

Communicating With Your Expert (With Form)



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**Finding the right expert is just the beginning.
The rest of the job is about communication**

YOU HAVE DONE all your homework and have found a possible expert witness to help you prosecute or defend that major case that has been taking up all your time and attention. For just a brief moment, you breathe a sigh of relief. You've found the person you believe will help you win the case for your client. And then the reality hits you. Finding the expert was only the beginning. Now you need to communicate with the expert, provide her with file materials to review, work with her while she formulates her opinions, make sure that her report is in proper form, and provide the report to the other side within the deadlines imposed by the court or the applicable court rules. What follows are some practical suggestions about communicating with your expert and providing materials for the expert's review.

1. Inquire About Prior Disqualification

Questions about prior disqualifications should be part of the initial conversation you have with the expert when you are trying to figure out whether to retain the expert's services. On the off chance that prior disqualification does not come up during the initial conversation with the expert, it should be the first thing that is discussed with the

expert once the expert is retained and before he or she starts to do any work on the case. When I was a young lawyer starting out in practice, I retained an expert witness to offer opinions regarding the safety aspects of a product. I did not ask the expert if he had ever been disqualified from giving opinions in any prior cases. I told the partner I was working for who I had retained and he told me that he thought that the expert had been barred from testifying in a case in the federal court here in Chicago. I called the expert and asked him about it and he admitted that he had indeed been disqualified from testifying. Needless to say, we found another expert.

The lesson to be learned: do not be afraid to ask your expert if he or she has ever been offered as an expert in the past but not accepted by the court. If so, ask for an explanation of what happened. Ask the expert if he or she has a copy of the order excluding his or her testimony. If the prior disqualification is too high a hurdle to overcome, thank the expert for his or her time and find another expert.

2. Inquire About Conflicts

Again, a discussion about potential conflicts should take place before the expert is retained. In the event that no effort is made during the initial contact to discuss possible conflicts of interest or other bases for disqualification, every effort should be made to communicate with the expert about possible conflicts before the expert does any work on the case.

Several years ago, I was defending the owner of a large commercial property in Chicago in a personal injury case. The plaintiff in that case alleged that she fell in an elevator in the building and, as a result, developed multiple sclerosis. Co-defendant's counsel and I contacted one of the country's fore-

most experts in the field of neurology and asked him if he would serve as an expert witness for us in the case. We discussed the facts of the case and he indicated that the science simply did not support the plaintiff's claims. We did not discuss whether he had been consulted by anyone else in this case. We retained the doctor and sent him copies of all of the plaintiff's voluminous medical records, as well as dozens of deposition transcripts, witness disclosures, and other materials. Once we disclosed him as an expert witness, the plaintiff's attorney moved to bar

him from testifying on the ground that this particular doctor had been consulted by plaintiff's counsel at the beginning of the case and he could not now, having been

a consulting expert for the plaintiff, serve as a testifying expert for the defendants. We fought long and hard, but eventually the court barred the doctor from testifying for the defense — on the ground that he had previously consulted with plaintiff's counsel and was privy to plaintiff's counsel's opinions and theories of the case. We were required to obtain a different expert — something we could have avoided had we asked the doctor to perform a check to see if he had done any prior work related to this particular plaintiff.

Practice Pointer: Before retaining and sharing confidential information with an expert witness, inquire into the expert's previous employment and ask the expert to run a conflicts check.

3. Clearly Communicate With The Expert About Work To Be Done And All Deadlines

Never assume that the expert witness you engage to help you in the case will know exactly what you want done in the case. Explain in detail the exact issue or issues you want the expert to address.

The lesson to be learned: do not be afraid to ask your expert if he or she has ever been offered as an expert in the past but not accepted by the court. If so, ask for an explanation of what happened.

Make sure that your retained expert is very clear on what needs to be accomplished and monitor the expert's progress toward the goal. The last thing you want is to find out on the day the expert's report is due that the expert has gone down the wrong path.

