activities will most likely be mandatory. You also must determine how to handle the testing protocol, the data generated, the manner in which the data is reported, and the conclusions reached from the data. You must also consider how certain you are that the testing will work out in a fashion that will be helpful to the expert, you and the client. Additionally, any testing will most likely require direct involvement by the client and the resources the client can bring to bear.

In many jurisdictions, a report from the expert must be prepared and tendered well in advance of trial, either in lieu of or an addition to the expertôs deposition. You should make sure to check the local rules with respect to the specific requirements of the report and ensure your expertôs report is in full compliance.

Prior to the expertôs deposition, you should meet with the expert and confirm that the task to which the expert has been assigned has been completed and the expert is in a position to render final opinions. You need to review each of those opinions and the basis for those opinions with a clear view as to how they fit within your theme of the case. In addition, you should discuss what the expert may need with respect to exhibits or audio visual aids in order to enhance the presentation at trial. Give some critical thought as to whether or not those exhibits and aids are

prepared in advance of the deposition or if final preparation should wait until a time closer to trial (but that still allows you the opportunity to list them as exhibits and avoid any initial foundational objections).

You also should consider whether or not a meeting with the expert a day before the deposition is necessary. Your familiarity with the expert, as well as the expertôs tasks in the matter, will govern the need for such a meeting. At such a meeting, I would review any new developments in the matter, and I would again review the expertôs opinions and the basis for those opinions. You also need to be mindful that in some jurisdictions a time limit has been placed on depositions. Should you practice in such a jurisdiction, make sure the expert is clearly aware of any existing time limitations.

Preparing an expert for deposition is a topic which could be the topic of several papers and a thorough treatment is well beyond this effort. Nonetheless, I would like to review a few thoughts and considerations. The time method and timing of deposition preparation are in many ways dependent upon experience of counsel as well as the opponent. With respect to direct examinations, the expert witness is there to teach the jury about a specific element or issue in the case. In order for you to prepare a tight, thorough and interesting direct examination, the first step in the process will be to have the expert teach you during the deposition preparation you need to thoroughly investigate and probe the expertôs opinions and the basis for those opinions. You need to investigate where the weak points may be, what additional work might be necessary and where demonstrative aids might assist the jury in understanding the teaching points expressed by your witness. In addition to all of this, you also must prepare the witness, and yourself, for cross examination. This requires asking pointed questions, challenging opinions

and the basis for opinions and otherwise testing not only the witnessôs opinions and expertise, but their demeanor as well. You may wish to explore peripheral issues involving their lack of industrial experience, academic qualifications and the like as well.

Needless to say, this type of preparation can be difficult. Consider suggesting that another colleague play the role of the cross examiner. Allow that individual to prepare and go after your witness while you defend them. This helps season the witness without requiring you to be the antagonist. You may want to also consider videotaping segments of this type of preparation so that when you have breaks and discuss areas of difficulty you can play the testimony back and review it with the witness. By the end of your experience at the Trial Academy, youôll be very familiar with this process!

I would suggest that if you are going to process with an in-depth cross examination preparation session that you do it well in advance of the deposition itself. In my experience these types of preparatory sessions can be extremely valuable but oftentimes takes some time for the positive aspects of the experience to settle with the witness. Also if there are areas of weakness or exposure that come to light during this exercise, it permits an opportunity for counsel and the witness to address them in advance of a final preparatory session before the deposition.

Typically the expertôs file will be requested at the deposition. It is important to give yourself time to go through the file prior to the deposition in order to determine whether or not there are any protected documents in the file. If you elect to remove any documents from the expertôs file, you must be in a position to defend your actions should you be challenged. Accordingly, it will be important for your review the applicable rules relative to the attorney

work product doctrine and/or any other applicable privileges you may assert in your specific jurisdiction.

