BRAIN SCIENCE & VISUALS (p. 14) LAWYER–EXPERT DIALOGUE (p. 50)

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EXPERT WITNESS SPECIAL ISSUE MARCH 2019

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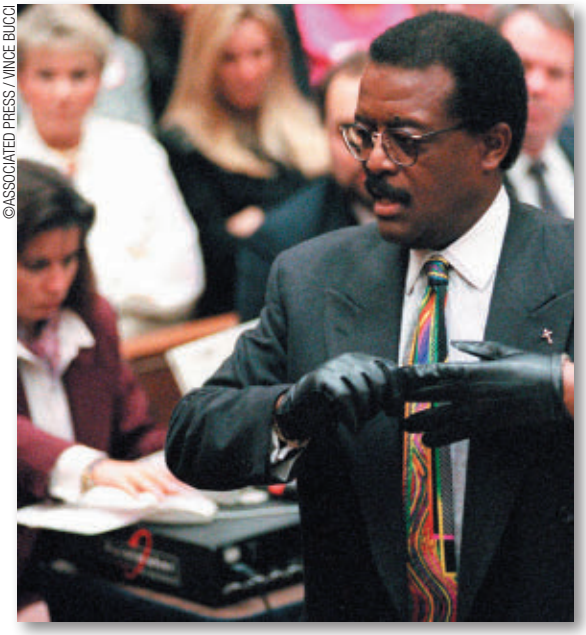
EXPERT WITNESS SPECIAL ISSUE

CONTENTS
MARCH 2019

FRONT

32

14



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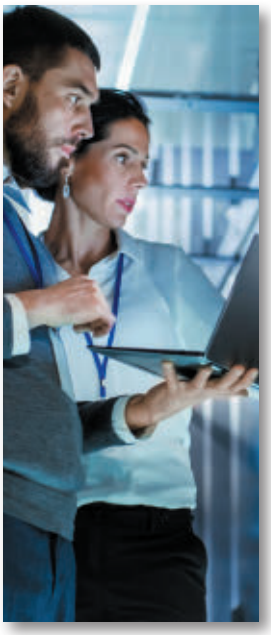

6

ON THE COVER

Legal issues and litigation grow more complex every year. This issue helps you help your expert navigate the complexity and get better results.

56

FEATURES

Keegan, Linscott & Kenon, PC

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Fraud Investigation & Prevention
Bankruptcy/Reorganization/Receivership
Expert Testimony

BUILDING STRONGER CASES FOR OVER 25 YEARS

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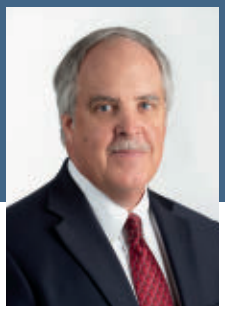

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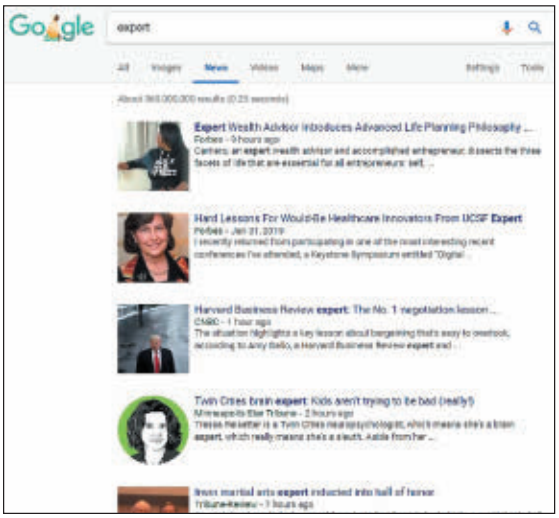
FROM THE EDITOR

Expert, schmexpert

Humans **love** experts.

Yes, yes, it's more complicated than that, but that's my theory. We love to know there's a smart person around—smart through experience, training or both—who can show us the way. Someone who **deeply understands** the topic and is capable of conveying their conclusions in an accessible way.

The legal profession relies on experts—hence this **annual special issue**. But another group that relies on expert advice are **journalists**.



And because the purpose of journalism is to be disseminated, all consumers of media are exposed to the thoughts of experts—**no pressure, experts**, but you're in the news. All. The. Time.

Just look at **Google search results**. Not the run-of-the-mill Google home page results, where the search term *expert* may yield Pentagon commentary alongside pudding recipes.

Turn instead to **the News tab**. There, searching for *expert* yields pages of stories in which an expert was the center focus. Story after story rely on experts to interpret facts, data and the world. Having worked in newsrooms, I can tell you that many of those stories would have been deemed incomplete—or even **spiked** by an editor—if expert commentary could not be found and included.

A few years ago, **Tom Nichols** wrote a book called ***The Death of Expertise***. He posited that Americans have largely come to believe that rejecting the advice of experts is a way to assert their autonomy. "Americans have reached a point where ignorance, especially of anything related to public policy, is an actual virtue."

Maybe, maybe not. As a nation, we may be overly attracted to a belief in "common sense" and easily wowed by self-educated genius. Though Nichols may overstate the widespread rejection of expertise, his view should be front of mind, whether you're an expert or a lawyer retaining one. Access to the interwebs *has* given people the **illusion** that they possess deep knowledge. They—we—don't. But advocates must pry that impression from our minds—gently but firmly.

I said at the top that my theory probably oversimplifies **our relationship with experts**. It's true. For as much as we yearn to connect with them, we cannot resist making their lives more difficult. We **pick nits** with their training, experience and conclusions.

Sometimes that happens because we think we don't need an expert (spoiler alert: We probably do). But it also happens when the conclusion is an **uncomfortable** one. Think climate change, or income inequality—or any of a dozen hot-button topics for which agreement appears impossible.

Both elements—**distrust of expertise** and **discomfort with hard facts**—mean the expert's job is more complicated than ever. The talented authors in this issue know that, and they offer valuable advice to lighten your burden. **I'm no expert**, but I think they've succeeded.

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Redefining the Attorney—Expert Relationship

BY BRAD TAFT

Consultant First, Expert Witness Second

Are you getting the most out of your expert witness? Attorneys can optimize the value of retaining an expert by utilizing them as a consultant first, then using them as a testifying expert second. By initially defining the expert's role in a case as a consultant, the attorney can gain the expert's fresh, non-legal perspective on the issues, better understand what evidence needs to be gathered, and learn from the expert's initial research, analysis and opinions in order to develop a strong foundation for litigating their case.

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By putting the time and effort into drawing out and taking advantage of an expert's consulting abilities, the attorney can gain much more from an expert's talents than if they use the traditional approach of retaining an expert to review the facts of a case and give their opinions.

By asking the right questions of the attorney–client, a consultant–expert is showing their analytical ability by identifying the issues, good and bad.

The Consultant's Advantage

At the start of a consultant–client relationship, an effective consultant listens more than talks by asking open-ended questions of the client. They seek not only to understand the situation and their role in it but also to get a full understanding of the needs of the client. By asking the right questions of the attorney–client, a consultant–expert is showing their analytical ability by identifying the issues, good and bad, involved in the case that are relevant to their role and the development of their opinions. The consultant–expert can then present their approach to their research, analysis and methodology for forming their opinions. The attorney can use their understanding of the underlying issues to develop their overall strategy for the case.

Interrogatories, Depositions and Admissions

When was the last time you asked an expert witness to assist you in developing questions for interrogatories? Input by the consultant–expert can help the attorney craft effective interrogatory questions to learn the scope and details of an opponent's case. Experts also can assist in giving accurate and correct responses to interrogatories that have been received, and they can review the opposing party's interrogatory answers and provide insights into the party's claims and damages.

As a subject matter expert, the consultant–expert can support the attorney's development of deposition questions to gain relevant information from the opposing side and increase the effectiveness of the deposition as a form of discovery. Experts also can be asked to assist with creating admissions requests and/or preparing responses to them.

Transition From Consulting Expert to Testifying Expert

By developing a strong relationship with your expert at the beginning of a case, you have built a foundation for the expert to move from the consultant role to the expert witness role. Attorneys and experts need a relationship built on confidence, honesty and trust in order for the expert to effectively fulfill their obligation to provide opinions to the court. Regardless of the familiarity developed during a close relationship between attorney and expert during a case, the adversarial nature of the practice of law requires attorney and expert to maintain a strictly professional, arm's-length relationship that supports the objectivity of the expert in developing and presenting their opinions to the trier of fact.

A major benefit of using an expert as a consultant early in the case is that it gives the opportunity for the expert to present their opinions to the retaining attorney well before the deadline for expert witnesses to be designated. If the attorney decides that the opinions are not supportive of their case, the decision can be made not to designate the consulting expert as an expert witness. Then the attorney can seek the services of another expert, determine if the opinions they provide are more supportive of their case, and declare them as their expert witness.

Case Study

For example, an employment expert was retained by a defense attorney as a consulting expert three years ago to determine the employability and earning capacity of the plaintiff in a wrongful termination lawsuit. A major issue in the case was whether the plaintiff made reasonable efforts to gain employment after being discharged by the defendant, a manufacturing company.

The expert gave input with regard to the defendant's questions to the plaintiff in the first set of interrogatories. The questions addressed the extent of the plaintiff's job search activities from the day his employment was terminated to the present day. The expert also consulted on the development of questions that were asked the plaintiff at deposition.

After receiving information gained from the interrogatories, the deposition testimony, and documents relating to the plaintiff's job search campaign, the expert conducted a labor market study to determine the availability of jobs for which the plaintiff was qualified. Based on their research and analysis, the expert stated to the defense attorney that, in their opinion, the plaintiff had made reasonable efforts to obtain new employment.

The attorney thanked the expert for their work, concluded the consulting arrangement, and sought the opinion of another expert. When that expert came back with a similar opinion, the defense attorney urged his client to reach a settlement in the case rather than take it to trial. The experts in this case were able to persuade the retaining attorney to change his strategy to better serve his client.

Relationships Matter

Attorneys can optimize their relationships with experts by utilizing them as consultants first in order to gain their fresh perspective on a case and to identify and understand pertinent issues that must be addressed to develop a successful strategy for the litigation.

Experts Preparing Lawyers for Trial

BY GARY L. HIX

Much has been written about attorneys preparing expert witnesses for deposition or trial, but there is another side to that story, and it can work both ways. There is also a lot that an expert witness can do to prepare an attorney. One way is to teach the attorney how to properly use the special words and recognized terms of that profession. And it goes without saying that an expert witness also can help an attorney formulate the proper questions using words and expressions common to that particular science when questioning the opposing expert.

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Experts Preparing Lawyers

When a scientific expert and an attorney first meet, they have to get past the instinctive issue of "friend or foe" that is contained in all of our DNA. Once we are mutually accepted as a "friend of our clan," then they can begin to discuss the other's qualifications and expertise. Next come the details of the issue at hand and identifying any conflicts of interest by either party. Once past those hurdles, the conversation turns to the details and extent of experience each side has on the topic. Finally, the conversation gets down to the real meat of the contested issue. That's when the "techish" jargon of the expert's field of science comes into play.

If an attorney can use the proper technical terms that are commonly used in the science of the expert's field during questioning, it is easier for the expert to give a precise answer to the question being asked. A really good expert witness will want any question posed to them to be properly phrased in the language of their science so that they can reply with an unqualified answer—such that another expert in the same science would have no question about the clear meaning of the statement given, even if they didn't agree with it. Debating the merits between the statements made by two different experts is easier if the questions are clearly worded in the commonly used language of that science.

If an attorney can use the proper technical terms that are commonly used in the science of the expert's field during questioning, it is easier for the expert to give a precise answer to the question being asked.

There is another reason to keep the discussion or testimony as clear and concise and possible. To persuade a jury to see the merits of one side of the argument, it must be stated as concisely as possible, given the nature of the science in which it is stated. Medical terminology and words commonly used by professionals in that area can be "as clear as mud" to a jury. Experts are most often scientists accustomed to stating measurements, observations or conclusions clearly and with full knowledge of the limits of the data that support their statement. They are far more likely to stammer or ad lib if they feel that they have to qualify their statement.

For instance, a groundwater scientist expert under questioning might state that the concentration of arsenic as measured in a water sample he or she collected that was meant for drinking water was analyzed and reported to be 0.001 mg/l. That could be a statement of true fact, but the expert still has in the back of their mind that this is an accurate fact only if the sample was properly collected following EPA Recommended Standards for groundwater sampling, and that it was properly labeled, stored and transported under a valid and properly signed Chain of Custody form until it reached a Certified Laboratory. Once signed for by the laboratory, the sample was prepared for analysis following more stringent EPA Standards for testing drinking water samples. The laboratory would also have a Quality Assurance – Quality Control plan that was followed while testing. The expert's statement is true, but with qualifications.

So when the attorney asks the expert to report to the court the value of the analysis, the expert knows the true significance of the value reported. If the geoscience expert is asked to explain the significance of the reported value, they could describe it in relation to the EPA's Maximum Contaminate Level (MCL) for public water supplies.

But if the expert is asked to explain the significance of that value in terms of adverse impact on the human body, they should state that such an answer would be beyond the limits of their area of expertise.

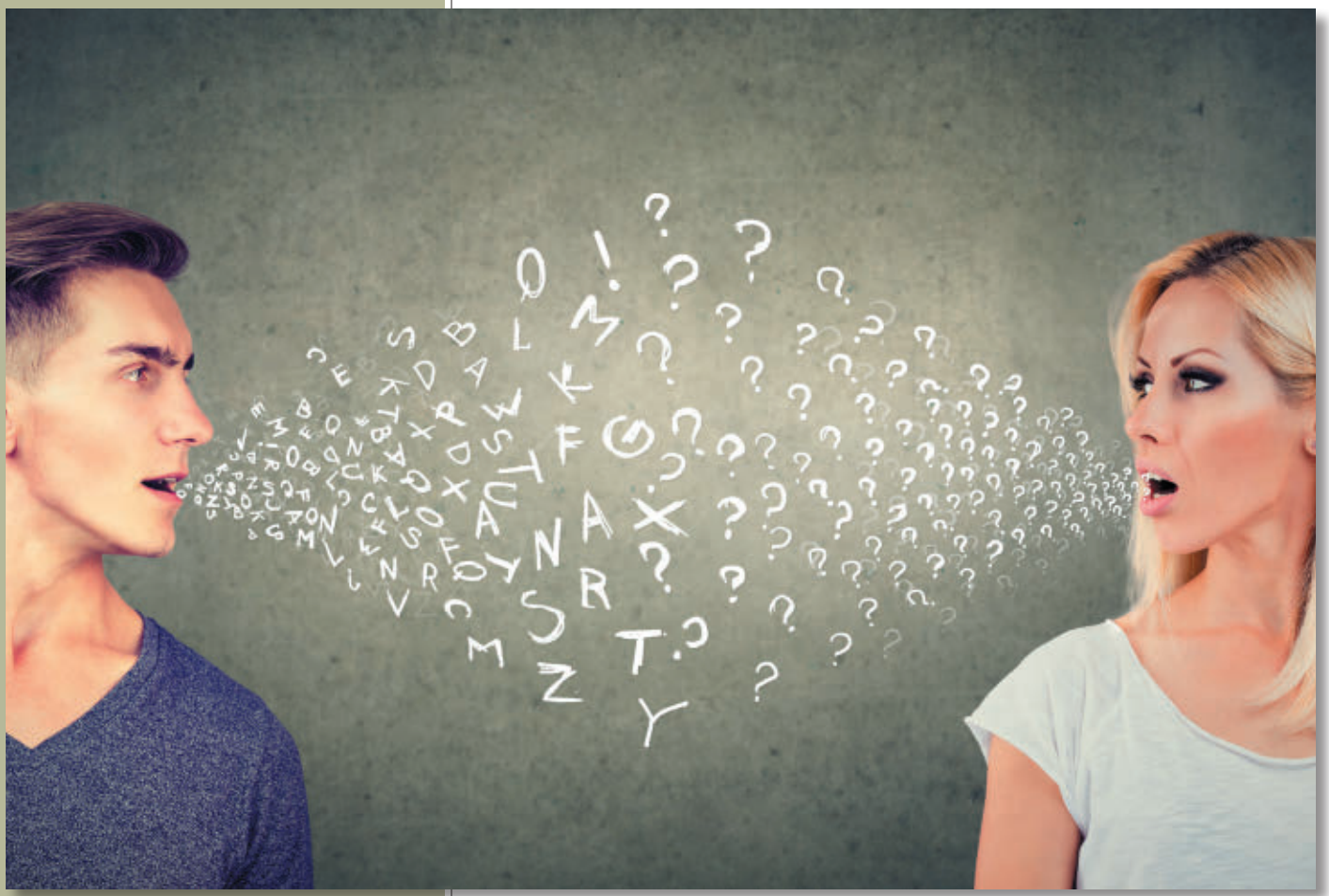
An attorney must recognize the limits of this expert's area of expertise. So a better question might be along the line of defining the limits of the validity of the testing process, the limits of measurements, and the expert's statement regarding the value comparison.

If the expert can answer a clearly worded question about the reported value, he or she might be able to explain that the value of 0.001 mg/l is within less than one percent of the finite accuracy of the testing equipment and procedure. And while the value is quite low and below the EPA's MCL for public drinking water, it is not zero (because zero does not exist in chemical testing). Hopefully the expert has explained to the attorney in advance that this reported value is a plus or minus value, and the MCL is a current limit for public water supplies that in most states does not apply to private drinking water supplies.