Make sure that you communicate with your expert about the deadlines applicable to the work to be performed by the expert. If the court has entered a scheduling order that governs the disclosure of expert opinions, make sure the expert knows what the deadlines are and that he or she is prepared to meet those deadlines. Except in

cases of extreme emergency, you should not retain an expert at the last minute. Give the expert enough time to complete the work that needs to be done on the case and to prepare a proper report or disclosure. Just as important is to make sure that you communicate any deposition date and the trial date to the expert as soon as possible. You don't want to hire the best expert in the field, only to find out that he or she is committed to testifying in another case on the same day that you need him or her to testify in your case.

If cost is an issue, make sure that you have communicated with the expert about this particular topic. Define the expert's commitment of time. Ask the expert to commit to a budget and then follow up with the expert from time to time to make sure that the budget numbers are still within the realm of reality.

Practice Pointer: Do not be lulled into a false sense of security when a federal court judge fails to enter an order governing the production of expert witness reports. Federal Rule of Civil Procedure 26 contains a specific provision that governs the production of expert witness reports. Expert reports are to be provided at least 90 days before the date set for trial or for the case to be ready for trial.

4. Select The Right File Materials For Your Expert To Review

It never ceases to amaze me that attorneys still refuse to send their experts everything in the file to review before formulating their opinions (the exception is privileged material, which I will discuss shortly). Whenever I retain an expert witness and ask him or her to render opinions in the case, I send the expert everything in the case — and ask him or her to review it. If you do not send your expert everything in the case to review, you are setting the

expert up for a withering cross-examination at deposition or trial. Counsel for the other side will emphasize the fact that the “expert” formulated opinions without reviewing all the pertinent materials in the

case and will imply that the expert obviously formulated opinions without any concern for the facts that appear in the file materials.

I was defending a medical malpractice case some years back and I carefully read the opposing expert's report in preparation for his deposition. I noted when reviewing the report that the expert had reviewed very little before drafting his report. He had not reviewed all of the plaintiff's medical records. He had failed to review any of the depositions in the case, including the plaintiff's deposition and the deposition of the plaintiff's main treating physician. He had failed to review the plaintiff's complaint (so he really had no idea what the plaintiff's theory of liability was in the case), and he had not reviewed the plaintiff's (or the defendant's) discovery responses. Although the use of a medical device was at issue in the case, the expert had failed to obtain and review the operating manual for the device (despite the fact that the expert opined that my client had used the device improperly during surgery). All of this was used to maximum effect when the “expert” physician was examined at his discovery and evidence depositions.

Practice Pointers:

- Do not provide your expert witness with material that is privileged. Any material you provide to the expert witness is discoverable;
- Do not send the expert your personal notes or materials that have your personal notations on them;
- Do not send your expert summaries of depositions or witness statements, especially those that contain the lawyer's impression of the witness. All of these materials will have to be turned over to the other side before the expert is deposed;
- Do not send your expert scientific or other specialized literature. Sending this type of material gives the impression that all of the materials the expert relied on were provided by the retaining attorney — that the expert is simply a “hired gun,” saying whatever the attorney wants him or her to say. Ask the expert to do his or her own research into scientific principles.

Sometimes attorneys are tempted to exclude an item from the materials sent to the expert witness because that particular document or item is harmful to the attorney's case. Do not give in to this temptation. If you leave out what your opponent sees as a critical document, your expert will get cut to pieces on the issue of whether his or her opinions would have changed had he or she actually seen the document. Leaving out the harmful document or documents will also serve to draw attention to them. It is better to show the document to your expert and ask him or her to help you find a way to neutralize the effect of that particular piece of evidence.

If you have information to provide to the expert that is confidential or proprietary in nature, make sure that the expert is aware of that fact. Explain to the expert that this confidential material cannot be disclosed to anyone outside the litigation and can-

not be used or cited in research or journal articles. If the expert is required to sign a confidentiality order governing his or her review and use of the documents, make sure he or she is provided with a copy to sign.

