

A Practitioner's Guide To The Management And Use Of Expert Witnesses In Washington Civil Litigation

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I. INTRODUCTION

The Washington litigation process places a premium on the skillful management of expert witnesses.¹ Testimony presented by such witnesses is both readily admissible² and virtually unlimited in scope.³ Washington's adoption of the new Rules of Evi-

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1. The same can be said of civil litigation within the federal system or any other jurisdiction that has adopted procedural and evidentiary rules based upon the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

2. The decisions of the Supreme Court of Washington have encouraged the use of expert testimony. The court has limited itself to the statement that the trial court has broad discretion to determine whether expert testimony should be admitted. *State v. Tatum*, 58 Wash. 2d 73, 360 P.2d 754 (1961). A trial court will not be reversed unless it has abused that discretion in ruling upon the competency of a purported expert or in admitting expert testimony where an issue is one of "common knowledge." *Ball v. Smith*, 87 Wash. 2d 717, 556 P.2d 936 (1976); *Poston v. Clinton*, 66 Wash. 2d 911, 406 P.2d 623 (1965). In reality, a Washington trial court will virtually never be reversed for admitting expert testimony. Only where an expert is grossly and patently incompetent will the trial court refuse to admit his testimony. In *Nelson Equip. Co. v. Estep*, 50 Wash. 2d 612, 313 P.2d 679 (1957), the court affirmed a trial court decision to allow expert testimony where the witness admitted that he was not an "expert."

Objections to a witness's qualifications relate solely to the weight of his testimony. *Nordstrom v. White Metal Rolling & Stamping Co.*, 75 Wash. 2d 629, 453 P.2d 619 (1969); *Nelson Equip. Co. v. Estep*, 50 Wash. 2d 612, 313 P.2d 679 (1957). In practice, the issue of competency has become a matter for the trier of fact. The concepts of "competency" and "credibility" have become closely intertwined.

The reluctance of trial courts to reject purported expert testimony is understandable. As the supreme court's decision in *Bernal v. American Honda Motor Co.*, 87 Wash. 2d 406, 553 P.2d 107 (1976), would suggest, a trial court is far more likely to be reversed for rejecting such testimony than for admitting it. The *Bernal* case involved a products liability claim for enhanced injuries resulting from a rear end vehicular accident. The supreme court reversed a summary judgment of dismissal and held, *inter alia*, that the trial court erred in not considering an affidavit filed by a City of Auburn police officer. The affiant's experience was limited to three and one-half years in the police department's traffic division. The supreme court, nevertheless, held that the officer "could reasonably" have been found competent to testify as to both biomechanical and automotive design issues. *Id.* at 412-13, 553 P.2d at 111.

3. Expert witnesses can express opinions on the *ultimate* facts to be determined by the trier of fact. WASH. R. EVID. 704. *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 345, 588 P.2d 1346 (1979); *Battlen v. South Seattle Water Co.*, 65 Wash. 2d 547, 398 P.2d 719 (1965). The only qualification to that premise is that such an opinion must not be

dence⁴ can only serve to reinforce the current practice.⁵ Since most litigated cases involve substantial factual disputes, the development and presentation of expert testimony should be a major concern of all trial attorneys.⁶

The importance of trial examination has never been underrated. That part of the litigation process is one that all attorneys relish. The skillful management of expert witnesses, however, involves far more than the formulation of techniques for trial examination. The proper selection, preparation, and protection of one's own experts lay the necessary groundwork for direct examination. Timely ascertainment and thorough cross-examination of opposing experts during the discovery process allow an attorney to limit their effectiveness at trial. Unfortunately, these preliminary matters are often mismanaged. As a result, many attorneys begin trial with little chance of making a skillful presentation.

This article offers a basic system for the management and trial use of expert witnesses.⁷ Central to this system is a concern for the preliminary litigation events that are so often overlooked.

one likely to "mislead" the trier of fact. *Gerard v. Peasley*, 66 Wash. 2d 449, 403 P.2d 45 (1965).