All this knowledge might prepare the attorney *not* to ask the expert a question that begs them to answer with a "in all cases" this water with this value of arsenic is safe to drink.

A scientist working as an expert witness typically does not want to use words like "all, always, and forever" because in the back of their mind they know the basis for the sampling, testing and reporting—and there can always be an exception to any conclusion. If attorneys want their expert witness to look and sound convincing, they should make sure they are asking questions within the area of expertise of that expert and use the proper terminology so that does it not force them to needlessly qualify their answer.

A science-based expert witness must learn from the attorney the rules of deposition, the need to remain calm under cross-examination, and waiting for the question to be fully stated before giving an answer. In turn, it helps tremendously if the attorney can ask the questions in the proper words and/or "techish" jargon of that science. An attorney can learn from an expert that gives them the proper vocabulary to use. They will both sound and appear better where it counts—in the courtroom.



Landlines (Or Is It Landmines?) of Communication

How Experts and Attorneys Can Connect Effectively

BY SCOTT GREENE & JOHN LEADER

Communications between an attorney and their expert can be complicated. Yet communication must be effective for the expert to address their part in the litigation. If there is too little communication, the expert can spend time going down rabbit holes with no result. Too much, and the expert's fees for communication can be expensive.

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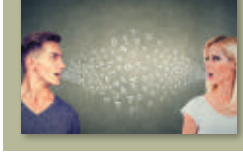


The better the communication is up front between the retaining attorney and their expert, the better the outcome.

Experts, especially highly trained and knowledgeable ones, may not always be the best communicators. Therefore, the better the communication is up front between the retaining attorney and their expert, the better the outcome.

In this article, an expert and an attorney offer their viewpoints on:

- Pre-expert retention
- Communications that provide the expert with the material they need for their opinion
- Communications related to a report
- Logistical communications
- Communications related to deposition and testimony

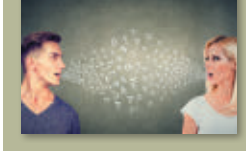
Pre-Expert Retention

The Expert's View:

- As the first step, it is imperative to know who all the parties involved in the case are. As an expert, if there was a past conversation with opposing counsel, even if it occurred unwittingly, it may prove harmful.
- Scott recalls: "I will never forget the time early in my career when I ended up speaking to both the plaintiff and the defense counsel about the same case. Each had their own spin on the case and it didn't occur to me until well into the second attorney conversation that it was a case I had been introduced to by the other side. Needless to say, I wasn't hired by either side."
- The expert also needs to understand the premise of the case. Generally this understanding is in a "nutshell." However, when speaking with the client, it must be enough detail to know if I am a proper fit for the needs of the attorney. The last thing you want to do as an expert is to feel like a fish out of water.

The Attorney's View:

- When I contact potential consultants "cold," one of the first things I tell them is that I do plaintiff's work, because there are some experts who do exclusively defense work.



- If I don't have an established relationship with the consultant, I'm careful with my wording, particularly in the preliminary phases. Be as objective and accurate as you can. If you give the consultant one version of events, and the materials you later send him or her tell a different story, that consultant may not want to work with you. Don't be afraid to share the "bad" evidence, even early on. Be prepared to give the expert the names of all parties, for purposes of a conflict check.
- Avoid emails, because they are often discoverable. Have phone conversations with your consultants whenever possible.

Communications That Provide the Expert Needed Information

The Expert's View:

- Communications between the expert and attorney in this stage of the case are generally quite open—especially when it comes to written email communications. The expert is seeking materials that the attorney has or needs to obtain on the expert's behalf. Generally speaking, you are providing a list of materials that you need to form an opinion. There aren't many secrets in this phase of a case. The expert on the other side is likely seeking the same materials.
- Scott says: "There are certainly times when I want unique documents or data. When I do, I generally call the attorney I am working for and have a verbal conversation. If that attorney indicates that it is ok to do so, I follow up the conversation with an email summarizing my request."

The Attorney's View:

- Don't wait until the last minute. Do everything you can to give your expert enough time to review the materials and prepare their opinions. All too often, lawyers reach out for experts at the last minute. This puts the expert in a difficult spot, and potentially reduces the quality of their work product.

When it comes to communications about a report, experts exchange very little in writing.

- Make sure your expert gets all relevant materials, which can be difficult with voluminous document cases. You don't want to put your expert in the position of seeing a document for the first time when they are being deposed. It will hurt your case, and the expert won't be happy with you. Typically, the expert will rely on you to determine what documents and information they should receive. Be overinclusive.

Communications Related to a Report

The Expert's View:

- When it comes to communications about a report, experts exchange very little in writing. Due to discoverability, nothing is exchanged via email. Phone or in-person conversations with the attorney you are working for seem to be the best way to communicate at this point. This type of discussion ensures the expert hits the highlights the attorney is expecting, and the attorney understands what is important to the expert.
- The attorney at this point is also going to work with the expert to make sure all the materials the litigator needs are mentioned by the expert and can therefore become evidence at trial.

The Attorney's View:

- First figure out if you even need or want a report. If you're in federal court, you will need a report.
- In Arizona state court, reports aren't required, and disclosure statements are sufficient. I think juries might be slightly more impressed with reports, but not significantly so.
- I personally don't have a preference between reports and disclosure statements. But your expert might, and I would ask him or her. If they want to do a report, let them.
- If you provide their opinions via disclosure statement, make sure that the expert has reviewed it for accuracy beforehand. My typical practice is to have a phone conference with the expert, draft a disclosure statement, and then send the draft to the expert for review.
- Then, make sure to send a copy of the disclosure statement to the expert so that it's part of his or her file.

Logistical Communication

The Expert's View:

- This is the stage where some of the funniest and sometimes horrifying communications have happened. These are the logistical communications between the expert and the law firm when arranging for a deposition or trial testimony.
- Unless there is some unusual circumstance, experts should make their own arrangements for travel and lodging. It is not unheard of for experts to find out at the last minute that something has been done wrong, or not been done at all. One of the examples of this is discovering their name is wrong on the airline ticket. If it is off by enough, they can't get on the airplane. If it is off just a little, you can be delayed and miss a flight.
- Scott recalls: "I will never forget the time when I showed up at the airline

counter to check in and obtain a boarding pass. The agent couldn't find my reservation. While trying to rectify the situation, I made several calls to the law firm, only to find out they had gone home early for the day. In the end, I discovered the legal assistant had booked my flight out of the wrong airport."

When it comes time for a deposition or trial testimony, always meet with the attorney. Meet face to face and get to know each other.

The Attorney's View:

- Do everything you can to make deposition scheduling easy on your expert. They are your ally and you need them. Make the effort.

Communications Related to Deposition and Testimony

The Expert's View:

- When it comes time for a deposition or trial testimony, always meet with the attorney. Meet face to face and get to know each other. Then spend time discussing the case. This is the point at which the litigator knows all of the ins and outs of the case.
- Scott says: "Frequently this is the first time I have ever met the lawyer in person. I want to get to know them. I become familiar with their style and let them become familiar with mine. I learn so much at this point that I don't skimp on the time allotted to each of these meetings. In fact, quite the opposite, I require that the litigator spend the time."

The Attorney's View:

- Spend enough time preparing your expert for deposition, especially if the expert doesn't have much deposition experience.
- Go over the questions you think opposing counsel will ask.
- Your expert must come across as reasonable. They should concede points that can't reasonably be contested but be prepared to strongly defend the points they contest.

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In this Sept. 27, 1995 file photo, defense attorney Johnnie L. Cochran Jr. puts on a pair of gloves, to remind the jury in the O.J. Simpson double-murder trial that the gloves Simpson tried on did not fit him. Cochran, Simpson's lead attorney who coined the phrase, "If it doesn't fit, you must acquit," wrote a memoir revealing his rift with Robert Shapiro, the first member of Simpson's defense team, over control of the defense case. He died in 2005 from brain cancer at the age of 68. (AP Photo/Vince Bucci, Pool, File)

Brain Science, Visual Presentations and Demonstrative Exhibits

BY KIRK HAYS & DAVID KOMM

Advances in neuroscience and behavioral economic research are showing us how important it is to provide demonstrative exhibits and other visual presentations to judges and juries to reinforce information presented orally. The use of fMRI machines now allows us to literally see inside the human brain while people are evaluating evidence and making decisions. This provides valuable insights for lawyers and expert witnesses about how important visual clues are to that decision-making process.

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DAVID KOMM, PE, is the Principal Engineer at Augspurger Komm Engineering Inc., and has been serving as an expert witness in the field of Mechanical Engineering for over 18 years.

Among these findings is that visual presentations are processed in a different part of the brain than oral presentations—meaning that when you show a judge or juror something, it is processed in a different part of the brain than when you simply tell them about it.

In one study patients were put into a fMRI machine that allowed researchers to watch their brain while being given the Pepsi Challenge—a blind taste test between Coke and Pepsi. When the test was given blind, a part of their brain lit up associated with cognitive reasoning, which makes sense, because their brain was trying to compare the two flavors. But then the researchers flashed an image of Coke or Pepsi while they drank, and that visual clue shifted where their brain was processing to a completely different part of the brain—one associated with visual stimulation. In other words, the use of demonstrative exhibits by your expert can completely change the portion of the judge or juror's brain that evaluates that evidence.

> The part of the brain that processes visual stimulation is more accepting, less skeptical and uses far less mental energy.

That is important because the part of the brain that processes visual stimulation is more accepting, less skeptical and uses far less mental energy than the part of the brain that processes speech. People tend to believe what they see, while questioning what they hear.

The types of visual materials you can use include illustrative exhibits such as charts and graphs as well as substantive exhibits, which are actual physical objects, such as subjects and exemplars. For example, an illustrative exhibit would be a diagram of the inner workings of a ball valve, while a substantive exhibit would be a ball valve with the outer body removed so you can see the inner workings. These are actual objects and presented in order to clarify facts and descriptions of how an accident occurred, damages, medical issues or any otherwise difficult subject to convey.

The first advantage of visual presentations is it makes things much easier to understand. Testifying experts like the use of these models as they allow us to converse directly with the jury and typically improve our ability to explain issues. A picture is worth a thousand words, the old saying goes. But touching something goes even further.

For example, in a products liability case

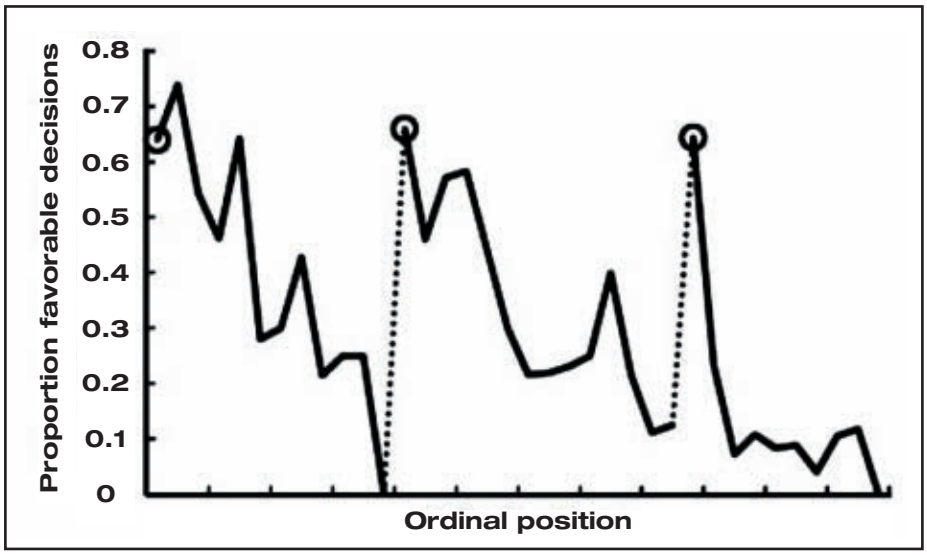

Figure 1 – Parole Rate

the performance of a ball valve may be critical to the understanding of the event. Obtaining an exemplar of the subject ball valve and removing a portion of the body to expose the internal components allows for the expert to point out various key elements, how they fit together, the function of each and how each part contributes to the performance of the whole. Visual presentations of such issues are far easier to understand than simply telling someone how it works and them trying to figure it out in their head.

And making something easier to understand means it is far more likely to be accepted by the jury or judge. Behavioral science research has shown that there is literally a race to understanding, and whichever side gets their position understood first is far more likely to win. The reason? The brain is like any other muscle, and it gets tired the harder it has to work. The more tired it gets, the more likely it is to just give up.

Just how significant that advantage can be was illustrated in a study of Israeli judges who decided whether prisoners should be granted parole. In the morning when the judges were rested, around 65 percent of the prisoners were given parole, but as the day went on and judges had to evaluate more and more evidence, they became tired and the parole rate dropped to zero. Then came the lunch break and following that the parole rate jumped to 65 percent, only to fall to about 10 percent before the afternoon break. After the break the parole rate again jumped to 65 percent, only to fall to zero again by 5:00.

Why did this happen? In the morning the judges were fresh and able to understand the prisoners' arguments for release. But as the day wore on and the judges became fatigued, they became less and less sure they were making the right decision. Because no one wants to give parole to someone likely to reoffend, tired judges started giving up trying to understand the arguments made and simply began denying everyone's petition.

> Making something easier to understand means it is far more likely to be accepted by the jury or judge.

The same can happen in the courtroom. The harder the judge or juror has to work to understand your position, the more or less likely they are to believe you.

Nobel Prize-winning behavioral economist Daniel Kahneman discovered two mental processes that the judge and jury will use to evaulate your evidence—fast and slow thinking. Fast thinking occurs very quickly with minimal mental effort, while slow thinking is very methodical and requires a lot of mental effort. And they occur in those two different parts of the brain. Fast thinking happens in the same part of the brain that processes visual stimuli, and slow thinking occurs in the part of the brain that processes audio stimuli—meaning that if you tell someone how the ball valve works, they are using the slow thinking mental process to evaulate your explanation, while if you show them the valve, they are using fast thinking to understand.

That is important because those parts of the brain behave very differently. The slow thinking brain is inherently skeptical. It's human nature to question what you are told. But the part of the brain that processes fast thinking and visual presentations is inherently trusting—people believe what they see with their own two eyes. So when your expert provides a visual presentation instead of just explaining things, they can dramatically increase the chance they will be believed.

The second advantage is that visual and tactile experiences are easier to recall than only oral presentations.

Many of us have experienced that in order to learn how to do something, you cannot simply read the 'how" but you must "do." Research into brain functions provides insight into why this is so.

We receive information from stimuli—typically sight, sound, touch, smell and taste. What we retain, or remember, following that input is referred to as stimulus or sensory modality. After touching a hot stove one registers temperature modality—we know, in rough terms, the temperature of the stove is higher than the room. We may also remember modalities such as colors, textures, pressure, taste or smell.

The stimulus presented to a judge or jury is limited to sight, sound and occasionally touch. The authors are not aware of examples where smell or taste were intro-

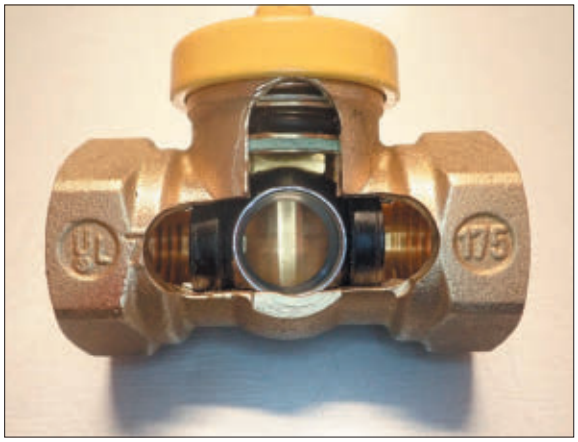

Figure 2 – Brass Ball Valve Showing Interior Components

duced directly into evidence. The provenance of such evidence alone makes this problematic. Given that most litigators (and to some extent witnesses) like to talk, clearly the primary sensory stimuli is auditory, or sound, followed by visual stimuli, such as photos, diagrams, charts and graphs.

Again, processing of the auditory and visual stimuli within the human brain is conducted in separate regions, with little evidence of reinforcement when it comes to recall of detail.[1] However the same regions of the brain are utilized for visual and tactile stimulus processing, and there is evidence that these two act together to improve recall.

It also appears that tactile memories do not necessarily have to be from actual physical touch. The presentation of a solid object to the jury along with a description of the object and its function can be enough to stimulate that modality.

Given the possible interaction between tactile and visual memory processing, techniques to reinforce points with a jury can be employed.

Attorney Johnny Cochran used these techniques masterfully in the O.J. Simpson trial. Those of us old enough to remember that trial will always remember the glove that didn't fit. During the trial, the prosecution gave O.J. the gloves that were used by the murderer and famously, they were too small for O.J.'s hands and he couldn't get them on.

During his closing argument, Cochran did three things to further embed that visual memory in the jurors' minds. First, Cochran didn't just mention the prosecution's failed glove experience once, he referred to it multiple times before discussing it in detail. Each time he did, the jury visualized the event and it became further reinforced in their memory. Although these were short, quick references, studies have shown that repeated reference to visual memories make them more vivid and compelling to people.

Second, he didn't just refer to the event, he described the reaction he wanted them to have to it:

> As I stated before, perhaps the single most defining moment in this trial is the day they thought they would conduct this experiment on these gloves.