During the deposition itself, I suggest that you keep your objections to a minimum. Typically consultants have sufficient experience in the litigation process that they require reasonably little control or direction from counsel. Of course there are always exceptions to this rule and you should be mindful to consider the litigation experience of your consultant when determining how active you intend to be at the deposition. Examples of areas where you may have to become involved to protect the witness include salary information, as well as income generated from litigation support activity.

Trial

As with everything else, preparation is a condition precedent to success. Right before trial it will be important for you to address certain issues in order to minimize anxiety and surprise.

First, visit the court room in advance of trial with an eye to the following: where to set up any audio visual aids; how large is the ñpitò for exhibits; where are the electrical outlets; how much set up time will be necessary for the audio visual aids and/or demonstrations; where is counselôs table, the jury box and witness box, and how do they relate to the positioning of exhibits; as well as where will you be able to position yourself during the examination.

As mentioned above, direct examinations are all about the story and the witness and not the lawyer. You want to be positioned so that the interaction between the witness and the jury is comfortable and non-threatening. Keep in mind that jurors tend to be very protective of their personal space when they are in the jury box. Encroaching on that space can make the jurors

uncomfortable, and possibly even offended. Should that occur, the jury may not listen to your witnessesô testimony and will have a negative impression of you and the witness, and thus your client as well. When possible, I prefer to work from a podium positioned away from the jury box but in such a fashion that when the witness looks at me to answer questions, the witness will invariably make eye contact with the jurors. Obviously this can only be done in those jurisdictions and courtrooms where the judge will permit counsel to move. It adds to the level of difficulty when dealing with courtrooms where counsel is restricted to the table or podium and is not permitted to move without permission. It is critical that you find out ñthe lay of the landò in that regard as soon as possible so that you can prepare yourself and your witness accordingly.

Another word to the wise with respect to audio visual equipment is to practice with it and be totally comfortable with how it operates. In light of the stressful nature of trials, you do not want to find yourself in a position where you are trying to determine for the first time how to operate a program. In addition to practice, backup equipment also is critical should there be any sort of failure. When using projectors, laser pointers and the like, replace all batteries and bulbs in advance of trial to minimize the chance of a failure. If you intend to use video tapes, make sure they are cued and ready to go. Always remember that ñMurphyôs Lawò applies - things that can go wrong, will go wrong, and at the worst possible moment.

If the matter justifies the expense, consider retaining a vendor to support and run all type of technical presentations. While you will need to work with these individuals in order to insure that the presentation is run smoothly, the relief of not having to deal with the equipment itself is significant, and in my view represents money well spent.

Make sure all of the exhibits that you intend to use with the witness have been marked, transported to the courtroom and arranged in the order that you intend to use them. This should minimize chances for interruption or gaps in your presentation. If you are trying a case in a jurisdiction that requires exhibit books, make sure that one is prepared for both your opponent and the court.

Do not be surprised if your opposing counsel has exhibits which they have strategically placed around the courtroom. Take the time to move those exhibits and materials before your expert is called to testify so that the focus of the jury is on the material that you will be using with your expert.

If you will utilize articles and learned treatises of any sort, make sure that you have copies to be disseminated to the court and opposing counsel if and when needed.

Your direct examination outline should be prepared initially once the expertôs work has been completed and the expertôs opinions have been provided either by way of deposition and/or report. Your outline should be, to use a popular term, a living document. You should revisit it often and make the changes that you think are appropriate, realizing that significant portions of the outline may change prior to its actual use at trial. In essence, the outline acts as a tool, offering discipline to your thinking, trial theme and your clientôs story.

Once the expertôs deposition has been conducted and the exhibits have been prepared, make arrangements to meet with the expert to review the examination. This should be done sufficiently in advance of trial so that if you need to make changes in your outline or additional exhibits need to be prepared, this can be accomplished without too much difficulty. Nothing can compare to the time that you spend with the expert preparing the expert. The rapport that you will develop with the expert and the

comfort that the two of you have during the examination will go a long way to achieving the goal of making the witness and the story more important than the lawyer.