4. The Washington Rules of Evidence became effective on April 2, 1979. Although there are some significant differences, the Washington rules are substantially the same as the Federal Rules of Evidence.

5. A detailed comparison of the new Rules of Evidence and prior Washington decisional law on this subject is beyond the scope of this article. It can be noted, however, that Article 7, which deals with expert testimony, is not dramatically different from the prior decisional law. The Rules of Evidence will serve to make existing practice more uniform. There are, for instance, Washington cases that reject expert testimony based solely on hearsay. See *Mercer v. Department of Labor & Indus.*, 74 Wash. 2d 96, 442 P.2d 1000 (1968); *Pierce County ex rel. Bellingham v. Duffy*, 104 Wash. 426, 176 P. 670 (1918). *State v. Weinberg*, 74 Wash. 2d 372, 444 P.2d 787 (1968), and other recent decisions allow testimony as to opinions based on hearsay and other inadmissible facts. The contrary line of authority, however, had never been formally overruled. Rule 703, which expressly allows an expert to make reference to facts and data that are not themselves admissible in evidence, eliminates any confusion on this issue. WASH. R. EVID. 703.

6. Rule 702 is consistent with prior decisional law:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

WASH. R. EVID. 702. See *Gerberg v. Crosby*, 52 Wash. 2d 792, 329 P.2d 184 (1958).

7. While certain basic rules must be mastered, every attorney will feel more comfortable using his own techniques. It is important, however, to develop a system for the management of expert witnesses. Basic to that system is an overview of the manner in which the various parts of the litigation process fit together.

II. SELECTING EXPERTS

A. *Appropriateness*

Rule 702 of the new Rules of Evidence gives the trial court⁸ much discretion in determining whether expert testimony is appropriate.⁹ The thrust of that rule, however, is that expert testimony *should* be allowed in all cases where such testimony "will assist" the trier of fact.¹⁰ Since trial judges in Washington cannot comment upon or resolve evidentiary disputes,¹¹ the language in the Rule should be applied liberally in favor of admissibility. In practice, a judge will admit expert testimony as long as it "may" assist the trier of fact.

B. *Deciding Whom To Select*

In most litigated cases, opposing counsel will also produce expert testimony on the same issues. As a result, the selection process involves more than securing an expert who will render a favorable opinion. The credibility and persuasiveness of an expert are equally important concerns. The ultimate decision made by the trier of fact will often turn on his feeling as to which expert is better qualified and more trustworthy.

Experts who testify in many different substantive areas should be avoided. That these experts of "last resort" are often used is understandable. They are highly visible, adept at testifying, and always available. These experts, however, are not highly credible and should remain experts of last resort. Specialists and sub-specialists are far more credible.¹² Unfortunately, the secur-

8. The article touches only lightly upon trial examination. This area is one that is both highly personal and one in which innate skill plays a large part. The preliminary management of expert witnesses is a function that all thorough lawyers should be able to perform skillfully.

9. See note 6 *supra*.

10. Some older decisions, while following the literal language of the *Gerberg* standard, have applied it in a restrictive manner. See *Wilkinson v. Martin*, 56 Wash. 2d 921, 340 P.2d 608 (1960); *Ewer v. Johnson*, 44 Wash. 2d 746, 270 P.2d 813 (1954). Those decisions, emphasizing that an issue was a matter of "common knowledge," affirmed the exclusion of expert testimony. The supreme court may apply the "common knowledge" qualification to the standard set out in Rule 702. That qualification is simply a preliminary inquiry in determining whether evidence "will assist" the trier of fact. In any case, that qualification is not expressly set out in the new Rule with which trial judges and attorneys will grapple.

11. Article IV, section 16 of the Washington Constitution prohibits trial judges from commenting on factual matters. WASH. CONST. art. IV, § 16. See also *Risley v. Moberg*, 69 Wash. 2d 560, 419 P.2d 151 (1966).