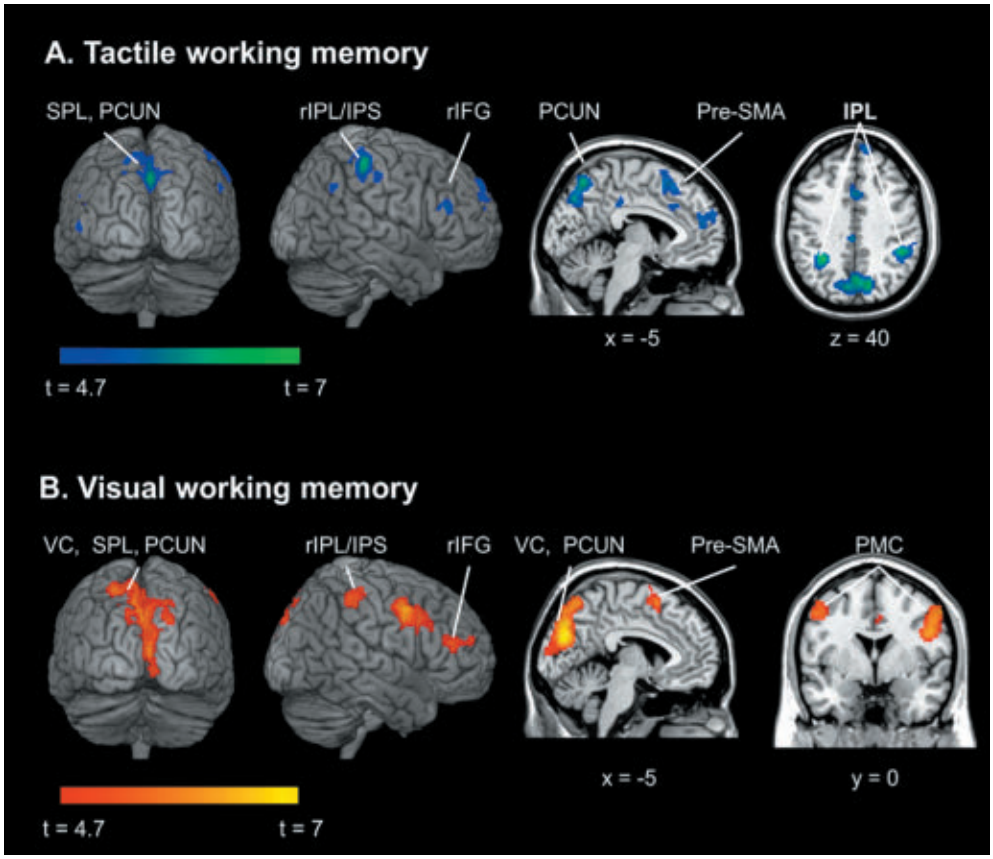

Figure 3 – Active Areas of the Human Brain in Tactile and Visual Memory[2]

> They had this big buildup … they were going to demonstrate to you that these were the killer's gloves and these gloves would fit Mr. Simpson. You don't need any photographs to understand this. I suppose that vision is indelibly imprinted in each and every one of your minds of who Mr. Simpson walked over here and stood before you and you saw four simple words, "The gloves didn't fit." … We may all live to be a hundred years old, and I hope we do, but you will always remember those gloves, when Darden asked him to try them on, [and they] didn't fit.

Cochran increased the importance of that visual memory by describing how important the visualization was while describing it. How effective can this be? In one study, subjects were given quizzes to fill out—some got quizzes that used visually descriptive words of being young, while others received words associated with being old (gray, wrinkled, Florida). After taking the test the subjects were asked to walk to another room down a hall. The scientist measured how long it took the subjects to walk down the hall and found that subjects who had just read "old" visual words took considerably longer to walk it than those who read words associated with being young. Visualizing words actually made people feel older or younger and act accordingly.

Finally, Mr. Cochran then reinforced the visualization again by reenacting the glove-doesn't-fit moment, further embedding in their minds the visualization.

The visualization of the glove not fitting, both when O.J. tried them and when Cochran reenacted it, would have a profound effect on the jury.

One study found that people are so predisposed to believe what they see that it can change even their most entrenched biases. Researchers in France asked sommelier students to describe wines. What the students didn't know is that the researchers had dyed white wines red with a tasteless food coloring. Even though they had spent years training their palettes to know the difference between the taste of white and red wine varieties, when confronted with the visual image of a red wine, they all described the wine in terms of a red wine—bold, full-bodied, etc. None described it as a white wine.

Johnny Cochran demonstrated strategies that not only reinforced his message, but also minimized the prosecution's message:

> Recognizing the power of visual stimuli, Cochran relied heavily on a set of visual aids that had highly desirable salient characteristics. They were attention getting, easily comprehensible and memorable. Whereas the prosecution used visual aids and graphs that seemed to flood the jurors with information overload and deadly dull DNA detail, the visual aids used by Cochran made the point concisely and graphically. And of course, the demonstration of the non-fitting recovered gloves and the "you must acquit" catchphrase served to cement the message in jurors' minds.[3]

This serves as a lesson that for demonstrative exhibits: Simpler may be better. Small, light objects can actually be presented to the jurors for their own firsthand experience. And, in conjunction with explanations from expert witnesses, the message is reinforced.

At the same time, the message should be kept simple. If an explanation is too complex, then an exhibit may not be of use at all, and may actually distract from the message.

Of course, whether the demonstrative exhibit can be used at all is up to the judge. Nonprejudicial exhibits only, and they must be clean. The largest exhibit one can use must still fit within the courtroom doors.

endnotes

1. Gunther Lehnert & Hubert Zimmer, *Auditory and visual spatial working memory*, Memory & Cognition, 2006, 34(5), 1080-1090.
2. Wu, Ulic, et al., *Overlapping frontoparietal networks for tactile and visual parametric working memory representations*, NeuroImage, 2017.
3. Dale G. Leathers & Michael Eaves, Successful nonverbal communication: Principles and applications (1997).

Choosing an Expert

Do I Need a Statistician or a Forensic Accountant?

BY MELISSA KOVACS

As data, big and small, increasingly infiltrate our business and personal lives, so do they infiltrate our litigation. More and more, attorneys need to rely on data used as evidence in litigation. Both expert statisticians and expert accountants add clarity to litigation matters where an understanding of data meaning can be key in a case.

Broadly speaking, forensic accountant experts are the best match for litigation regarding financial and economic data, and statistician experts are the best match for data whose reliability, validity, usage and completeness are called into question. The expert's industry matters, and so does the primary litigation question.

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As well, statisticians and accountants have different sets of ethical codes and industry standards. I'll address how these differences result in potential differences in expert testimony.

What Do These People Do?

Let's start with some definitions.

Statisticians apply the science of statistics to data in order to solve problems for businesses and government. Statistics is a toolbox of techniques that can be used in numerous industries. Accountants prepare or examine financial records using financial data. They also review financial processes for accuracy. Sometimes accountants use statistics in the area of audit testing and sampling. Both statisticians and accountants are fluent in math.

Both statisticians and accountants have specialties, and these should be considered when choosing an expert that matches the needs of your case. Accountants may specialize in tax, auditing, corporate accounting, international accounting laws, business valuation and financial fraud. Statisticians specialize in different industries and sectors, such as biostatistics, big data and machine-generated data, social sector statistics, econometrics, epidemiology, psychometrics, education statistics, demography and business analytics.

Case Subjects

The largest looming question in choosing a data expert is the subject of the case. For cases involving audit malpractice and financial fraud (e.g., financial statement fraud, embezzlement, etc.), these clearly require a forensic accountant who has in-depth knowledge of auditing and accounting standards. Statisticians typically aren't familiar with accounting principles and standards, and do not offer opinions regarding whether the standards have been violated.

For cases involving non-financial data and data of all sizes, including machine-generated and big data, statisticians can opine on whether the data is correctly used in the scenario in question, and its correct application.

In general, statisticians work with many types of data in many types of industries. Accountants work with financial and economic data. Statisticians sometimes work with economic data, but not usually with financial data. Error sources and data quality differ among industries and data types, and each expert is accustomed to errors and quality in their own area.

For example, you may need a biostatistician expert in a medical data or pharmaceutical case, and you may need a certified fraud examiner in a bank fraud case. A statistician can help determine whether housing discrimination occurred given the proportion of racial and ethnic categories in a population, and an accountant can help determine the value of a business that is in dispute. Your statistician expert will attest to whether your sample likely represents the population of concern, and your auditing or accounting expert will attest to whether an audit was properly performed or whether accounting principles were followed.

Summary of Differences—Statisticians and Forensic Accountants

	STATISTICIANS	FORENSIC ACCOUNTANTS
What do they do?	Apply statistical toolbox to data to solve problems for government and businesses.	Prepare, examine, and review financial records and processes.
Case subject	Industry data; Big data; Scientific sampling and surveying; Discrimination (i.e. housing, gender, race); Data processes; Biomedical data; Determining data quality.	Audit malpractice; financial fraud; Accounting fraud; Sampling in audits; Software use in fraud.
Data Process	Statisticians consider a broad view of data point's life cycle.	Accountants focus on financial data once originated.
Standards and Ethics	Ethical Guidelines for Statistical Practice	Generally Accepted Accounting Principals (GAAP), Statements on Auditing Standards (SAS), AICPA Code of Professional Conduct, etc.

Data Process

The lifecycle of a data point is long. Data begin as a construct that must be measured, then captured and collected, then stored, often cleaned and scrubbed, analyzed, reported, and socialized. Statisticians view this whole data lifecycle in their work, particularly when determining data fitness and quality. Statisticians think about data completeness, proper usage, reliability, validity, and readiness for analysis.

Both statisticians and accountants want to get things right, yet both are often working with incomplete information. For many of us, this is what we love about our work—hanging out in the realm of inference. Choose an expert with years and years of experience in a world of professional decision-making with incomplete information.

Accountants are often inferring financial behavior from a sample of records, and statisticians are often inferring causality between two constructs. For this, both must be comfortable with a bit of error.

For statisticians, the field has agreed to a five percent level of statistical significance, or, only a five percent probability of seeing the test's results if the null hypothesis is true (null hypotheses are worded in terms of "no effect" or "no relationship," as null language).

For accountants, they speak in terms of "tolerable levels of risk" in an audit sample, and construct their test methodologies to meet these levels.

Statisticians regularly consider the data process, including:

- How was the data collected
- What data was collected and is it complete to answer the question at hand
- What data were not collected for the questions being asked
- Were there data collection problems or any potential sources of error in the collection process
- Where and how are the data stored, in case this is a source of error
- Who has altered or cleaned the data prior to it being acquired by the statistician

Statisticians spend considerable time cleaning and readying data for analysis, and assessing its shape and strength for analyses. Statisticians are part of a more thorough cycle of collecting, analyzing and using data to make recommendations than accountants.

Accountants take a more focused look at certain points of the data process. Accountants are accustomed to assessing data for an acceptable level of risk or level of tolerable error, and whether such errors are material to their conclusions or represent an acceptable level of risk.

Standards and Ethics

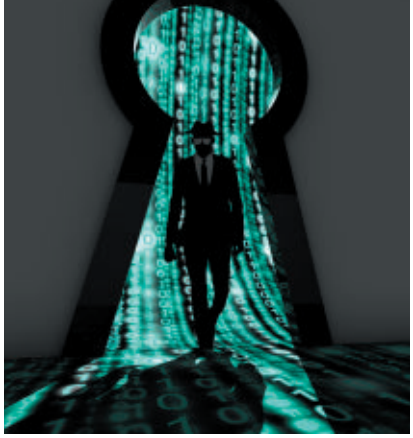
Both statisticians and accountants follow ethical guidelines and standards of practice. Statisticians follow the American Statistical Association's *Ethical Guidelines for Statistical Practice*. These guidelines hold statisticians to act professionally by advancing knowledge while doing no harm; by not using statistics to pursue unethical ends; by adhering to integrity of data and methods; and by following certain ethical responsibilities to research subjects and the public.

Accountants enjoy longer, more detailed standards that guide specific accounting and auditing practices and ethics. Examples include the AICPA Code of Professional Conduct, Generally Accepted Accounting Principles ("GAAP"), Statements on Auditing Standards ("SAS"), and PCAOB Auditing Standards. The purpose of accounting and auditing standards is to provide consistent guidelines so that financial information is accurate and reliable.

To be sure, both statisticians and accountants consult each other when ethical dilemmas arise in their professional work, and both professions hold themselves to high ethical standards. All expert accountants and statisticians should be able to describe to a courtroom the steps they take to ensure ethical practices.

Conclusion

This short piece has merely touched on the types of work that statistician and forensic accountant expert witnesses do in cases. While the following table summarizes the differences between these two expert areas, our commonalities are important—that we are both held to high ethical standards, we both think about levels of error and risk regularly, and we are both comfortable with how numbers can inform a case.



The Anatomy of a Cyberheist

Internet attacks are becoming more sophisticated and persistent.

The subtle process of social engineering is an increasingly common online fraud designed to separate you from your money.

People are being defrauded of money via email or internet scams every day. Increasingly common is the subtle process of social engineering that is specifically designed to separate you from your cash. It can affect your family members, your business, personnel, bank accounts, even your paycheck.

As we become more reliant on doing business on the internet, attacks become more sophisticated and persistent.

Anatomy of a Cyberheist

Step 1 – Information Collection

This is typically accomplished via email but it can take other forms. The email may appear to come from someone you know or from an "administrator" or "tech support" for your company or from companies like Microsoft, Google or Yahoo. The message will often have the correct or at least familiar letterhead, signature line and formatting.

For example, you may receive an email that appears to originate from a family member, saying they have shared a picture or document with you. It requests that you click a link to access the item. When you do so, you are confronted with a request to log into your account. If you do so, you've just provided your user name and password to a malicious third party who will use that information to access your account to gather information like who you know, who you work for and who you bank with.

Tips to avoid compromising your information:

- Examine links. Many fraudulent links will not go to the site they are referring to. For example, if it's an *icloud* share, the link should return to an *icloud* website.
- Examine emails for subtle flaws. Check grammar, punctuation and the links in the message.
- Keep strong passwords.
- Never type your password into a web page that came from an email link. Go directly to the website yourself.
- Set up and watch for email alerts of a password reset or unusual account activity.
- Check that the site has valid SSL (https://).

Step 2 – Exploitation

Armed with the information obtained, the criminals will now attempt to monetize that information.

This typically entails asking for money to be diverted to a different account, wire transfers to be made or any other transfer of funds via irrevocable methods. The mechanisms used in these requests can be very sophisticated and include fake domains that look like real domains (**mydomain.com** becomes **mydomian.com**); bogus email servers; and copying legitimate parties on the emails. Once the correspondence becomes fruitful, the attackers will dedicate additional resources to continuing the attack for as long as possible. If nothing more, they will use the exploitation phase of the attack on you as the information collection phase on another potential victim.

Tips to avoid this exploitation:

- Develop processes to double check/confirm monetary actions.
- Turn off wire transfer on your bank account if you are not using it.
- Be cognizant of changes in processes. If you always pay a vendor by check, and they ask you to wire money via email, further investigation is warranted.
- Request verbal confirmation from banks based on certain actions, like before funding a wire transfer.
- Activate 2-factor or multi-factor authentication on all of your accounts.

Step 3 – Advanced Persistent Threat

Once a perpetrator has managed to compromise a target, that target is then more likely to experience additional attempts. The information regarding the attack now becomes an asset that will be shared and resold on the dark web. A successful compromise will result in more attempts of various skill levels and attack vectors.

Tips to minimize the threat:

- Utilize a credit protection service with reputation, dark web and identity protection services and insurance.
- Use complex passwords and change them periodically.

Case Examples

We have seen examples of these activities in virtually all sectors. For example, a home buyer paying a mortgage funding wire request. In this case, the dollar amount of the request was exactly what the buyer was expecting to see. The parties on the email were from the title company, the mortgage company and the bank, and none of them caught on that the account was incorrect.

In another case, a service company sent an invoice to a client. The invoice was expected and the client did not think the request to remit payment in a new way was strange, even though they had never paid the service company via that method before.

In both of these cases, by the time someone realized the error, the money was beyond recovery. This process has become a lucrative source of theft, with the global reach of the internet often putting the offenders outside the reach of the justice system of the victims. The take-away: never let your guard down. ■

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Karl can assist with digital device and email forensics as well as internet/cloud forensics, hacking events and data recovery/ preservation.

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ANALYSIS | PRESERVATION/RECOVERY | LITIGATION

Signature and Document Evidence in the Digital Age

Hiring the Right Expert

BY HEIDI H. HARRALSON & DAVID J. TEEL

With the advent of the electronic signature act (ESIGN Act), many signatures and documents are now in digital format, produced with mixed methods involving both digital encryption and/or physical hand-signing. The constant updates and complications in document and signature technology can make it difficult to determine the type of expert needed to examine a questioned or disputed document. This article offers simple explanations about electronic signatures and how to know when a forensic document examiner and/or a forensic digital evidence expert is the right expert for the job.

What Is an Electronic Signaure?

The terminology associated with electronic or digital signatures is confusing mainly because the terms have such broad definitions. Both of the terms "electronic" and "digital" signature can represent a handwritten signature that is captured on an electronic device. It also can refer to a digital algorithm that is an encrypted code that has nothing to do with handwriting. Both are considered electronic and/or digital signatures, and the ESIGN Act (2000) does not distinguish between either signature method. Both can occur in the same signing process, as well. The term is often shortened to the more simplified "e-signature."

