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ARTICLES

When Your Expert Becomes Their Expert

By Robert L. Byman and Nathaniel K.S. Wackman – December 5, 2018

What should you do when your opponents discover that part of your expert's opinion actually supports the other side? Even worse, what should you do when your opponents decide that they like your expert's testimony so much that *they* want to offer it in their case?

Picture it: "Ladies and Gentlemen, don't take my word for it. Take the words of the expert retained by the defendants themselves, the distinguished doctor whose credentials are so unassailable that they agreed to pay $1,000 an hour for his opinions. And he dutifully came up with the opinion they happily paid for, but then he conceded there is the 'other hand.'"

Now, you know that under the Federal Rule of Civil Procedure 26(b)(4)(D) you have no obligation, absent a showing of exceptional circumstances, to disclose the identity, much less the opinions, of experts retained in anticipation of litigation who are not expected to be called as witnesses. So if you uncover the inconvenient opinion before disclosure, there should be no harm.

But what happens once you disclose the expert as a potential trial witness? Can you take it back? Can you stop your opponent from using your witness by saying that you no longer intend to call the witness? How about if you haven't filed the expert's report yet?

Luckily (or maybe unluckily, depending on what side of the equation you are on), there is a bright-line rule here: *Once a report is filed, the expert belongs to either side*. In other words, you can change your mind and shield a witness from discovery after disclosure and before a report is tendered; but once an expert's opinions are disclosed, they are fair game and can be used by either side. The mere revelation of the name of the witness doesn't preclude a change, of course, because a disclosure under the Federal Rules of Civil Procedure requires both disclosure of the identity of the witness *and* a written report containing the opinions. But the report is the point of no return.

Prior to 2009, the prevailing view was that one could change one's mind at any time. If a designating party withdrew its disclosed expert as a witness, the witness was magically reconstituted as a consulting expert immune from discovery. But an influential opinion from the U.S. Court of Appeals for the Seventh Circuit took the magic out of the equation when the court held that "[a] witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report has been disclosed. . . ." SEC v. Koenig, 557 F.3d 736, 744 (7th Cir. 2009) (Easterbrook, J.).

So what should you do if you have disclosed the expert's report and now your opponent wants to use that expert's opinion against you? At the very least, be sure to ask for an in limine ruling that no mention be made of who retained the expert. Courts and commentators have recognized that

this fact is "explosive" and can lead to "very substantial prejudice" to the retaining party (in this case, you). Rubel v. Eli Lilly & Co., 160 F.R.D. 458, 460 (S.D.N.Y. 1995) (quoting 8 C. Wright, A. Miller & R. Marcus, Federal Practice & Procedure, Civil § 2032)). It won't take all of the sting out of your expert testifying against you, but it will help. However, if the trial court rejects your motion in limine—even erroneously, in the appellate court's view—it is unlikely such a rejection will constitute reversible error. For instance, in *Peterson v. Willie*, the Eleventh Circuit held that "the district court erred in permitting . . . counsel to elicit the fact that [the expert] had been previously retained by [the other side]" but concluded that the error did not "rise[] to the level of substantial prejudice mandating a reversal of the district court's judgment." Peterson v. Willie, 81 F.3d 1033, 1038 (11th Cir. 1996). Thus, if you lost on the motion in limine, you should elicit whatever testimony you can in an attempt to soften the blow.

On the other hand, what if *you* want to use your opponent's expert against your opponent? Consider preserving the testimony in a deposition. The court may allow you to call the opposing expert. But how do you get him or her to trial? An expert is not a party opponent—the report is not an admission. Your opponent has no obligation to bring a nonparty expert to trial. If the expert is beyond the subpoena power and if you haven't deposed the expert, your attempt to turn the tables by using the other side's expert may get turned on you when the other side decides not to bring the witness to trial. Of course, all the usual caveats about deposing an opposing expert apply—including that you may not like the opinion so much after the expert gets a chance to explain it away at a deposition.

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