Practice Pointers: Clearly identify all confidential or proprietary material you provide to the expert. Make sure that material is referenced in your engagement letter and remind the expert that it is not to be shared with anyone outside the litigation.

5. Give Careful Thought To Your Written Communications

Whenever I retain an expert witness and send the witness materials to review, I take care in drafting the letter that accompanies the materials. I have attached a sample retention letter as the Appendix at the end of this article. Some of the highlights of the letter are that I commit the expert to the engagement by thanking him or her for that commitment, I agree to pay the fee that he or she and I discussed, I inform him or her of impending deadlines, I highlight any materials that are privileged, I list out all of the materials that I am sending for review, and I inform him or her that I do not need a written report (a report would be required if the case was pending in federal court). The last two points are critical. Eventually, the expert will be deposed. When he or she is, it will likely be some time after I retained him or her. Neither the expert nor I will remember exactly what was sent to review. By listing out in the letter precisely what was sent, it will be clear at the time of his or her deposition what the expert reviewed before formulating his or her opinions. I ask the expert not to prepare a report since, at least in Illinois state court, draft reports are discoverable. If a report will be prepared at some time down the road, I want to make sure that I have

talked through the expert's opinions and the bases for those opinions before they find their way into a written report.

Again, keep in mind that at least in Illinois state court, these communications with the expert witness will be subject to discovery and review by counsel for the opposing side. For that reason, I avoid including any language in communications with my expert witnesses that suggest that the experts come to certain conclusions about the case. I make sure that the letters that forward materials for review are not accompanied by any analysis or comments from me about the evidence or what I think it shows.

Practice Pointers:

- Any letter that you send to your retained expert should be written using neutral expressions so that they do not suggest conclusions that may compromise the expert;
- Forwarded materials should not be accompanied by analysis or commentary.

Be aware of the fact that certain changes to the Federal Rules of Civil Procedure took effect on December 1, 2010. Under new Fed. R. Civ. P. 26(b)(4)(C), communications between testifying experts and retaining counsel are protected from discovery, with three exceptions. Opposing counsel is still entitled to discovery regarding communications concerning: compensation for an expert's work; facts and data provided by an attorney that an expert considered in forming opinions; and assumptions provided by an attorney that an expert relied upon in formulating his or her opinions.

6. Keep Consulting Experts And Testifying Experts Separated

It is not unusual for an attorney to make use of a consulting expert (one who is specifically retained to offer advice and guidance in anticipation of litigation but will not testify at deposition or trial) and a testifying expert. As a general rule, the op-

posing party is not entitled to discovery regarding consulting experts. *See, Plasma Physics Corp. v. Sanyo Elec. Co.*, 123 F.R.D. 290 (N.D. Ill. 1988) (Although Fed. R. Civ. P. 26 (b)(4)(B) offers strong protection to consulting experts, this rule protects only those experts who are specifically employed in anticipation of litigation). In order to protect the privilege afforded the work performed by consulting experts, you must make sure that your consulting expert and your testifying expert do not review each other's work, review each other's file materials or interact with each other.

Practice Pointers:

- Do not allow a testifying expert to review the work of a consulting expert (this includes written comments made by a consulting expert about a testifying expert's work product);
- Do not allow consulting experts to interact with testifying experts;
- Keep separate files for each expert and keep careful track of the materials sent to each one;
- If a consultant may be converted into a testifying expert, use caution in asking the consultant to perform tests or experiments. The results may become discoverable.

7. Communicating About The Expert's Report

In the federal court system, pursuant to Fed. R. Civ. P. 26, an expert witness who is retained by a party to "...provide expert testimony in the case..." must prepare and sign a report that contains a complete statement of all the opinions of the witness, the data or other information considered by the witness in forming the opinions, any exhibits that will be used to summarize or support the opinions, the witness's qualifications, a list of all other cases the witness has testified in during the previous four years, and a statement of the compensation to be paid to the witness for testifying in the case.