E-Signature Devices and Technology

We are all familiar with the poor signature capturing methods available on point-of-

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sale devices in stores, on iPhones, on handheld devices used by delivery agents, and more. Many people create simple scribbles on signing devices or apps that rarely resemble the signatures written with pen ink on paper. These types of signing environments present options for a wide variety of signing and pen methods, including the stylus, fingertip, and even the mouse. While some companies have remarked that these simple scribbles capture handwritten movement that is unique and identifiable, more serious study into this type of writing reveals that without the capture of more sophisticated measurements associated with "biodynamic" features, there simply may not be enough forensic information available to offer a reliable opinion about signature authorship. Much depends on the environmental conditions and quality of information associated with capturing the handwritten signature on the electronic device.

In the marketplace, there is considerable variety in the methods used to capture handwritten electronic signatures. It is critical to investigate the method in which the signature was captured, including external factors in signature production (such as using a stylus, fingertip or mouse to write the signature), the sampling rate and accuracy to record the signature (referred to as "Hertz"), tablet quality, and transmission of data. When a person signs their handwritten signature on a device, their movements are converted into measurements, as dictated by the software, and the resulting data is then translated into a series of digital data, which is capable of being replicated on the screen in the form of a visually readable image of the handwritten signature.

The graphic image of the handwritten signature is not the only data that the forensic document examiner should be reviewing. If the document examiner is provided with a hard copy of the static signature image for examination, this may not be the best evidence presented to the court.

Many electronic signatures are recorded at a low resolution with a pixelized or digitized effect replacing the smooth line quality of a manuscript signature written with pen ink. Sometimes the digital data forming the signature is affixed or incorporated into the document on a signature line in an unnatural way, or the signature's natural size may be significantly reduced—or both of these effects might occur. If the forensic document examiner receives a hard copy or image of an electronic signature on a document, such indications will be obvious that the signature was recorded electronically. If these factors are present, the forensic document examiner should make inquiries about how the signature was produced and request a copy of the electronic signature file, because it is the digital data that must be examined, not only its graphic representation. If the digital data exists, these provide the relevant information about the biodynamic properties of the signer, not the static, digitized image of the signature.

Aside from examining the handwriting features that may have been recorded, some of the first steps in examining digital signature files is to inquire whether the file has been stored and processed in a way that allows for adequate forensic signature analysis. Certain computer processing procedures are carried out in order to facilitate the feature extraction process. For example, different digital renditions of signatures, no matter how poor, may need to be moved, rescaled and rotated to allow optimal comparison, thereby further increasing the coarseness of the pixelated image. There may have been distortion or loss of data during the transmission or processing of the data. During recording, ideally a signature is recorded at a constant sampling rate. However, the processing may miss sequences of samples. This implies that small parts of the signature may be missing purely due to the technology and not because the writer was omitting an essential part of the signature.

Forensic Document Examiner or Digital Evidence Expert?

In reviewing systems offered in the marketplace, there is little standardization as to how a signature is recorded. Different types of forensic analysis may be required when examining electronic signatures associated with documents. Part of the Topaz Systems, Inc. signature recording process includes binding the signature to the document using a secure hash that forms a direct cryptographic relationship between the signature and a single document or aggregated

data message, and security data. Topaz records biodynamic signature measurements in only some of its software packages. Depending on the type of software used, both a forensic document examiner and a forensic digital evidence expert may be required to investigate this type of "mixed-methods" electronic signature. The digital evidence expert needs to examine the cryptographic elements embedded in the document, while the document examiner is needed to examine the biodynamic handwriting features captured while the person was hand-signing on a tablet.

DocuSign, Inc. affixes the signature measurements and other security features, but does not record a signature in a way that is a graphic representation of the handwritten signature. The user types in his or her name and can select a cursive-type font style in order to make the name look like a signature when it is affixed or logically associated with the document. In this scenario, a digital evidence specialist is the appropriate forensic expert for consultation as there is no handwritten signature available for examination. Terminology and graphics can be confusing in such a scenario as there is the implication that a handwritten signature was involved in the signing process and there appears to be a graphic signature on the document, yet no such physical hand-signing was involved.

Handwritten signatures can be "lifted" with cut-and-paste tools in other types of software and inserted into another document. Examining this type of evidence may require the expertise of both a document examiner (who examines the components of the natural handwriting and compares it to other handwriting samples) and a digital evidence specialist (who can provide information about the electronic document and determine if it was created on a particular device).

Legal Implications and Relevance

It would seem that forensic analysis of electronic signatures would only be necessary in examining important legal and financial documents. From a forensic perspective, however, every signature may have forensic relevance. A poorly recorded electronic signature captured on a point-of-sale device at a place of business may place a suspect at the scene of a crime. Or a signature recorded on the device of a courier service connected to a package containing illegal materials also has forensic relevance. This means that the corresponding deterioration or complications involved with recording electronic signatures compounds issues involved in forensic handwriting identification both in civil and criminal proceedings. From a practical perspective, however, many biodynamic electronic signatures encountered in document examination cases are static images rather than the original digital data, which means that the best evidence may not be available to the document examiner.

For both document examiners and lawyers, it is important to understand that electronically captured signatures use processes that materially alter the dynamic movement of handwriting. These differences occur at the beginning of the process (when the signer is using equipment such as a stylus and tablet), as well as the method in which the measurements of the signature are recorded and processed in accordance with the instructions set out in the software algorithm. A proper analysis of the signature must not only examine the graphic version of the signature but should include the digital data and software that causes the measurements to be recorded, such as the speed and pressure of the handwriting process.

Tips for the Legal Practitioner

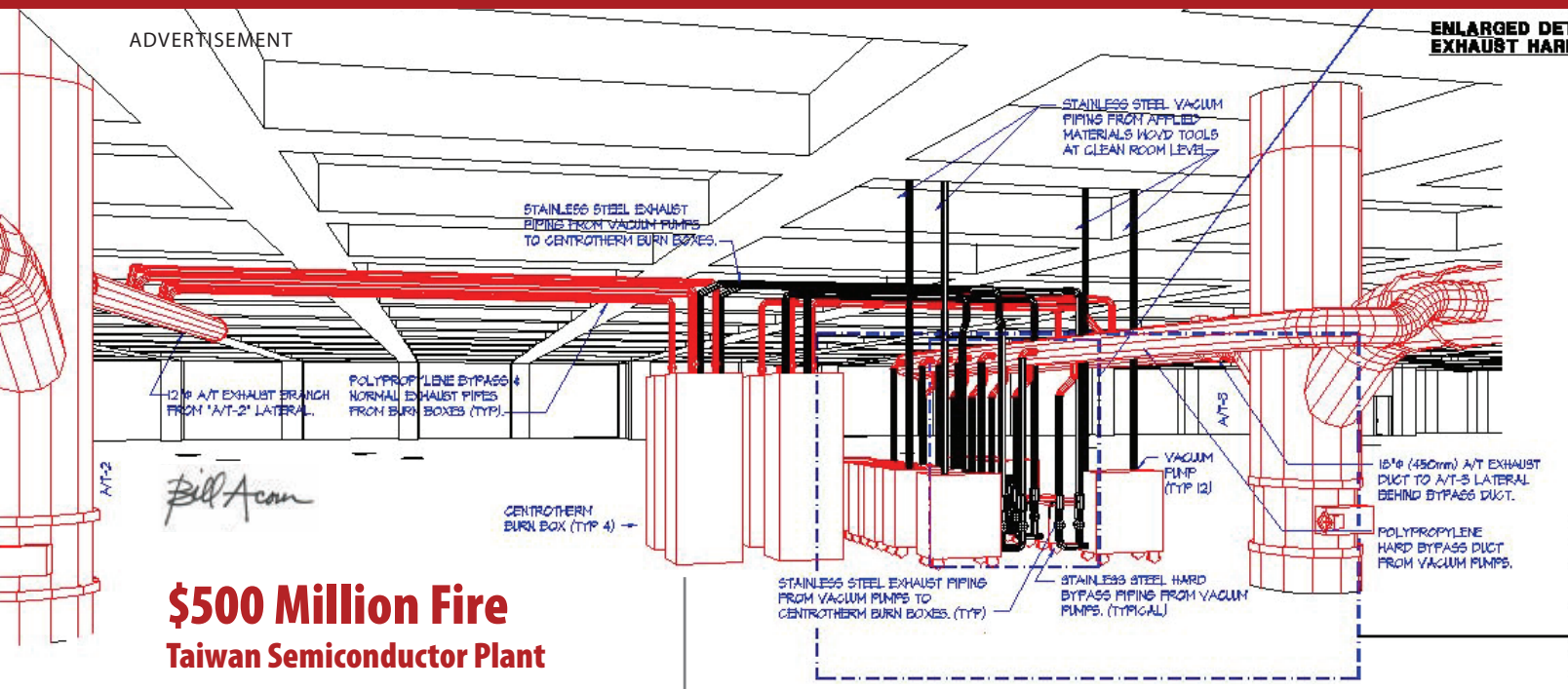
These are some tips to consider when encountering e-signatures on questioned documents:

- When evaluating paper-based documents, if the signature looks compressed, pixelated or unnatural, it is probably an electronic signature or has been affected by digital processes involved with scanning and/or digital manipulation.
- When hiring a forensic document examiner, inquire as to their knowledge, specialized training and experience in working with digital or electronic signatures. You are relying on the document examiner to give you guidance about the complicated and technical nature of electronic signatures. You need an expert who can guide you as to the type of information that needs to be gathered for analysis, including but not limited to standards collection, hardware and software specifications, and unusual writing conditions associated with e-signatures. The expert also should provide you information as to the limitations of this type of forensic evidence.
- It is not always easy to determine if you need to hire a document examiner or a digital evidence expert. When in doubt, call and discuss your case with both types of experts. Don't expect the digital evidence expert to understand the handwriting variables involved with electronically captured biodynamic signatures. Likewise, most document examiners are not qualified to examine cryptographic-based digital signatures. A competent consultant will be able to guide you through this technical forest and lead you to the information you need.

RESOURCES

- For a broader review of electronic signatures, refer to *Electronic Signatures in Law* (4th ed.) (Institute of Advanced Legal Studies 2016) by Stephen Mason. The 470+ page text is available as an open-access book at www.humanities-digital-library.org and includes information about typing a name into an electronic document, scans of manuscript signatures, biodynamic signatures, digital signatures, evidence, data protection, and more.
- *The Digital Evidence and Electronic Signature Law Review* is available as an open-access journal and is published once a year: http://journals.sas.ac.uk/deeslr
- For more specific information and technology updates about electronic signatures associated with forensic document examination, refer to *Developments in Handwriting and Signature Identification in the Digital Age* (Routledge 2014) by Harralson and Miller. The text was written for forensic, legal and criminal justice practitioners and includes a glossary of terms.

CASE STUDY | **FIRE**



$500 Million Fire

Taiwan Semiconductor Plant

CASE: The largest architectural firm in Japan was being sued by their client – a semiconductor manufacturer – as well as the insurance company that paid the claim and sought subrogation.

This was a complex case, not only from a technical perspective, but also from a logistics perspective. We had a Japanese client, a Taiwanese manufacturing company, an American insurance company, American attorneys, and myself, an American forensic engineer.

ANALYSIS: I was retained by the architectural firm, two years after the incident. After thorough investigation, I found the source of the fire ignition and why the fire occurred. With the supporting evidence I developed, I was able to establish that the plaintiff had improperly operated their facility and my client's actions were not responsible for the loss.

RESULT: A very favorable outcome for my client during mediation in the U.S.

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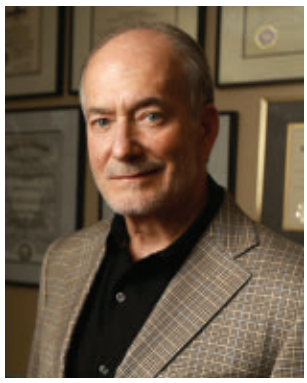

William R. Acorn, PE

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- *Certified Forensic Litigation Consultant (CFLC)*
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Recent Developments in Digital Forensics

BY CRAIG REINMUTH

Have you had cases where the following types of information could have assisted you in getting facts needed, such as:

- Social media data (Facebook, Twitter, WhatsApp, Instagram)
- Data from cloud storage (iCloud, OneDrive, Dropbox)
- Emails/messages from web-based sources (G mail, Yahoo, iCloud, iMessage, AOL)
- Photos from web-based storage (iCloud, SamsungCloud, Windows Phone Data-Cloud)
- Geodata from a smartphone (Apple, Android)

CRAIG REINMUTH, CPA/CFE/PFS, MST, EnCE, is President of Expert Insights, P.C., a litigation support firm specializing in digital forensics and forensic accounting and has strong expert witness experience. He has over 35 years of experience and his case involvement spans over 360 diversified cases.

Many companies, such as Apple, have tried to protect their customers from allowing this information to be available forensically,[1] but many of these obstacles have been overcome recently.

So how can you obtain this form of evidence? This article explains recent developments in the area of digital forensics that is making this data available. The information can be forensically obtained in three ways: (1) directly from the cloud[2], (2) from smartphones, and (3) from an individual's computer.[3]

Social Media

As indicated in the diagram on page 30, the number of social media and other applications/sites on the internet continues to grow.

Forensic software companies are trying to keep up with the ever-growing number of sites that provide relevant data. They have tackled quite a number of them and even if they have not, they are receptive to try to allow experts to obtain it if requested.

A recent study from the Pew Research Center concluded 79 percent of adults now use social networking sites, and two-thirds log in every day. So it is no longer a matter of whether litigating parties are using social media communications, it's more a matter of how much it is used.

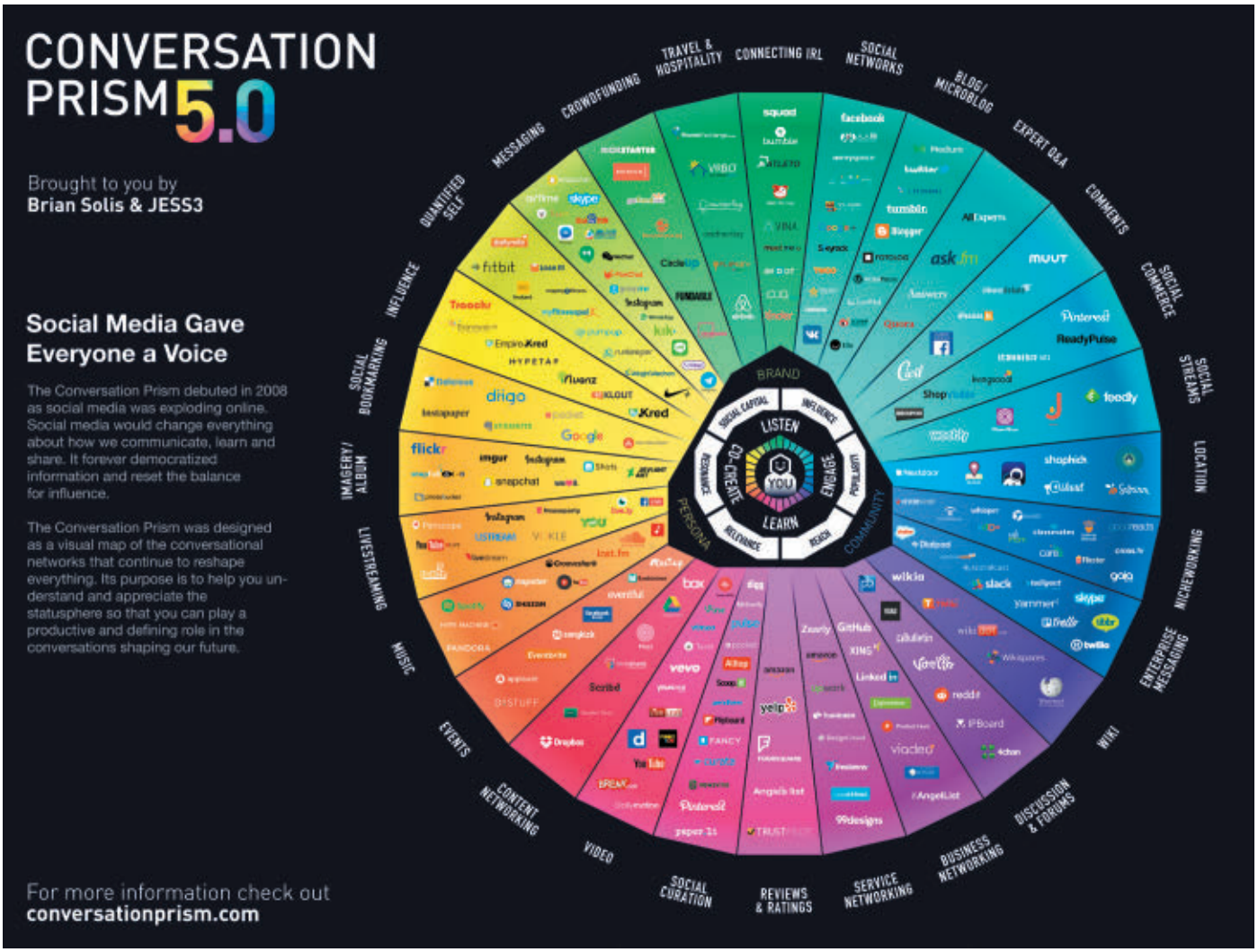
The convenience and accessibility from both computers and phones make social media an ongoing practical means of expressing what is going on in people's lives. Social media is known for the number of pictures that it stores … and you know the old saying about pictures.