When reviewing the direct examination with your witness, also spend time preparing him/her for cross examination and trial. Invariably there have been changes in the focus in plaintiffôs case at trial. Witnesses that were less critical during discovery have now become pivotal. Witnesses have expanded their views and opinions on the witness stand and the areas of cross examination for your witness may no longer be the same as when they were deposed.

Incorporate into your outline the specific points during the examination where you will use an exhibit. If you expect any evidentiary problems, note that on the outline and then prepare an insert for yourself that you can page to quickly should the anticipated evidentiary issue arise during trial.

Trial Examination

Having discussed proper trial preparation, it is now time to address the examination itself, focusing initially on the more general aspects of the examination and its preparation. First, it is axiomatic that you must know the material cold, both the facts as well as the examination. Your knowledge of this will go a long way to minimizing your anxiety and increasing the quality of the examination.

The examination should be focused and tight. Whatever the discipline involved, make sure that the expertôs examination is oriented to the expertôs task and role in the litigation and the support of your theme. Extraneous material not only distracts from the impact of your examination, but also undoubtedly will lead to problems on cross examination.

You should also consider the texture of the examination. By that I mean the tone of your voice and how the questions are asked of the witness. I find myself to be far more conversational during the

direct examination. In fact, I try to be as calm and considerate as I can. Each of you must find a style which fits your personality and works best for you.

It goes without saying that you cannot, and frankly should not, ask leading questions during a direct examination. While acceptable for certain background or preliminary matters, it nonetheless can leave an impression with the jury that the witness is merely the lawyerôs puppet.

Thorough preparation, attention to detail and familiarity with the material all will enable you to do something that you hope the jurors will do as well - listen to the expert. At one point or another during your examination, you will be surprised. An answer will be a little different than you have heard it before, the expert will forget to include something that he has reviewed, etc. The only way you will be able to catch these surprises and repair them is if you have been listening to the witness and not focused on composing the next question. I know it sounds obvious, but you would be surprised how many very talented lawyers become so enthralled with the questions that they forget to listen to the answers!

It is equally important to keep the examination moving. For example, during qualifications, you want to make sure that you avoid any potential objection or motion and you want to make sure that the jury understands the level of expertise being brought to bear, but you need to weigh that in light of the short attention span of the jury. You must remain flexible and able to move with the flow of the examination. All of this can be greatly assisted with the use of audio visual aids. Do not, however, inundate the jury with a series of demonstrations or exhibits. Try to sprinkle them throughout the examination so as to keep the jury interested and involved in what the witness is saying and the story being told.

Every now and then you will find yourself tendering an expert who may have some ñbaggage.ò Once you have made the decision, along with your client, that the benefits outweigh

the risks in tendering this witness, you have to decide how you are going to deal with the attendant baggage. My suggestion is to deal with any ñbad stuffô up front during the direct examination. It cushions the effect of the information on the jury should they hear again during cross and, depending upon the nature of the issue, your opponent may not further address the issue on cross to avoid appearing abusive. Keep in mind that the only way you can find out about this type of information is if you have done your research during the consideration or retention stage.

Attached to this paper for your review are two direct examinations of experts which were actually conducted during a trial. The purpose of attaching these transcripts is not to suggest that these examinations are particularly awe-inspiring, but rather to provide you with examples of a particular style of direct examination. Both of these examinations were conducted with the assistance of an outline and using the guidelines which have been described in this paper.

Obviously once the witness is sworn and is sitting in the box, the first thing to do is ask the witness to introduce him or herself to the jury. Thereafter, it becomes important for the jury to get to know the expert both as an individual, as well a person of specialized knowledge to whom the jury should listen. To accomplish this, I typically begin with the expertôs background. You may wish to concentrate on their professional standing and then track back into educational and academic positions, or vice versa. The importance of this dialogue is to demonstrate to the jury that this individual is someone who can help them come to the right decision on a specific issue.