There is no prohibition against the lawyer working with the expert to draft the expert's report. Indeed, the Advisory Committee Notes accompanying Fed. R. Civ. P. 26 clarify the intended meaning of the phrase "prepared and signed by the witness," explaining that a report can be "prepared" by an expert witness even if counsel has aided the witness in preparing the report. Specifically, the Advisory Committee Notes provide that: "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." All of this is a long way of saying it is okay for the retaining attorney to communicate and work with the retained expert to draft the expert's report. What the retaining attorney should not do is ghostwrite the entire report and simply have the expert sign it.

Be advised that certain cases contain language that suggests that ghostwriting of an expert's report by counsel is improper. In *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611 (D.N.J. 1989), the attorney wrote the report for the medical expert. The attorney sent an unsigned version of the report to the expert marked "PLEASE HAVE RE-TYPED ON YOUR STATIONERY." The court in *Occulto* said that it was not aware of "another case in which the attorney has...[prepared] a verbatim self-ad-

dressed expert report." *Id.* at 615. In *Jackson National Life Insurance Premium Litigation*, 2000 WL 33654070 (W.D. Mich. 2000), counsel used the same expert witness with the identical report in two different cases. The court found that "the report [did] not contain a statement of [the expert's] opinions in his own words" and that "counsel's participation" so exceeded "legitimate assistance" as to violate Fed. R. Civ. P. 26(a)(2). *Id.* Although the attorney drafting the expert's report may not result in the report being stricken, the fact that the proposed expert did nothing more than rubber-stamp a report written by counsel could provide the opposing attorney with a great deal of fodder for cross-examination.

Should you ask the expert to prepare a draft report and then send it to you for review and evaluation before being placed in final form? Again, I think it depends on where the case is venued. In the past, I would counsel against having experts issue draft reports in any case (since all drafts would be discoverable). Today, however, under Fed. R. Civ. P. 26(b)(4), drafts of expert reports are no longer discoverable in federal court proceedings. They are still discoverable in Illinois state court proceedings, however (Illinois Supreme Court Rule 213 requires the production of any expert witness reports), so I would continue to advise that draft reports should not be prepared. Have a conference with the expert to discuss his or her potential opinions and then prepare Rule 213 disclosures that set forth the opinions and the bases for the opinions.

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APPENDIX
Sample Expert Retention Letter

[Case name/number]

Dear [expert name],

Thank you for agreeing to serve as my security expert in the above-captioned matter. As we discussed, the plaintiff in this case, [plaintiff name], has alleged that he was subjected to false arrest and unlawful restraint by security personnel at the [defendant] Store located at [address] after they suspected him of shoplifting various items from the store. I would like you to review the file materials in this case and offer opinions regarding the security services provided at the subject store. Although there is no trial date set for this matter, the disclosure of your opinions is due to be filed with court no later than [date].

At your request, I enclose the following documents for your review:
Plaintiff's First Amended Complaint and Defendant's Answer thereto;
Plaintiff and Defendants' answers to interrogatories;
Deposition of [plaintiff];
Deposition of [name], manager of the [defendant] Store located at [address];
Deposition of [name], director of security at the [defendant] Store located in [address];
Deposition of [name], security guard on duty at the time of the plaintiff's alleged incident;
Incident report;
Witness statements from [witness names];
[Defendant] Corporation Security Manual;
Applicable employee manuals from [defendant] Corporation.

I am pleased to pay your reasonable fee of [amount per hour] to review this matter on behalf of my client, [defendant]. Please note that the Security Manual and Employee Manuals are confidential and proprietary. Do not share these materials, or disseminate them in any way, as they are the subject of a protective order in this case. I do not need a written report at this time; rather, please call me after you have had a chance to complete your review.

Very truly yours,

[Signature]