Some social media sites permit the user to download information (username, password and written authorization are needed). For example, Facebook has a "Download a copy" option for data to be downloaded in HTML format that provides times for the postings. No "Friends" or "Group" data can be obtained using this method, however. Similarly, Twitter has its own tools from the user site that permits real time tracking, organizing, trends/patterns, and other analytic tools. Unfortunately, this does not provide a forensically sound capture of the content or provide search and reporting capabilities.

Using the proper forensic software, social media can be:

- Collected and stored/preserved locally with hash values to document originality
- Collected for Facebook activity (including both private and public pages, friends and groups), Twitter, YouTube, LinkedIn, Instagram, AOL, Gmail, Tumblr and websites (Yahoo, IMAP)
- Pared down by a timeframe or between certain parties
- Searched with keywords
- Output in PDF, HTML, CSV & Concordance formats

Other forensic software can locate social media hard drive remnants in Internet Cache (unallocated space) from a computer.



Cloud Storage

The proper forensic software can determine if the user has cloud storage accounts, the user's activity relating to cloud documents, and whether the user synced the account to the computer. A timeline of events also can be determined, as can total internet history (including outside of social media).

Needless to say, cloud storage can contain just about anything—photos, emails, texts, corporate IP documents, etc. A computer also may contain backups of phone data, which can be helpful if the person claims they have "lost their phone," "recently traded their phone in for a newer model," or that it was somehow recently "damaged."

Smartphones

Nobody goes hardly anywhere today without their smartphone. But this is a good thing, because it is likely tracking everything that person does. Not only text, phone calls, emails and photos, but also tracking geodata as to where they have physically been with that phone are likely to reside there. This could be critical information for nearly all types of litigation.

Geodata

When it is important to indicate where a person was at any point in time in litigation, geodata on a person's phone can likely provide it. It also can identify an owner's frequently visited places. Timelines can be quickly put together as to where someone was within a specified period of time.

Conclusion

It is important to keep in mind the additional types of digital information now available when establishing your discovery goals. Information on the cloud, or on an individual's smartphone or computer, may be the only location that key data exists. AZ AT

endnotes

1. Examples include Apple File System (APFS), Fusion Drives and File Vault 1 and 2.
2. It is recommended written authorization be obtained from the user to access if private account (Computer Fraud and Abuse Act). The password should also be changed after the data collection is complete. You can attempt to subpoena the cloud provider, but it may get pushed back based on the Stored Communications Act.
3. Commonly, username and password information are needed if the computer data is encrypted. If the user set up an "access code" to open their phone that would also be needed. This may change in the near future.

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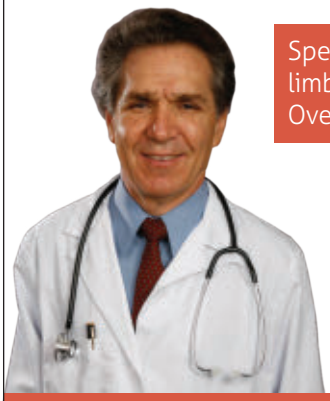

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The Impact of M&M Candies in Business Valuation

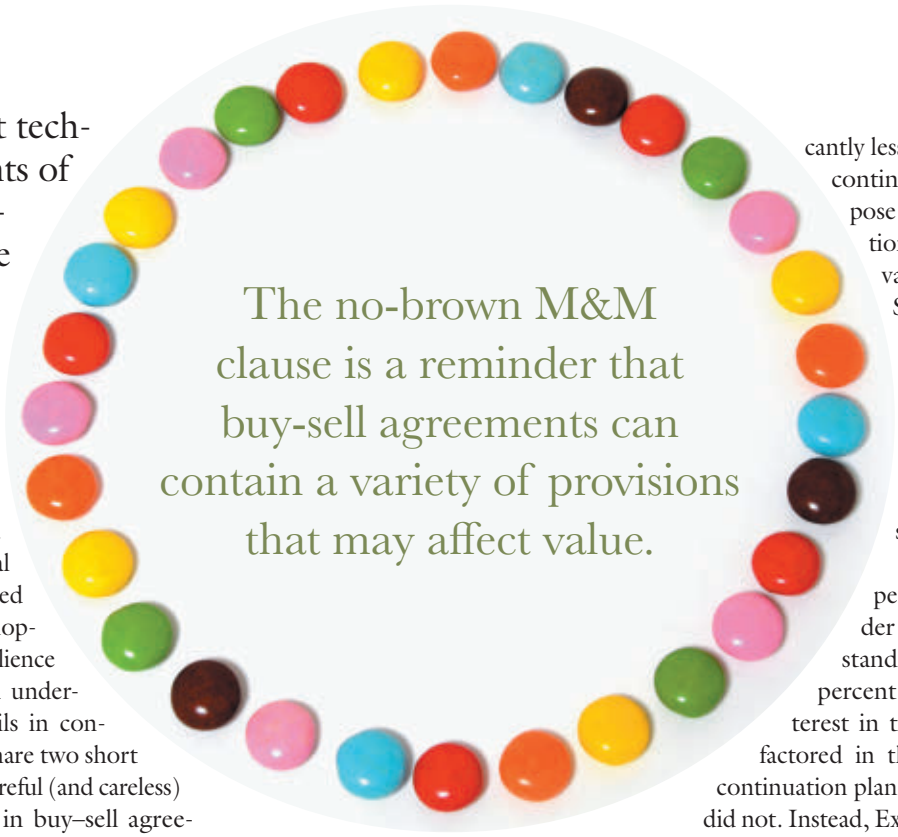
BY BRIAN FOLTYN

Rock band Van Halen's 1982 world tour performance rider contained a provision (under the *Munchies* section) demanding a bowl of M&M candies backstage, with all the brown M&Ms removed. The consequence of even a single brown M&M found in the bowl was a forfeit of the entire show at full price—and maybe even a trashed dressing room.

The motivation behind the provision was actually a hidden safety measure. If there were brown M&Ms backstage, the band knew their contract was not read in detail—and most likely the

BRIAN FOLTYN, CVA, leads the business valuation efforts in the Phoenix office of REDW (redw.com). He has more than 20 years of professional experience in both industry and public accounting, which includes business valuation advisory services, strategic planning, dispute advisory, and mergers & acquisitions. Brian actively provides litigation support and Expert Witness services in the areas of accounting, economic damages and business valuation in state and federal courts.

highly important technical requirements of their contract regarding the stage rigging had not been met either.



Details matter!

Reading contracts in detail can be tedious, painful and exhausting. Through my professional experiences, I have learned the importance of developing the diligence and resilience to thoroughly read and understand the relevant details in contracts. In this article, I share two short stories that involve the careful (and careless) readings of the details in buy–sell agreements and the respective impact this had on the expert witness valuation conclusions.

Short Story 1

A buy–sell agreement typically governs equity transactions among owners in a business if a triggering event occurs.

Early in my career, I was involved in valuing a spouse's interest in a nursing group (the "Practice"). The members of the Practice had signed a buy–sell agreement. The agreement contained a buyout provision of the husband's interest in the Practice. The buyout amount for his interest was at a much higher value than could be reasonably derived under the three generally accepted valuation approaches (income approach, market approach, and asset approach). One of the details of the buyout included a five year non-compete clause.

The opposing expert valued the husband's interest in the Practice consistent with the very high buyout value; however, the husband was nowhere near retirement age and therefore could not afford to not work for the next five years, as outlined in the buyout provision. The non-compete term was a critical detail overlooked by the wife's valuation expert.

Short Story 2

A buy–sell agreement also may contain provisions to ensure continuation of a business by restricting the transfer of shares to unrelated parties.

This was another situation where a spouse's interest in a family business (the "Company") required a valuation for marital dissolution purposes. The owners of the Company were Dad (holding a one percent controlling interest) and Dad's two sons, Son [A] and Son [B], (holding a combined 99 percent non-controlling interest). The owners had signed a buy–sell agreement, which included a salary continuation plan provision for Dad. The salary continuation plan paid Dad $1 million per year, which eliminated substantially all excess cash flow (Company earnings in excess of owner/officer compensation) of the Company, thus rendering Son A and Son B's shares significantly less than without the salary continuation plan. One purpose of the salary continuation plan was to reduce the value of the shares held by Son A and Son B to ensure that Son A or Son B would not sell their respective shares in the Company to a third party (or transfer shares pursuant to a divorce settlement).

Opposing experts each performed a valuation under the fair market value standard of value of a 49.5 percent minority ownership interest in the Company. Expert 1 factored in the effects of the salary continuation plan provision, and Expert 2 did not. Instead, Expert 2 normalized Dad's compensation to reflect his duties performed. Accordingly, Expert 2's analysis showed approximately $1 million more of cash flow available to the owners of the Company, resulting in a significantly higher value of the subject interest in the Company than Expert 1. Understanding that Dad's compensation was a contractual obligation rather than discretionary was a critical detail overlooked by the wife's valuation expert.

Wrapping Up

The no-brown M&M clause is a clever example of what can happen when details are not carefully read and understood. The above short stories are a reminder that buy–sell agreements can contain a variety of provisions that may affect value. Notwithstanding this, from a valuation perspective, buy–sell agreements have received varying considerations by courts. These examples are also a good reminder of the importance of consulting with an experienced business valuation professional when drafting certain provisions of buy–sell agreements and other governing documents. AZAT

CPA Testifying Experts

What Attorneys and Their Clients Should Expect

BY DON R. BAYS

During my years of testifying as a CPA expert, I've had many questions posed to me about what a testifying expert can or cannot do. I've provided my thoughts on some of these questions below.

Is technical knowledge alone persuasive enough?

It was after the lunch hour and I was testifying as a CPA expert on an economic damages case. The venue was a superior courthouse in Santa Ana,

DON R. BAYS, CPA, ABV, CVA, CFF, is a Director in the Litigation and Valuation Services Group of Henry+Horne. He has been involved in litigation support services since 1984. Prior to becoming an accountant, Mr. Bays spent six years as a police officer and detective on the Tucson Police Department.

California. The day was a hot one, and I was testifying at a jury trial. I had been retained by the plaintiff. My testimony was laced with a great deal of technical accounting jargon, which I delivered in an almost expressionless and mundane manner.

About 20 minutes into my testimony I glanced over at the jury members. I saw one of them, a young man, probably in his mid-30s, dozing. Another 10 minutes went by. I took a quick peek at the jury again. This time I saw an elderly fellow's head bobbing back and forth. He was trying his best to stay awake. If this wasn't enough to shake my confidence, I looked up at the judge. His eyes were closed. Was this just his way of processing what he was hearing, or was he actually dozing too? I wasn't sure.

This particular trial occurred about 20 years ago. I had not been involved in too many jury trials up to that point. This one taught me a lesson that I've never forgotten. I needed to do a better job of keeping the jury—and judge—engaged and interested in what I had to say.

I now try to be more of a teacher—one who does not use a lot of technical jargon, or, if I do, I fully explain what it means. If I am testifying before a jury, I look at and attempt to engage them while I am speaking. If I am testifying at a bench trial, I make it a point to turn and make eye contact with the judge. I do this for the purpose of not only engaging the judge but to determine, from the judge's facial expressions, whether the judge is following what I'm saying.

If I notice a questioning look on the judge's or jury members' faces, I revamp my testimony. My opinions are unchanged, but I just say them in a way that is easier to understand and interesting to hear by a jury or the judge. I also will try to vary the inflections in my voice and use my hands more to emphasize certain points of my testimony. I've gotten used to doing this, but for some experts who are new to testifying, it may take them some time to feel relaxed enough to do the same.

Sometimes I find it's good to use a bit of light humor, as long as it is courtroom-appropriate. Members of the jury just might relate more to me and what I have to say if they know that I have a sense of humor.

Should the CPA expert be a client advocate?

Max was an experienced tax accountant. He had a small CPA firm whose members included him, a receptionist and two staff accountants. Max decided that he wanted to branch out into litigation support services. Before he did, he took courses on how to value a business and eventually got his Accredited in Business Valuation (ABV) certification from the American Institute of CPAs. Max wanted to get involved in divorce business valuations and be retained by family law attorneys and their clients as a testifying expert.

> While it is perfectly appropriate for an attorney to be an advocate for his or her client, a CPA who testifies as an expert cannot be an advocate.

Max sent emails to several law firms announcing his desire to be retained as a testifying expert in family law cases. He eventually received a call from an attorney who asked Max if he could value an auto repair business that was owned by his client ("Wife") and her spouse ("Husband"), who also ran the business. The valuation was needed for property settlement purposes between the divorcing couple. This meant that Max had to determine the value of a 50 percent interest in the auto repair business—the 50 percent interest to be "sold" by Wife to Husband.

Max was eager to do a good job with the valuation. He also was eager to please the attorney who referred him in the case so that he would be assured of getting future business through the attorney. When Max met with Wife, she expressed to Max that it was most important to her that Max come up with the highest valuation of her 50 percent interest in the business that he could. Max told her that he would lean in her direction in any way he could when he was doing his work.

While it is perfectly appropriate for an attorney to be an advocate for his or her client, a CPA who testifies as an expert cannot be an advocate. For example, in an economic damages case, the CPA expert can only be an advocate for his calculated damages opinions. The CPA cannot take sides. The CPA must arrive at a damage calculation that is fair to both sides in the case.[1] The same is true for Max in his business valuation of Wife's 50 percent interest. He cannot purposefully make his valuation "lean" in favor of Wife when this approach is clearly not equitable to Husband. Max must prepare a valuation report that is helpful to the trier-of-fact. The judge will be attempting to determine what an appropriate value of the 50 percent interest in the auto repair business should be. The judge will likely agree or disagree with Max's valuation depending on whether it has been prepared in a manner that is reasonable and equitable to the positions of the parties.

If a CPA is hired to advise an attorney or the attorney's client in a litigation matter—say on financial issues—and is retained only as a consultant, and will not be testifying as an expert, the CPA consultant can be an advocate for his client.[2] The files of a CPA expert witness used to prepare a report or support his or her opinions at trial are generally subject to review by the opposing party and their counsel. This discovery includes emails and notes in the expert's files. A CPA retained as a consultant generally would not have to produce their files to the opposing party or the party's counsel because the consultant will not be subject to cross-examination on the witness stand.[3]

Some attorneys will initially designate the CPA who has been retained on the case as a "consultant." If the case looks like it is going to proceed to trial the consulting CPA may now be designated an "expert" who is

expected to testify in the case. At that point, the CPA's files are now subject to discovery and review by the opposing party and their attorney. A danger with this type of arrangement can exist if, once the CPA changes from consultant to expert, the CPA has indications in his or her file that they were clearly advocates for their client's position in their consulting role. It may be difficult to overcome this perception once the CPA is named a testifying expert.

No matter how upset the CPA expert gets from the opposing attorney's perceived intentional intimidation, the expert must not lose their cool.

Is the CPA expert supposed to remain composed under cross-examination?

The CPA expert can tell the client or the client's attorney, "Yeah, I'm cool under pressure." But, this may not be known until the trial has begun. This is a tough attribute for the client or their attorney to gauge unless they have observed the expert testifying on other cases or have received positive feedback on the expert's testifying prowess from other attorneys.

No matter how upset the CPA expert gets from the opposing attorney's perceived intentional intimidation when questioning the expert, the expert must not lose their cool. Showing strength under duress is an indication to the judge or jury that there is strength in the expert's report and, therefore, in their opinions. In the unusual case where the opposing attorney is pushing the limits of outright badgering the witness, the judge may ask the attorney to ease up. If not, the behavior will not be looked on favorably by the judge or jury. On the other hand, if the expert shows anger and tries to argue with the opposing attorney, the judge or jury may not appreciate what they are seeing or hearing from the expert.

Is a CPA credential enough for a testifying expert?

In addition to my CPA credential I have two others issued to me by the American Institute of CPAs. One deals with business valuations and the other with forensic abilities. Could I be just as effective as a testifying expert with only my CPA credential? It depends.

It depends on whether I can speak in an educated manner about business valuations or on forensic issues in the courtroom. The judge and jury will soon forget that an expert mentioned he or she held other credentials once they are on the witness stand. On the other hand, an attorney may feel more comfortable having a CPA expert who has a business valuation credential testifying about the value of a 50 percent ownership interest held in a business by each party of a divorcing couple.

I once had a friend—since passed—who was a CPA who testified many years on economic damage, forensic and business valuation litigation matters. He never believed he needed any other credentials to be an effective testifying witness. He was right. He was highly sought after by numerous attorneys for his testifying ability.

How expensive are CPA testifying experts?

Except when dealing with their clients and the clients' attorneys, CPAs who testify in the greater Phoenix area are very guarded about what their hourly charges are for litigation service work. One might charge $175 an hour, while another might charge $450 to $500, or even more, an hour. CPAs who charge at the lower end of this range might be those who are just making their way into litigation support services. Others, who have been retained as experts for many years and have a great deal of experience, might be at the high end of the range noted.

Because it is usually very difficult for a CPA testifying expert to estimate the total hours he or she and their staff will spend on an engagement, it is difficult for experts to give their clients precise fixed fee quotes as they do for business valuation services.