Also during this time, I address the ñconsultingò issue. Much has been said and published regarding ñjunk scienceò and in some jurisdictions, juries bring a healthy cynicism with them to

the courtroom, especially when listening to opinion testimony. It is important to establish that the consultant is not being paid for his testimony, but merely for his time as anyone else would be paid. Ask the expert to tell the jury the expertôs billable rate. Keep in mind that many consultants who work for various specialty firms can and do testify as to rates *the company* charges for their time. This nuance distances their own person remuneration from the issue and I recommend that you use it whenever it is available.

You also should review with the witness whether or not the expert has worked for you, your law firm or your client before, and if so, on how many occasions. To the extent your consultant has worked for both plaintiffs and defendants, you should review that as well. It is not uncommon for a liability consultant to work primarily for plaintiffs or defendants with very little cross over. There are a couple of ways to handle this issue. One way is for the expert to indicate that the expert does not have predisposition to turn down certain types of assignments, but rather, the expert has not had the opportunity of being offered assignments for ñthe other side.ò Another technique which I have seen successfully employed is for the expert to indicate that the expert could not take a case for the opposition against an industry for whom the expert has been substantially employed because, in the expertôs view, this would present a conflict of interest. Regardless of the position in which you may find yourself, it is nonetheless a topic which you must handle during direct examination to minimize any potential impact that it may have on cross.

Once you have addressed the preliminary matters up to and including qualifications and expertise, you then reach the point in time where you will begin asking the witness case specific questions. Be aware that different jurisdictions handle the transition from qualifications to

opinions differently. In some jurisdictions, an opportunity is provided for your opposing counsel to voir dire the witness regarding qualifications. In some jurisdictions it is the custom and habit for the attorney proffering the expert to announce to the court whether the attorney seeks to have the witness qualified as an expert in the field and therefore able to offer opinion testimony. My admitted preference, where permitted, is to merely move forward with the case specific testimony.

With respect to my expert, I try to avoid any voir dire on the expertôs qualifications prior to the opinion testimony because it throws the expert off rhythm and it interrupts the examination, all the while providing your opposition an opportunity, if done properly, to minimize the impact of your witnessôs testimony by raising questions about the consultantôs experience, training, or background. Indeed, there are a number of judges before whom I have practiced who would find the request from counsel regarding qualifications as being nothing more than a blatant attempt to condition the jury. I would suggest that you investigate the particular jurisdictions, and more specifically your particular judge, in this regard well in advance of trial and prepare yourself and your expert accordingly.

Regarding case specific questions, I typically start with the date that the consultant was retained. I then request that the expert tell the jury what the expert was told, the extent of the expertôs assignment, and what the expert has done. This should include a discussion of all of the materials reviewed. If possible, you want the expert to be able to testify during direct examination that there was nothing that the expert asked for that was not provided. In other words, there was nothing the expert was told the expert could not do. As much as possible, you want to convey the impression that the consultant has undertaken an independent analysis of

those issues in the case which fall within the expertôs expertise and the expert is prepared to provide opinion testimony regarding those issues.

Once that has been completed, you then should ask whether or not the expert has formed any opinions as a result of the expertôs expertise. Obviously the answer will be in the affirmative. You should further inquire as to whether the opinions are in final form and depending upon the situation, you may ask an expert whether or not those final opinions were conveyed to you or anyone else prior to trial. This will afford you the opportunity, in those cases where it is appropriate, for the expert to indicate that either a report was prepared or a deposition was taken in which the opinions about which the expert is about to testify have previously been provided to the other side.

I then typically ask whether or not all of the opinions expressed by the expert are held to a reasonable degree of certainty within the expertôs area of specialty. In many jurisdictions this is a requirement rather than repeating the question with respect to each separate opinion, and it is sometimes easier to get a global concession before delving into the specific opinions. Once you reach this point in the examination, I believe it is critical that any and all of the opinions expressed by the expert are documented by way of an exhibit in some fashion or another. Whether its handwritten, flip charts, ñpower pointò presentations, or blow ups with layovers, you need to show something that identifies and itemizes each of the opinions.