One way for clients to control their expert's fees is to ask the expert to break the engagement down into phases. For example, in a case where an employee in charge of the accounting functions of an organization is suspected of fraudulently taking money out of the company, the first forensic phase to determine whether there are any "smoking guns" to indicate this might be occurring might be to analyze the transactions for one year, or two years, in the accounting software to see if there is any theft going on. Depending on what is found in Phase I, the client may not want the CPA to do further forensic procedures on a disputed item.

One thing for sure is that it will be unusual for a CPA testifying expert's fees to be only a few hundred dollars.

What are the CPA testifying expert's first steps before being retained?

My experience in my own firm, and with other testifying CPA experts with whom I am aware, is that we all start with the performance of a conflict check. This is a procedure within the testifying CPA's firm to ferret out any issues any senior members of the firm might have with any name associated with the litigation engagement at hand.

In a one- or two-person firm this procedure might be as simple as asking, "Do we have a problem with accepting this client?" In my firm a form with all the names of the parties and entities involved in the case is circulated to partners and senior managers. If there are no conflicts, the next step would be the preparation of a document referred to as a letter of engagement, or retainer agreement, or fee agreement. The letter is given to the potential client, who then will sign their approval to the terms outlined in the letter and return a signed copy to the CPA expert. Next, a meeting with the client

and/or the client's attorney will generally take place where the case background is fully discussed. This would then be followed up with a request for specific documents to assist the expert in formulating their opinions.

What Code of Professional Conduct guides Arizona CPA experts?

Any CPA licensed in the state of Arizona must adhere to the Code of Professional Conduct of the American Institute of Certified Public Accountants—even if they are not a member of the AICPA. The Administrative Code of the Arizona State Board of Accountancy, rule R4-1-455 on Professional Conduct and Standards, states the following[4]:

A. It is the Board's policy that the rules governing registrants be consistent with the rules governing the accounting profession generally. Except as otherwise set forth in these regulations, registrants shall conform their conduct to the Code of Professional Conduct, published June 1, 2017 in the AICPA Professional Standards by the American Institute of Certified Public Accountants, 1211 Avenue of the Americas, New York, New York 10036-8775 (www.aicpa.org), available from the AICPA.

B. The AICPA Code of Professional Conduct, and any interpretations and ethical rulings by the issuing body, shall apply to all registrants, including those who are not members of the AICPA. The version specified above, including any interpretations and ethical rulings in effect shall apply. Any later amendments, additions, interpretations, or ethical rulings shall not apply.

What the foregoing means is that any CPA, licensed by the state of Arizona, and who is involved in litigation support and business valuation services, must keep the Code of Professional Conduct of the AICPA in mind when doing their work.

endnotes

1. Once the practitioner is named as an expert witness, the practitioner needs to understand that he or she must be independent as a fact finder for the court and is not an advocate for his or her party, as he or she may have been if he or she were initially retained as a consultant. American Institute of Certified Public Accountants, Practice Aid 10-1, Serving as an Expert Witness or Consultant (2010), at 30.
2. Id.
3. Id. at 48, definition of consultant (litigation) – A person or expert who, though retained by a party, is not expected to be called as a witness at the trial.
4. https://www.AzAccountancy.gov/Aboutus/ArizonaAdministrativeCode.aspx

5 Best Practices to Promote the Admissibility of Your Expert's Opinion

BY COURTNEY BELLER & JESSICA IENNARELLA

As an attorney, you will likely hire at least one expert witness during the course of your career. To promote admissibility of the expert's opinion, his or her deliverables should comply with Rule 702 and *Daubert*. We discuss five best practices counsel can follow to guide and assist their experts in accomplishing this objective. But first, a brief refresher on Rule 702 and *Daubert*.

In 1993, the United States Supreme Court issued an opinion in *Daubert v. Merrell Dow Pharm., Inc.*,[1] addressing the admissibility of scientific expert testimony in federal court. The admissibility standard was expanded by the Supreme Court's 1999 decision in *Kumho Tire Co v. Carmichael*,[2] wherein the Court held that the *Daubert* standard applies not only to scientific expert testimony, but to all expert testimony.

Federal Rule of Evidence 702 was subsequently amended to reflect the changes articulated in *Daubert* and *Kumho*, and now requires that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> a. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> b. The testimony is based on sufficient facts or data;

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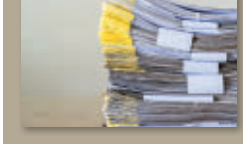
JESSICA IENNARELLA is a Certified Public Accountant and Certified Fraud Examiner at the Phoenix office of Hagen, Streiff, Newton & Oshiro, Accountants, P.C. She has experience in calculating economic damages and investigating employee dishonesty in a variety of industries.



c. The testimony is the product of reliable principles and methods; and
d. The expert has reliably applied the principles and methods to the facts of the case.

Although not expressly outlined in Rule 702, *Daubert* also sets forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors outlined by the *Daubert* Court are:

1. whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
2. whether the technique or theory has been subject to peer review and publication;
3. the known or potential rate of error of the technique or theory when applied;
4. the existence and maintenance of standards and controls; and
5. whether the technique or theory has been generally accepted in the scientific community.

The Court in *Kumho* held that these factors also might be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue."

The most critical step in retaining an expert witness and satisfying these criteria is to select one with the proper expertise and qualifications. Assuming your expert is qualified and best fit for rendering the opinions to be proffered, there are additional steps you can take as counsel to promote admissibility of his/her opinion(s). The following five tips for complying with Rule 702 and *Daubert* focus on the content of the expert's written report, as the written report generally sets the parameters for the expert's testimony. The report is also opposing counsel's first opportunity to assess the quality of your expert and the threat the expert's opinion might pose to their client's case.

1. Relevancy of Opinion

In order for an expert's opinion to meet the admissibility requirements under Rule 702, his/her opinion must "help the trier of fact to understand the evidence or to determine a fact in issue." In other words, the opinion must be relevant to the case at hand. A judge and/or opposing attorney should be able to clearly understand from your expert's report how the opinions contained therein relate to the facts of the case. There are a few ways counsel can assist with this objective:

- Encourage your expert to include a relevant background section in his/her report. Most cases involve a multitude of information, some of which may not be pertinent to a particular expert's analysis. Using a background section to filter information gives the expert an opportunity to identify the specific facts of the case that are pertinent to his or her opinion and to frame the scope of the opinion for the reader.
- Remind your expert to frequently tie case-specific facts and evidence back to the methodologies applied and in support of the conclusions drawn in the report. Including reminders of the facts within the context of the related opinions helps the reader easily understand how the opinion is relevant to assisting the trier of fact with the case at hand. For example, financial damages experts often apply industry benchmarks to measure losses. Encourage your expert to outline the reasons the chosen benchmark is relevant to the specific facts of the case.

2. Avoid Scope Creep

Rule 702 under the *Daubert* standard requires that an expert witness be qualified as an expert "by knowledge, skill, experience, training, or education." The first step to ensuring that your expert has the requisite level of knowledge, skill, experience, training or education is to clearly define the scope of work to be performed and opined upon. Your expert should help you understand if there are gaps between the scope of the subject matter you intend for them to opine on and the subject matter(s) they are qualified to opine on. If there are gaps, consider asking your expert for suggestions on the other types of expert opinion that will be relevant to the basis for the opinion (i.e. "stacking experts").

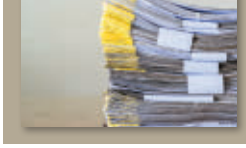
For example, assume a case where Business A is alleging lost profits due to Business B's misappropriation of proprietary business processes that allowed it to enter the market. When projecting expected revenue for Business A but-for the entrance of Business B into the market, consideration may need to be given to the pricing of the product. If the market was made up of only a few suppliers, the availability of the product through more suppliers may have changed the price a customer is willing to pay. In that scenario, a forensic accounting expert may rely on an economist's opinion to establish the product sales price had the infringement by Business B not occurred.

Your expert also should understand their role in the litigation process. The expert's job, as set forth under Rule 702, is to assist the trier of fact with understanding evidence or a particular fact at issue. It is not the expert's job to render legal opinions, nor should they. Doing so can disqualify your expert as they do not have the knowledge, skill, experience, training or education to issue a legal opinion (unless they are also serving as a legal expert). As such, you and your expert should ensure that the report does not contain any legal conclusions.

3. Avoid Unnecessary Assumptions

Rule 702 requires that the expert's testimony be based on sufficient facts or data. As such, Rule 702 inherently discourages experts from basing their opinions on assumptions. There are, of course, instances when assumptions are appropriate and/or necessary. For example, the parties to a transaction may be deceased, making it difficult or impossible to validate facts or information. In other circumstances, the opposing party may have destroyed or refused to provide documents.

One way to avoid unnecessary assumptions is to give careful consideration to the timing of when an expert should be retained. The sooner an expert is hired, the sooner they can get involved in outlining the information needed to prepare and support the report. The expert can also be utilized to outline topics for discovery and depositions that will allow them to fill in the gaps where



assumptions would have otherwise been necessary.

If assumptions must be included, experts should refer back to facts and evidence in the case that specifically support the reasonableness of the assumption whenever possible. Doing so will move the basis for an opinion away from only an assumption to more of an estimate. Also, an expert should clearly identify any assumptions inherent to their opinion. Assumptions should not be passed off as known and supported facts.

4. Ensure That Your Expert Has Sufficient Relevant Information

One of the principal challenges that both experts and counsel face is ensuring that the expert has enough relevant information to credibly support and defend their stated opinion. You may be tempted to overload your expert with every potentially relevant (and sometimes not) document, making finding key data more like searching for a needle in a haystack. You may be inclined to restrict the expert's access to documents and information, often in an effort to keep costs down. Both approaches will likely have negative consequences, either in terms of cost to the client or harm to the credibility of your expert's opinion. If your expert sees an important document for the first time at deposition or trial, it may seriously compromise the integrity of their opinion.

But there are several ways that effective collaboration between you and your expert can ensure that the most relevant information is located and shared:

1. You should seek direction from your expert about the types of documents and information they would expect and need to see. This will allow you to identify holes in disclosures and discovery (and to act on it), as well as to flag documents and information for expert review during the document review process.
2. You and your expert should discuss potential keyword searches that can be applied as part of electronically stored information (ESI) discovery and document review to locate the most relevant documents.
3. In many instances, you will not know what a specific type of document that your expert is interested in will look like. A great way to handle this is to ask for sample documents and distribute them to your document review team.
4. You and your expert should discuss key timeframes and facts that may be relevant to their opinion, so you can focus on locating relevant documents and information.

These steps will allow you to get relevant information into the hands of your expert for use in preparing and supporting his/her report.

> The expert report is opposing counsel's first opportunity to assess the quality of your expert.

5. Disclosure of Supporting Materials

Daubert requires that an expert's opinion be the product of reliable principles and methods. It also instructs judges in assessing reliability to consider as "non-exclusive" and "non-dispositive" criteria whether an applied methodology has been tested, is subject to peer review, and has attracted widespread acceptance within a relevant scientific or technical community, among other things.

Though the applicability of these factors often depends on the area of expertise, one way to demonstrate adherence to this standard is to clearly outline the sources—including treatises and industry publications—that your expert has relied upon when discussing an applicable industry standard or methodology for testing and why those sources were chosen. Are they part of a particular profession's general education materials? Is the publication the gold standard for current methods of practice? Is it published or endorsed by the governing body that issued your expert's professional license (a board of accountancy, for example)? The answers to these questions can be included as part of your expert's report in order to preemptively address *Daubert*.

Another important consideration is whether copies or excerpts of the sources and materials relied upon by your expert should be included with their report. Those sources may be available to the expert in an electronic format but not, for example, in a printable format. In some instances, providing a copy of those sources along with their report may head off a Rule 702 and/or a *Daubert* challenge, while in others it may not be necessary. You and your expert should discuss the sources utilized and assess whether it is cost effective and, importantly, whether it is necessary, to provide them in whole or in part with their report.

Conclusion

Although not exhaustive, these are five tips for attorneys to use when working with their experts to avoid a Rule 702 and/or a *Daubert* challenge (or sustain one if presented). Communication is key between the attorney and the expert to ensure the report and opinions meet the standards of Rule 702 within the context of that expert's subject matter. Attorneys should become familiar enough with the *Daubert* standard to ask their experts pertinent questions regarding their qualifications and opinions. Likewise, experts should make sure the attorney retaining them understands the scope of the work the expert is qualified to opine on, and any potential issues and/or limitations inherent to the related opinions.

With effective communication a more reliable, relevant and useful product can be achieved.

endnotes

1. 509 U.S. 579 (1993). The *Daubert* standard has subsequently been adopted by numerous state courts, including in Arizona.
2. 526 U.S. 137 (1999).

Using Financial Experts in Civil and Criminal Fraud Cases

BY ERIC LEE

Each year, fraud and white-collar crimes cost individuals and businesses billions of dollars in economic losses and damages. It is estimated that U.S. businesses lose five percent of their revenues to fraud each year, and more than a quarter of businesses reported losses from fraud in excess of $1 million. Beyond the economic losses of the fraud, companies and individuals can sustain damages to business relations, employee morale, reputation and brand strength. They may even face jail time and substantial fines and penalties.

White-collar crime and fraud often involve complex financial transactions, concealment, numerous entities, related parties and a substantial number of documents. Due to the complexity of the crimes and significant economic impact, white-collar crimes can lead to civil litigation and possible criminal litigation. To assist the attorneys, judges and juries to better understand facts and circumstances, legal counsel or the government may use financial experts to analyze the records, summarize their findings, and provide expert testimony and consultation.

Financial experts with specialized expertise in fraud, forensic accounting, complex financial analysis, and investigations may be engaged in civil and criminal litigation related to fraud and white-collar crimes. Even in instances where the cases do not directly involve fraud or embezzlement, there may be components of the case where financial ex-

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pertise may be helpful to the plaintiff, defense, prosecution, judge or jury. Financial experts can assist in the following ways:

- Case evaluation
- Evidence review and financial analysis
- Assist in overall planning strategy
- Conduct investigations and interview witnesses
- Assist in pleadings and motions
- Calculate economic damages and sentencing losses
- Testify in hearings and trials

Criminal Fraud Versus Civil Fraud

Fraud and white-collar crimes are most often associated with criminal litigation and potential incarceration. However, allegations of fraud also may be brought through civil litigation. Some of the basic differences between criminal fraud and civil fraud relate to who is pursuing legal action in the case and the legal remedies. In criminal litigation, charges are brought by government prosecutors against the perpetrator, and guilty verdicts can include jail time, probation, fines and restitution. In civil litigation, the victim of the fraud can file a civil lawsuit in state or federal court against the perpetrator in an attempt to recover financial damages and possibly punitive damages.

Federal Rules of Criminal Procedure

There are unique differences between the federal rules of civil and criminal procedure, including discovery and expert reporting, that should be considered in fraud cases involving financial experts (Arizona courts have similar rules of civil and criminal procedure).

Under Rule 26(a)(2) of the Federal Rules of Civil Procedure, financial experts must provide the opposing party, in advance of trial, a written report prepared and signed by the expert. The report (typically referred to as a "Rule 26 Report") must include, among other things: a complete statement of all opinions; the bases and reasons for the opinions; a list of the documents considered; any exhibits that will be used to summarize or support the opinions; and the witness's qualifications, cases and publications. In addition, in civil cases the opposing party is entitled to take the expert witness's deposition under Rules 30 and 31 of the Federal Rules of Civil Procedure.

By contrast, experts in criminal cases are not required to disclose an expert report in advance of testimony. In criminal cases, neither party generally has a right to discover the other's evidence, with the exception that the defendant is entitled to certain types of evidence from the prosecution. Under Rule 16 of the Federal Rules of Criminal Procedure, the extent of discovery is typically dictated by the defendant. Particular to expert witnesses, if a defendant requests the written summary of the government's expert testimony prior to trial, then the defendant is obligated to make a similar disclosure in return. However, the "written summary" requirement for experts under Rule 16 falls far short of the "complete statement" requirements of experts in civil cases (Rule 26). The Rule 16 expert disclosure is a lesser standard that requires only a written summary of the witness's opinions; the bases and reasons for those opinions; and the witness's qualifications. Furthermore, unlike civil cases, depositions of experts in criminal cases are typically not allowed but may occur under certain circumstances.

Although the rules in criminal litigation generally limit discovery, in practice discovery can differ based on attorneys and jurisdictions. For example, discovery for government expert and fact witnesses may be expanded and be overly broad out of an abundance of caution to make sure nothing is left undisclosed to the defense that may affect the case. Defense experts also may participate in interviews with the prosecution to assist in plea negotiations. Legal counsel should discuss discovery protocol with the financial expert at the beginning of the case to make sure that they understand and comply with the discovery rules, and that records are retained and documented appropriately.

Differences Between Civil and Criminal Rules

DISCLOSURE REQUIREMENTS	CIVIL CASES (RULE 26)	CRIMINAL CASES (RULE 16)
Report type:	Report	Disclosure
Statement of opinions:	Complete list	Summary
Basis or reason for opinions:	Required	Required
List of facts or data considered in forming opinions:	Required	Not required
Exhibits used to support or summarize options	Required	Only if used as evidence in trial
Qualifications of expert:	Required	Required
List of publications (10 years):	Required	Not required
List of cases (4 years):	Required	Not required
Statement of compensation:	Required	Not required
Depositions of expert:	Allowed	Typically, not allowed*

** Although depositions are typically not allowed in criminal cases, it is not uncommon for the expert witness to participate in interviews or meetings with opposing counsel to discuss analyses, opinions and findings.*

Fraud Investigations

When individuals or businesses suspect allegations of fraud or have become a victim of fraud, financial experts may be engaged to conduct an investigation. Investigative activities can include: the collection and discovery of facts and evidence; interviews of witnesses or suspects; forensic analysis of financial records; and calculation of economic damages and losses. Because of the sensitive nature of the investigation and potential for civil or criminal litigation, it is recommended that the financial expert be retained through legal counsel to preserve legal privilege and limit potential discovery.

Financial experts should be retained through legal counsel to preserve legal privilege and limit potential discovery.

There is a range of potential remedies that can come from fraud investigations, including: administrative proceedings (such as employment termination, settlements or sanctions); civil litigation; and criminal litigation. Each remedy has different burdens of proof (or evidence) that are required to prevail. Often, the decision to pursue one type of remedy over another is based on the amount of evidence/proof that has been developed during the investigation. Legal counsel should have upfront communications with their client and financial expert about their overall objectives for the investigation. If the client's only objective of the engagement is to provide a reasonable basis to terminate an employee, then the financial expert should not undertake a full-scale investigation that is costly and time-consuming. Conversely, if the client is interested in pursuing criminal charges, the investigation should include sufficient work (and evidence) to satisfy the higher burden of proof in criminal litigation.

Financial Experts in Civil Litigation

Financial experts may become engaged in disputes or civil litigation related to fraud issues as either a consulting or testifying expert witness. Although fraud is a legal issue ultimately to be decided by judge or jury, financial experts can be used to analyze documents, testimony and other information produced in the case and identify and explain potential badges (flags) of fraud to the trier-of-fact. If serving as an expert witness, the expert also will be useful in preparing a report with their financial analysis and opinions on potential economic losses from the fraudulent activity.

Criminal Prosecution Experts and Witnesses

In criminal cases with complex financial issues, the government (prosecution) may engage financial experts with experience in forensic accounting, complex financial analysis and specialized accounting experience to serve as expert witnesses for the prosecution. Considering recent large financial crimes and corporate scandals, the government will continue to utilize financial experts that understand complex accounting and financial issues and can assist in explaining them to the government, judge and jury.

In addition, financial experts initially may be retained by private counsel, individuals or businesses to conduct white-collar/fraud investigations for either administrative or civil litigation purposes separate from criminal investigations (as discussed above). At the conclusion of the investigation, the financial expert may be asked to present their investigation findings to law enforcement officials for their consideration of criminal charges. If the prosecutor ultimately determines that criminal charges are warranted, the government may call the financial expert as a fact or expert witness to testify about the work performed and investigation findings.

Fact (Lay) Witness Versus Expert Witness

Although financial experts are regularly retained in criminal proceedings as expert witnesses, the government also has the option to have the expert testify as a fact or lay witness. Particularly when the financial expert was involved in the initial (administrative or civil litigation) forensic investigation that led to the criminal charges, the prosecution may call the expert as a fact witness to introduce investigation evidence and maintain the objectivity and independence of the investigation.

There are unique differences in the Federal Rules of Evidence between fact witnesses and expert witnesses that may affect the engagement and the communications in criminal litigation. Unlike expert witnesses, fact witnesses are not required to submit Rule 16 expert disclosures (discussed in detail above). And fact witness testimony cannot be challenged under Rule 702 or through a *Daubert* hearing.

However, there are limitations to fact witness testimony. Fact witnesses may only testify to matters of personal knowledge and only after evidence has been produced to support the testimony (Rule 602) and may only give opinions in limited circumstances (Rule 701). By contrast, expert witnesses may testify to hearsay evidence and offer opinions even if the evidence has not been admitted into court (Rule 703).

Criminal Defense Experts and Witnesses

The American Bar Association has recognized that investigators, expert witnesses and other support services are necessary for quality legal representation for criminal defendants.[1] Defense counsel involved in white-collar and other complex criminal cases may retain financial experts for the defense similar to expert witness or consulting engagements in civil litigation. Experts also may be engaged by the public defender's office or appointed by the courts. According to U.S. law, if a defendant is financially unable to obtain investigative, expert or other services necessary for adequate representation, then counsel may request the court to authorize the services.[2]

Consulting Services

Given the fact that more than 90 percent of criminal defendants will ultimately plead guilty rather than go to trial, it is likely that the majority of the financial expert's work in criminal litigation will be in providing consulting services. Experts acting in the consulting role may expect to assist the defense counsel with understanding and analyzing the evidence produced by the government, interviewing witnesses and possibly the defendant, and assist with plea negotiations. It is likely that financial experts in certain criminal cases may never end up issuing expert disclosures or testifying in trial.

One of the essential functions of experts in criminal defense litigation, particularly white-collar and financially complex cases, is to understand and analyze the significant amount of evidence the government typically produces against the defendant. Defense counsel will likely rely on the financial expert's experience and knowledge of financial issues to understand the evidence against defendant and the exposure in terms of losses and possible sentencing guidelines. Financial experts also may be asked by defense counsel to consult with them (and in certain instances, the defendant) about the evidence and the impact on defense strategies.

Sentencing Hearings

Sentencing and restitution in most white-collar fraud cases are affected by the amount of financial losses incurred as a result of the fraudulent activity. Federal sentencing guidelines include loss tables correlated to the charged crimes that assist in calculating the term of the sentence for the judge to consider. Financial experts with forensic and financial analysis experience may be a valuable resource to the government and defense attorneys during sentencing hearings. Evidence and expert testimony offered during the sentencing hearing can have a significant impact on loss calculations and, therefore, sentencing and restitution.

In addition, because most criminal cases are settled through plea agreements instead of trials, financial experts often will be used by attorneys to consult on appropriate loss calculations for the plea agreement. They also may be asked by defense counsel to prepare declarations or schedules identifying the calculation of losses or restitution for consideration by the government and/or judge, and the experts may testify at the sentencing hearing concerning their analysis of loss and restitution calculations.

endnotes

1. American Bar Association: Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4. Support Services.
2. 18 U.S.C. § 3006A – Adequate representation of defendants. § 3006A(e)(1) Services Other than Counsel: Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon findings, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to afford them, the court … shall authorize counsel to obtain the services.

Retaining a Damages Expert

Issues to Consider

BY STANLEY P. STEPHENSON

Imagine you have been approached by a potential new client about a case with financial loss implications. What should you do? Where do you turn? Before addressing consideration of those issues, here are a few actual examples of such cases:

1. After selling his dental practice, the dentist and his wife loaded up a rental truck with their belongings and drove across the state for several hours to their new home. However, the exhaust mechanism of the truck was faulty, and prolonged exposure to toxic carbon monoxide leaking into the truck cabin caused brain damage to both dentist/driver and wife/passenger. The dentist had intended to do

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Decide if you need an expert as a consultant only or a disclosed expert. Experts are not cheap.

part-time, contract work, but could no longer do so. Financial losses may be involved, but how to measure?

2. During a site inspection of a newly built health care facility in Northern California, which housed 150 dementia patients, it was discovered to have been built on an earthquake fault line. Cracks had already appeared in the parking lot and along an outside wall of a building that had patient rooms, cafeteria and medical treatment rooms. Major repairs were needed, during which patients would need to be relocated to a skilled health facility. A complex lawsuit is filed against all parties involved in building the facility. What are the damages and how to assess them?
3. A group of three design engineers, coworkers in a chip-making firm, shared confidential and proprietary information regarding the design of a new computer chip with a competitor firm before quitting their jobs and joining the competitor firm as new employees. The owner of their former firm was very upset at what his attorney called misappropriation of trade secrets, and the owner wanted economic damages, especially from his former employees. But he was concerned about keeping things quiet.
4. A manufacturer of cypress-log home kits received several complaints and lawsuits from his customers about problems with design and building of the kits. In the past, company managers had depended on their insurance carrier to handle litigation issues, especially court filings, court appearances and depositions. However, because the carrier repeatedly failed to do these things, the company CEO must handle the issues. To do so, he is forced to stop training new staff, attending trade shows, and related actions necessary in the operation and growth of his firm. Profits had begun to fall, and the firm sued the insurance carrier. Sales growth continued to rise, however.

All of these were actual cases that eventually led to economic damages being measured. But each also implied several decision-making steps by the litigators (and the expert). Here are those steps:

1. Decide if you need an expert as a consultant only or a disclosed expert. Experts are not cheap. One rule of thumb: Don't hire an expert if the potential award is not well above $100,000.

a. A consultant can be an advocate and is not revealed like a disclosed expert. However, if the attorney decides to switch the role to a disclosed expert, then all prior communication with the consultant is disclosed.
b. Determine role: consultant, plaintiff expert, or defense expert (who rebuts plaintiff expert)

2. Finding an expert is best done via word of mouth, use of an online or print directory, or through a placement firm. The litigator will want to visit the expert's website, interview the expert, and examine their CV. Considerations might include the expert's rates, testifying experience, publications, and academic or teaching experience. This interview is gratis. Sites to look at:
   a. ALM, Juris Pro, Expert Pages, and SEAK are established online and print directories and are good sources when the case involves personal injury, wrongful death or employment disputes. The law firm directly engages the damages expert, and the expert customarily provides an engagement agreement spelling out the expectations of each party.
   b. For more complex cases, especially those with more substantial damages like commercial matters, e.g., breach of contract, IP infringements, or traumatic personal injuries, attorneys may want to use a placement firm like Rubin Anders, Gerson Lehman Group, or Thompson Reuters. Such firms search and enable screening of the experts for the law firms. They also handle billing and payments. In exchange for these services, they typically mark up the expert's fee by 30 percent. The placement firm is retained by the law firm, which in turn retains the expert.

3. Part of the decision to hire an expert can involve an initial screening phone call during which it is acceptable to ask the expert to offer advice on various types of damages that might arise in the case. An experienced financial expert can do this in both personal earnings loss and commercial cases. For example, in the personal injury matter (#1 above), lost earnings, medical expenses (and, maybe life care plan costs), lost value of household production services were mentioned. Lost profits were a main issue in the #4 case but were a challenge to measure. In case #3, the CEO of the chip-making firm did not want to disclose the financial statements of his firm, so the expert could not proceed with customary approaches to trade secret misappropriation damages (Note: Past pay and bonuses and value of stock options granted were the main damages sources in #4). Case #2 called for the financial expert to join a team of many other experts led by an engineer, who developed an overall plan for repair and reconstruction. The financial expert's damages analysis was then developed consistent with the chief engineer's scope and timeline of repairs.
   a. It is fair game for the attorney to share case information with the expert and for the expert to offer advice as to damages measures, without generating an invoice because no retention has been decided.
   b. The expert may ask for and receive information on venue, timing, names of parties, etc. in order to provide a conflict check.

4. The main role of a damages expert is as follows:
   a. Develop a theory or theories of damages. (This is a joint decision, and theories of damages should follow the complaint.)
   b. Determine what information is needed regarding participants as well as market information. (Failure of the attorney to provide this information and do so in a timely manner may be reasons for the expert to withdraw from the case.)
   c. Prepare a damages report in keeping with federal or state guidelines.
   d. If acting as a rebuttal expert, prepare the rebuttal report.
   e. Be available for deposition and possible court testimony (if a trial, then provide assistance to attorney with Q&A for direct and cross examinations).

5. Things not to ask the expert to do:
   a. Sign a report the attorney has already written.
   b. Prepare a report without supporting evidence.
   c. Consider charging less if the case fails or take more if the case succeeds. (To do so violates ethics guidelines of professional groups like AICPA, NACVA, NAFE, each with likely financial experts as members.)
   d. Become an advocate for the attorney or attorney's case (again an ethics violation).
   e. Assume the errors of the attorney for procedural errors like late filing.

6. The attorney may want to consider asking the expert for help in settlement negotiations. (This can happen in lieu of filing a complaint in the first place.)

7. Certainly the attorney should give the expert enough lead time to do the job—no less than two weeks for a personal injury/wrongful death case and at least a month for a commercial case like a breach of contract or IP matter (and these are times after the expert has received the case file and all relevant information).

The attorney may want to consider asking the expert for help in settlement negotiations.

Finding, carefully considering, and selecting a good financial expert for civil litigation involving economic damages can make the difference in the outcome of your case. AZ AT

The Witness Speaks!

BY DANIEL V. SOLA CHATS WITH SHELL BLEIWEISS

What will happen is some smart attorney will ask, "So, Mr. Sola, back in 2018 you said expert testimony is nothing more than telling a good story, a 'ripping yarn' as it were. Are you doing that today? Are you telling this court a ripping yarn?"

That's expert testimony, and that's why I love it. Everything you have ever said or written is on the line. It is a battle of intellect and wits. The rules of the game are hundreds of years old and amount to a philosophical discourse on the nature of truth. It is a language where

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everday meanings overlap with esoteric jargon. It is a highly civilized conversation among oath-bound professionals wanting nothing more than for the other to fail.

I digress.

I was fortunate to have worked with my boss, Frank Rovers, almost as an apprentice on a large case for the Twin Cities Army Ammunition Plant. My job was to read and dissect depositions and draft and check supporting reports and data. I got to sit in during witness preparation and prepare alternate opinions to torture the opposing legal strategy. I'd be out collecting samples and drilling wells one week, and then arguing at the DOJ in Washington the next. I am a hydrogeologist and an environmental consultant.

My first case was a cost apportionment between two companies that had contaminated the groundwater. I was about five years into my career with nothing more than a Bachelor's degree in geology and I was on the stand in U.S. District Court. I bought a suit. My tongue stuck to the roof of my mouth. We did okay. The judge cut the baby in half.

One case led to another and I found myself becoming sought after. I was inevitably the least qualified expert on paper, yet we did well and the attorneys called again and again. I guess I told a good story.

View From the Bar: I am an environmental lawyer and have both handled experts and been one. Although Dan doesn't use the word "persuasive," his tell-a-good-story approach means the same thing. I believe that an expert's job is to help his or her team be persuasive. Telling a good story is a good way to do that. Often an environmental expert is not involved in depositions or trials. They may be dealing with an administrative agency whom their client(s) are trying to persuade on some point or points. Either way, whether "testifying" to a judge and jury, or presenting to an agency, an expert is hired to persuade the decision-makers regarding his or her client's important points.

The Art and *Technology* of the Story

At some point two hunters came back to the fire, each with a huge wild boar in tow. One of them brought home something more, something that made humans different: The Story. A story of details: of tracking the beast, the smell of the blood, the fear in its eyes. How the hunter noticed the wind and circled around. How the spear was released at just the right time. About crossing a river following the wounded beast. Seeing blood in the spoor. A new information technology—the story—was born.

Imagine hearing the first story ever told. The fellow cave folks must have been awed as colors, smells and emotions came to life. Critically, they also had information and details they could easily recall, learn and pass on. And they all got to eat. Two hunters with the same result, but the hunter with the story is the one they remembered.

> A story is the application of language to convey knowledge, information, even emotion.

A technology is the application of science for practical purposes. A story is the application of language to convey knowledge, information, even emotion. In fact, everything the human mind can imagine is coded in language. A story stores this code and empowers the listener by giving them access to the information in an easy-to-recall form. The listener can also retell the story, add a bit, and absorb some of the power of the original teller. We don't retain lists of facts for long, but we recall great stories for a lifetime.

Stories have a form: a beginning, a middle, a transformation, and an end. The tools of a story are descriptions, details, metaphors, events, the passage of time, introspection, surprise, twists. The best stories circle back to the beginning and resolve what was missing. With the wild boar we know how the story ends at the beginning. It is the middle that is memorable.

View From the Bar: It is often said that your most important/strongest point should be your first, and your second-best should be your last. That is because people remember the first and last points the best. Telling an expert's story, and for that matter the client's story, has to strategically plan the path the story takes to be most persuasive under the circumstances.

Passion Is a Trainable Skill

Beware the monotone. You've spent your life building your career. There is no shame in showing your passion. Since your client is probably paying double your regular rate, the least you can do is show up with some enthusiasm. Your job as an expert is to represent the best science in the service of the justice system. If that doesn't call for passion, what does? So how do you train passion?

Early on I made it a practice to take every opportunity to speak or present. Later, I took some speaker training and even took some acting classes. I leaned that for actors fear becomes a tool for digging deeper. Paradoxically, I find working with fear and anxiety is more powerful than trying to overcome it. I gave up on the illusion of confidence. The minute you find yourself feeling confident, the game changes or the stakes get higher and you have to start all over. Instead, try saying, "Ah, here is my old friend—fear. Let's rumble!" If you did your work preparing the science and you know it is bulletproof, confidence is no longer necessary. Anyone can speak well when they are confident; why not be the one who can do it while gripped with fear? This is the secret to unlocking passion.

View From the Bar: Dan is talking about preparation here. When you, as an expert (or lawyer, witness, fill in the blank) are fully prepared, you are confident. You are able to fence with opposing counsel and win. That is the challenge for an expert. Telling

your own story is easy. You have practiced it. You believe it. You know its ins and outs. But not being surprised by questions from opposing counsel—or at least being able to fully respond to them while still staying on path—that is key to the outcome. Good and extensive preparation should put you in position to do just that. Lawyers and their experts should practice cross-examination extensively, while throwing every imaginable attack at the witness that the real opposing party might.

Writing Backwards: The Expert Report

I like to write backwards in preparing an expert report. In the sciences we typically write from the beginning, build the evidence, and finally reveal our conclusions. An expert report is not a scientific paper, nor is it a mystery story. Like the cover of a jigsaw, we want the reader to know exactly where we are going so they see how each piece fits the story. Otherwise, they will just start making up their own story.