This is done for a number of reasons. First, it makes it easier for you and the witness to concentrate on each opinion and it keeps all of this information in front of the judge and jury. Typically, I then proceed with each of the opinions and ask the expert for the basis of each opinion. During this portion of the examination, if there is evidence and/or information that you

anticipate will be used on cross examination which is contrary to the position taken by the expert, you should ask whether or not the expert considered this information and if so, how. This helps to diffuse potential areas of concern on cross examination. You should also pay attention to how you list and proceed with the opinions. Its always wise to end on a positive note and a particularly strong one. As a result, you may choose to switch the order of opinions so that the last opinion is particularly impressive and/or compelling.

Once you have completed reviewing the opinions and the basis for the opinions, thank the expert and sit down. Typically I do not remove any of the exhibits or audio visual aids unless I feel that not to do so would appear discourteous. Opposing counsel then has a choice of either spending valuable time moving exhibits around or proceeding with cross examination while my supportive exhibits are visible to the jury.

The Law

A detailed review of the law concerning the qualifications of experts and the scientific legitimacy of their opinions is beyond the scope of this paper. Moreover, it is imperative that you familiarize yourself with the law specific to your particular jurisdiction, an analysis which simply cannot be conducted here. While recent amendments to the Federal Rules of Evidence have essentially incorporated *Daubert* and *Kuhmo Tire,* there are still several jurisdictions in the state court system which utilize *Frye* or some hybrid thereof You must be aware of the law as it applies in your jurisdiction, or you will lose credibility and, even worse, may find your expert disqualified.

With the applicable law in hand, review your expertôs background, training and experience with the same critical eye that your opposition will. Determine whether there are any weaknesses which your opponent can seize upon, and if so, thoroughly investigate them with your proposed expert. Inquire whether or not there is something either from their academic background, employment history, or otherwise, which might prove to be an issue as the trial progresses.

The following true story illustrates how this fairly apparent issue can sometimes be ignored by even skilled and experienced trial lawyers. An engineering expert had been used by defendants representing material handling manufacturers for quite some time. This individual had been employed within the industry for an extended period before establishing his own company providing consultation services which focused primarily upon litigation support. Not surprisingly, an important aspect of this gentlemanôs credentials was the fact that he was a Professional Engineer (P.E.). To become a P.E., an engineer must sit for an examination and then be employed as an engineer for a period of time before sitting for the second portion of the examination. If both aspects of the examination are satisfactorily completed, the engineer will become a licensed P.E. This particular witness became a P.E. while employed in the industry. His P.E. status was prominently indicated on his Curriculum Vitae and it had been mentioned in countless examinations, both at trial and in deposition.

During one particular trial, this individual was called as an expert for the defense. During the direct examination, counsel reviewed the individualôs credentials, including his Professional Engineerôs license. On cross examination, plaintiffs counsel asked all of the appropriate preparatory questions and then produced for the witness a certified copy of the records indicating

that he was no longer a Professional Engineer in the state in which he had professed having the license. Needless to say, this revelation damaged the witnessô credibility and thereby the ñstoryò he intended to tell on behalf of the defendant.

Subsequent to that trial, an investigation revealed that because the witness had received his P.E. while employed in industry, his then employer paid his dues and maintained his membership. When the witness left the company to start his own business, the company stopped paying the invoices and neglected to forward the invoices to his new address. The license therefore lapsed, without the witnessôs knowledge.

Despite the innocuous explanation, this gentleman still to this day is interrogated about the lapse at every trial in which he participates. Because the issue now is addressed as a matter of course during direct examination, however, it is not nearly as damaging as it was the first time discovered.

Conclusion

There is nothing about this paper that is written in stone. It is merely one individualôs perspective. Each of the areas of this paper are directed to topics which in and of themselves could, and are, the subject of chapters on advocacy. The objective in preparing this paper was simply to leave you with some food for thought. Should you take away only one thought from this paper, however, my hope is that you will always remember a direct examination of an expert is all about the story and the theme, and not about the lawyer!