Start with a simple declarative sentence for each opinion. Get rid of jargon, write in active voice, and keep it simple. No need to clutter it up with details or caveats. Get it clear in your own mind. Your statement is the cover of the jigsaw box. I like to number and order my opinions to carry the reader through the story I have to tell, each building an element of understanding toward the big picture.

Follow your clear statement with the supporting discussion and build to the opinion. This is where to put the complexity and calculations you need. Keep it to a few paragraphs. I like to put detailed calculations in an attachment so the flow of the opinion is maintained for the lay reader. If you quote a source, copy the citation and attach it. Attachments are for technical reader who needs to seek out the details.

The effect of writing backwards is the reader fits each statement into your conclusion, rather than forming (intentionally or otherwise) their own opinion. Like the cave people, we know we are having wild boar for dinner and the story is the appetizer. This clarity puts the other attorney on notice you are in complete control of your opinions.

Use your own words. I can always tell when a lawyer has written parts of an expert report. Don't let them do it. Avoid using words like liability, culpability, tort, damage or negligence. I try to avoid jargon phrases I hear attorneys use, like "It is my belief and understanding." These are someone else's codes and may be legal terms, which I am not qualified to use. I never want to be asked to explain, say, negligence under common law, or some such thing. Leave lawyering to lawyers.

Moreover, everybody can smell BS, and if the opposing lawyer smells it, she will dig into it. As I said, it is the details that make a story—they also can break it. Use words and terms you would use every day in your job. Pick just one or two technical terms and be a teacher. Frank taught an attorney the term "tortuosity"—a rather obscure term we rarely use. He lit up every time he got to use it. A good teacher makes you smarter; an arrogant expert makes you bristle.

View From the Bar: Strategizing expert reports is similar to testimony or presentations to agencies. Persuasiveness is the ultimate goal. Making the reader believe your opinions wins the case or leads to a successful agency outcome. Dan says make your lead-in sentences a guide. If the readers only read the first sentences *and believe them*, you are home free. Of course you need to supply the support for those positions, too, in a believable way, in order to have your readers believe them. Dan covers that. The best way to win over a listener, be it a jury, an agency person, or whomever, is to guide them to forming their own conclusion, which hopefully happens to be yours also.

If You Can't Explain It to Your Grandmother…

We've all heard that, but why your grandmother? Because you respect and revere your grandmother. You listen to your grandmother and recognize her wisdom. This is the test for the simple declarative sentences in your expert report. They should stand alone, reflecting the clarity in your mind and giving the reader a concise understanding of the issue. Your grandmother is the jury. Listen to your story from the jury's perspective and speak into that perspective. Imagine a juror explaining over the dinner table how much they learned about geology, or immunology, or engineering.

View From the Bar: Never cross-examine your grandmother.

Deposition Is Not a Geological Process

If the expert report is the fireside story, full of rich detail and truth, the deposition is the other hunter trying to kill the buzz. What did you leave out of the story? Did you really throw the spear? Was it really 50 paces? At deposition you need to know all the weaknesses in your story and have interrogated every aspect of it. If you did the work in your expert report, there should be no surprises in deposition, just traps to avoid. The deposition necessarily is a bit more guarded than court testimony or the expert report. This is the time to listen to the attorney's instructions and rehearse.

Insist on full preparation with your attorney. Understand the deposition process. Practice the hard questions. Make sure you have checked every calculation and haven't glossed over some aspect of your preparation out of wishful thinking or confirmation bias. This is the beauty of expert work: You are subjected to full-throated interrogation by an expert in finding your weakness. You know more about this topic than anyone in the room, and they know it. You can only trip on your own shoelaces.

We had an expert (an arrogant Ph.D.) in deposition who insisted groundwater could not get from one layer of soil to another. He said the soil layer between was dry and even agreed, hypothetically, that if we drilled into it, it would be dry. This opinion was not in his expert report and was purely the musings of a guy used to being the smartest one in the room. The thing was I, the undereducated field geologist, had already reviewed the handwritten notes (buried in an appendix) from the soil borings. It was not hypothetical; the soil layer was fully saturated with water. When confronted with the actual field notes, his attorney asked for a break. He didn't come back, and the case settled that day.

Stick to your opinions. If you haven't developed an opinion, don't make one up in

deposition. We all have opinions on everything, it's human, but these are expert opinions. Expert opinions are rigorously developed and tested—and are the only opinions you were hired to offer. There is nothing wrong with saying "I haven't developed an opinion on why the elbow is connected to the arm bone but am happy to look into it."

I recommend memorizing your declarative opinions from your expert report. Practice with your spouse. Practice in front of a mirror until you can sustain eye contact as you go through all your opinions. Stating your six or so opinions should make sense and tell the whole story. This exercise can be painful and embarrassing for a stiff old scientist. But if you can't look yourself in the eye, how can you look into someone else's?

The best tip I ever got was to take all the time I need to answer a question. Be comfortable with silence so you can think and compose a thoughtful answer. Look carefully at the exhibit. Jot a note (or pretend to). The secret is the transcript doesn't show your pauses. In the transcript, your well-organized responses, told in complete sentences, will look like they just spilled out of your mouth.

The best tip I ever got was to take all the time I need to answer a question. Be comfortable with silence. And answer only questions, never answer statements.

The second best tip is answer only questions, never answer statements. "I see here Mr. Sola you only have a Bachelor's degree." –crickets– "So then, why are you qualified to offer these opinions?"

"I hope you have a lot of paper in that funny little typewriter…"

View From the Bar: Experts need to understand the different reasons for, and approaches to, depositions versus trial. Depositions are usually fishing expeditions, where the opposing counsel is looking for anything they can use, and trying to lock a witness to a certain story that cannot easily change at trial later. The old adage of never ask a question you don't already know the answer to doesn't apply. Information doesn't even have to be admissible to be explorable. Like lay witnesses, experts should give no more information at deposition than opposing counsel asks for. The usual guidance of only answer the question asked, don't guess and don't volunteer apply equally to experts. Deposition is not your time to tell your story; trial is. Dan is absolutely right about the transcript not showing that you sat and thought for 30 seconds before answering—but don't try this in front of the jury.

Reasonable Degree of Scientific Certainty of "Get Rid of That Gray"

As scientists we live with uncertainty and, in fact, we *quantify* uncertainty. Lawyers don't like this. This discussion needs to be held up front with the attorney so that he understands what you cannot say and so will tailor the legal strategy accordingly. A good command of significant figures is one place to start. If I can stay within justifiable significant figures, it may be possible to make a more definitive opinion and show overreach by the other witness.

In my cases the groundwater velocity is often an issue. In one case the other expert testified that the groundwater velocity is 123.5 feet per year. That's four significant figures based on a calculation with at least one parameter with only one significant figure. Consider the weather forecaster trying to defend saying the wind is out of the northwest at 13.398 miles per hour. It is not more accurate, it is BS and shows poor grasp of the accuracy of the data (note to non-technical readers: Basically, your calculation can't have more significant figures than the least accurate parameter in the calculation). We get lazy with significant figures with our computers and numerical models spitting out 8-digit answers. Review your significant figures.

So what do you do? I suggest you not be inflexible to the point of giving up on finding a solid black-and-white answer. In the case of the groundwater velocity I needed to find the upper and lower limits I could live with and go back to the attorney and lay out the limits of the science. I was able to be more definitive within the range using a weight-of-evidence approach with my other calculations. Find where there is certainty and build on it. If you have been a good teacher, your attorney will be able to ask questions to show how the other expert's 4-figure answer is not scientifically supportable and is overreaching.

Ultimately my testimony was the velocity is no more than 100 feet per year (one significant figure). In this case we were trying to show how old the groundwater contamination "plume" was (think smoke plume in a gentle wind). A velocity of 100 feet per year was good and showed the plume was new and that it formed after my client owned the dry cleaner. I added other layers. The mix of chemicals looked young, and the process in the facility changed, it took time to soak through the soil, the equipment was more likely to leak as it got older. None of these were dispositive by themselves. The only piece the other side had was a calculation of 125.3 feet per year, just enough to implicate my client. We were both deposed the same day, and they settled very favorably for my client that evening. The groundwater velocity was uncertain, but I had a more complete story.

> Whatever it is, winning requires that the decision-makers believe your story.

View From the Bar: Both sides in litigation are likely to have experts if one side does. The other side's expert is hired to persuade the decision-makers to reach the opposite conclusion that you are trying to promote. The opposing attorney has the benefit of guidance from his or her expert on technical arguments you are making. In the end, the side that is most persuasive wins. The goal is not just reaching a conclusion that helps your side, but convincing the decision-makers that your conclusion is right. Dan uses the example of being able to support your conclusion as the right one, in this case by showing the other side's overreaching conclusion. Whatever it is, winning requires that the decision-makers believe your story.

Ethics Above All

Testimony is subject to the test of "a reasonable degree of scientific certainty." Research what this means, discuss it with your client, and check with your professional rules of conduct. If necessary, or you feel pressured to reach a specific conclusion, review it with your own lawyer.

You are not an advocate for your client, you are an advocate for your professional opinion and scientific discipline. It is great fun to get excited about the case and strategy and want to win. It is only human that when you are sitting at a 19th-floor burled-oak conference table, wearing your one suit, and preparing for a big trial or deposition, you want the team to win. By all means participate fully and argue strongly for your position and how your testimony helps. Try out ideas and test them to hone your story. But remember that no one in that room is sworn to protect you, your firm, or your professional license. Winning is the objective, but not at the expense of your reputation.

View From the Bar: I have to disagree with Dan here. Not that ethics isn't important. It is critical. But you are not only an advocate for the science, but also for your client. Leading up to your being hired your client reviewed with you whether your technical positions would mesh with what they were trying to argue to the court or agency. If you got hired, it is because you told them they would mesh. Now your science is consistent with the client's position. Advocating for your science and for your client are one and the same. It is unusual that something fundamentally different comes up after you are hired that changes that. Absent that rare occurrence, advocating for your client should be the same as advocating for your scientific discipline.

Just a Story, Mr. Sola?

So am I telling a ripping yarn? No, I am doing my professional best to explain my scientific findings in a way that meets my professional ethics, follows good scientific methods, and effectively communicates my findings to the court. What better reason to tell a story? And if you need a good expert on hunting wild boar, which of those guys are you going to hire?

View From the Bar: I don't know if Dan has ever hunted wild boar, but if he hasn't he should. I look forward to hearing his story afterwards. AZ Att

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davidlzacharias@gmail.com

Zacharias, 75, has been a director of four banks, CEO of two banks (one of which he founded) and two mortgage companies. Experience includes commercial credit/loan underwriting/analysis/approval, mortgage underwriting, loan loss provisions, loan structuring/documentation, lending policies and procedures, lender liability, branch/checking account operations, letters of credit, bank internal controls, bank fraud analysis, corporate credit fraud and board of directors' responsibilities. Zacharias has been involved in some of the largest and most complex financial lawsuits in Arizona representing plaintiffs and defendants, from locally-owned to Fortune 500 companies. Since 1990, he has been involved in District, Federal and Bankruptcy court in more than 90 cases in about 20 states, has given more than 200 hours deposition testimony in approximately 35 cases and has given trial testimony in more than 15 cases. He has about a 60/40 plaintiff/defendant ratio.

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Contact: David McGuire, P.E., M.B.A.

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Contact: Jan A. Sell
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Mr. Sell began appraising in Arizona in 1973; has testified 180+ times. Condemnation, Partnership Disputes, Divorce, Partitioning, Bankruptcy, Deficiency, Forensic, Detrimental Property Conditions, Title Defects, Private Way of Necessity and Lease Disputes. Past national bank director, developer, broker and property manager. Member, Real Estate Counseling Group of America. Certified in AZ, CA, CO, NM, NV, HI, TX. Arizona Broker; MAI, AI-GRS, SR/WA, SRA, CCIM.

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kachanovskaya@metaecon.com
www.metaecon.com
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Contact: Cathie Cameron
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Contact: Mark Musa
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Contact: Dr. Stan V. Smith
stan@smitheconomics.com
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Dr. Stan V. Smith is a University of Chicago educated economist. As an economic legal consultant for plaintiff and defense attorneys nationwide, he provides testimony and litigation support services in evaluating damages. He has developed state-of-the-art econometric analysis for: personal injury losses including lost wages, as well as antitrust, patent valuation, business losses, business valuation, pension losses, security losses, commercial damages, employment discrimination, identity theft and FCRA credit damages.

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www.metaecon.com
Meta Economic Consulting's principal Valentina Kachanovskaya is a trilingual (English, Spanish, Russian) Ph.D. Economist. Her experience includes expert economic opinions in serious personal injury and wrongful death, as well as loss of revenue projections for international businesses.

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(see ad p. 82)
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David holds two advanced degrees in business. He has a Master of Arts Degree in Human Resources and a Master's Degree in Business Administration. In addition, he holds the two highest Human Resource Designations for practitioners in the United States with a Senior Professional in Human Resources (SPHR) and through the Society of Human Resource Management (SHRM) the Senior Certified Professional (SCP). He has been an adjunct professor in Human Resources and has taught all the disciplines of HR (including employment law). David has been and continues to be a partner in a family owned and operated business with employees since 1983.

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Contact: Michael J. Stokes, MBA
mjstokes73@gmail.com
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David is Arizona licensed in all lines of insurance (Property and Casualty since 1980; and Life and Health since 1988), in addition, long term care, group health insurance and auto/home/business. He continues to actively teach and market insurance products. David has been and continues to be a working Insurance Agency Partner in a family owned and operated business since 1983. He has been a reviewer of the State of Arizona Insurance licensure exams since 1998. David has taught insurance continuing education insurance courses since 2002 and is currently an adjunct professor in insurance at Glendale Community College. He has consulted in over 40 insurance cases (both plaintiff and defense) including standard of care, coverage issues, and bad faith. David has both deposition and trial experience.

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dave@idealins.com
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David is Arizona licensed in all lines of insurance (Property and Casualty since 1980; and Life and Health since 1988). He continues to actively teach and market all lines of insurance. David has been and continues to be a working Insurance Agency Partner in a family owned and operated business since 1983. He has been a reviewer of the State of Arizona Insurance Licensure Exams since 1998. He has taught insurance seminars for continuing insurance seminars for education credits (CE) since 2002. David currently teaches as an adjunct professor in insurance at Glendale Community College. He has consulted on over forty Arizona insurance court cases and has both deposition and trial experience.

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dave@idealins.com
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David is Arizona licensed in all lines of insurance (Property and Casualty since 1980; and Life and Health since 1988). During this time span David has marketed and continues to market insurance to many construction contractors. He has been and continues to be a working Insurance Agency Partner in a family owned and operated business since 1983. David has been a reviewer of the State of Arizona licensure exams since 1998. He has taught insurance seminars for continuing education credits (CE) since 2002. David currently teaches at Glendale Community College as an adjunct professor in insurance. He has consulted on over forty Arizona insurance court cases and has both deposition and trial experience.

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David is Arizona licensed in all lines of insurance (Life and Health since 1988; and Property and Casualty since 1980). He continues to actively teach and market life and disability insurance. David has been and continues to be a working Insurance Agency Partner in a family owned and operated business since 1983. He has been a reviewer of the State of Arizona Insurance Licensure Exams since 1998. David also has a strong background in HR academia with a Master's degree and two professional designations, in teaching (taught twelve years as an adjunct professor in Human Resources (HR) and he has a practical background in Human Resources. With an insurance and HR background David is in a unique position to testify to group benefits from a HR and insurance producer's perspective. In addition, David is an adjunct professor in all lines of insurance at Glendale Community College. He has consulted in over forty Arizona court insurance cases, and he has both deposition and trial experience.

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Michael R. Weinraub, M.D., FAAP is a Board Certified Pediatrician with four decades of clinical experience. Areas of expert consultation include child abuse and neglect, Munchausen Syndrome by Proxy, Abusive Head Trauma (AHT (SBS), lead poisoning, Fetal Alcohol Spectrum Disorder (FASD), childhood injury and product liability, developmental disabilities (Autism), health care of foster children, and custody evaluation for pediatric concerns. Dr. Weinraub is a Fellow of American Academy of Pediatrics and a Member of American Professional Society on the Abuse of Children.

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stephen.hall@ucsf.edu
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David holds two advanced degrees in business. He has a Master of Arts Degree in Human Resources and a Master Degree in Business Administration. In addition, he holds the two highest Human Resource Designations for practitioners in the United States with a Senior Professional in Human Resources (SPHR) and through the Society of Human Resources (SHRM) the Senior Certified Professional (SCP). He has been an adjunct professor in Human Resources and has taught all the disciplines of HR (including employment law). David has been and continues to be a partner in a family owned and operated business with employees since 1983.

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Surprise, AZ 85374
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dave@idealins.com
www.idealins.com
David is Arizona licensed in all lines of insurance (Property and Casualty since 1980 and Life and Health since 1988). During this time span David has marketed and continues to market workers compensation policies. With his background in both insurance and human resource management he is in a unique position to testify to the standard of care of both insurance and human resource practitioners as it relates to workers compensation issues. David has been a reviewer of the State of Arizona insurance licensure exams since 1998. He has taught insurance seminars for continuing education since 2002. In addition, for twelve years David taught all the disciplines of Human Resources as an adjunct professor. Currently David teaches as an adjunct professor at Glendale Community College in insurance. He has consulted in over forty Arizona court cases and has both deposition and trial experience.

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