12. Universities are prime locations for such experts. Major universities such as the

ing of highly qualified experts is not a mechanical process.¹³

In many cases, *independent* observers can be qualified as expert witnesses. As Rule 702 emphasizes, an expert witness need not possess any academic credentials.¹⁴ Law enforcement officers, for example, can be used very effectively as expert witnesses. A thorough police officer, testifying as to point of impact, speed, or the rules of the road, will probably be more persuasive than experts retained by either of the parties.¹⁵ The fact that an expert has not been retained by any of the parties can only add to his credibility.¹⁶

In many cases, service of the summons and complaint is the first notice that a defendant has of a particular claim. As a result, the plaintiff has the first opportunity to retain the most qualified experts available on the issues involved in that lawsuit.

III. PREPARATION OF ONE'S OWN EXPERTS AND THE PRETRIAL PROCESS

A. *Communications Between Attorney and Expert*

Washington Superior Court Civil Rule 26(b)(3) protects the confidentiality of both an attorney's work product and the mental impressions of an attorney or other "representative" of a party.¹⁷ That rule, however, does not discuss an attorney's attempt to

University of Washington are staffed with excellent physicians and other professors in all of the physical and social sciences. These witnesses invariably have outstanding credentials.

13. Attorneys should not limit their search to their own cities or even to Washington state.

14. Rule 702 provides that a person may render an expert opinion as long as he is an expert "by knowledge, skill, experience, training, or education" WASH. R. EVID. 702 (emphasis added).

15. Attorneys should be creative in finding issues about which expert testimony can be elicited from a particular witness. See *Bernal v. American Honda Motor Co.*, 87 Wash. 2d 406, 553 P.2d 107 (1976).

16. The trial court is itself empowered by Rule 706 to appoint and elicit testimony from expert witnesses. In fact, Rule 706(c) allows the court in the exercise of its discretion to inform the jury that it, and not one of the parties, appointed that expert. WASH. R. EVID. 706(c). Obviously, such an announcement would greatly heighten that expert's credibility. Because of the constitutional prohibition against commenting on the evidence, it remains to be seen how often that discretionary power will be invoked. See note 11 *supra*.

17. An attorney's or representative's work product may be discoverable only if opposing counsel can make a showing that he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." WASH. SUPER. CT. CIV. R. 26(b)(3) [hereinafter cited as CR]. See *Crenna v. Ford Motor Co.*, 12 Wash. App. 824, 532 P.2d 290, *pet. rev. denied*, 85 Wash. 2d 1011 (1975).

influence his own expert's *thought process*. Opposing counsel is entitled to know the nature of a trial expert's assignment and *all* the things he has considered in reaching his opinions. Although opposing counsel will normally not object to a segregation of attorney-expert correspondence prior to the expert's deposition, he need not necessarily make such a concession.¹⁸ Consequently, an attorney should never memorialize his own views in materials sent to an expert.

Only those materials which opposing counsel and the finder of fact can safely review should be provided to an expert. Providing the trial expert with all relevant materials, including adverse evidence, will impress the trier of fact that the expert has performed a thorough evaluation. Ordinarily, such materials should be limited to those that either will be admissible in evidence at the time of trial or will be the proper basis for the expert's opinions.¹⁹

18. It is unclear whether opposing counsel has a right to review correspondence and other materials provided to a trial expert by the attorney who retained him. To allow such discovery would substantially lessen the confidentiality of the attorney-expert relationship. Some federal courts, however, have emphasized that opposing counsel is entitled to discover the bases for an expert's opinions. *Franks v. National Dairy Prods. Corp.*, 41 F.R.D. 234 (W.D. Tex. 1966). In *United States v. 23.76 Acres of Land*, 32 F.R.D. 593 (D. Md. 1963), the court recognized the opposing counsel's right to ascertain the factual information furnished to an expert. In a related matter, the court in *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 74 F.R.D. 594 (D. Conn. 1977), allowed discovery of reports embodying preliminary conclusions, after expressing concern about the possibility of a "sanitized presentation at trial." *Id.* at 595. In *Seven-Up Co. v. Get Up Corp.*, 30 F.R.D. 550 (N.D. Ohio 1962), the court allowed opposing counsel to discover information provided to lay witnesses where it appeared that such information might influence their testimony. As the court recognized:

Under such circumstances, it is apparent that the manner of selection of the prospective witnesses or interviewees and the facts and circumstances surrounding the *initial approach* to such persons are facts which, *in themselves*, are relevant and material in determining whether any *coercion* or *suggestion*, *however subtle* or unintentional, on the part of the interviewer, may have *influenced* the witnesses' responses. . . .

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The material to be produced or disclosed is *not* considered to be the work product of a lawyer, described in *Hickman v. Taylor*

Id. at 552-53 (emphasis added; citation omitted). While *Seven-Up* predates the 1970 amendment to Rule 26(b)(3) of the Federal Rules of Civil Procedure, a reading of both *Hickman v. Taylor*, 329 U.S. 495 (1947), and the amendment shows that the amendment was essentially a codification of the *Hickman* rule.

19. Rule 703 allows an expert to refer to matters even though they may not be admissible in evidence. WASH. R. EVID. 703. The materials which will normally be provided to an expert include deposition transcripts of lay witnesses, real evidence, and those interrogatory answers that relate to his assignment. Reviewing those materials will also allow an expert to make certain that his opinions are consistent with the lay testimony that will be presented at trial. In many cases, it is beneficial to have defense experts review

One should be careful about having experts perform experiments or tests. Opposing counsel is entitled to know about such work. If the results of that work do not support the proponent's position, it will be necessary to refrain from calling that witness.²⁰

As a general rule, a party's experts should be isolated from one another during the discovery process. In fact, experts should be instructed that they are not to communicate with each other or to furnish each other with any reports or other material. An attorney should control the materials his expert accumulates. Such a procedure serves three practical purposes. First, it protects against the furnishing of inappropriate or biased comments from one expert to another. Second, an attorney may wish to refrain from using one of the expert witnesses that he has retained. If that expert's report has been furnished to other experts, opposing counsel will be able to cross-examine those trial experts on the basis of the report. Third, keeping experts isolated emphasizes their independence and strengthens their credibility.

Where the opinions of one expert constitute the foundation for another expert's opinions, those experts must necessarily be familiar with each other's work. In such a situation, an attorney should still act as the intermediary between his experts in order to control the materials that they exchange. Materials developed by one expert should never be transmitted to another expert unless counsel has determined either that the expert preparing the report will be called as a trial witness or that there is nothing harmful in those particular reports.

the depositions given by plaintiff's experts before they themselves perform any substantive work. Such a practice does not result in any loss of credibility since the defense posture is a responsive one. The credibility of plaintiff's experts is enhanced if at least his opinions have been formed prior to a review of the defense expert's testimony. All experts, of course, should be familiar with the testimony of opposition experts before giving their trial testimony.

20. If an attorney does refrain from calling such an expert at trial, he can usually prevent opposing counsel from learning about the adverse test or experiment. CR 26(b)(4)(B). See *Crenna v. Ford Motor Co.*, 12 Wash. App. 824, 532 P.2d 290, *pet. rev. denied*, 85 Wash. 2d 1011 (1975). If a particular expert is critical to a party's case, counsel should consider retaining an additional expert to perform the desired experiment or test. While this strategy is not consistent with the "search for truth," it does not violate Ethical Consideration 7-27 or any other ethical consideration set out in the Code of Professional Responsibility. WASH. ST. BAR ASS'N CODE OF PROFESSIONAL RESPONSIBILITY. As the court of appeals indicated in *Crenna*, work performed by "consulting experts" need not be divulged. 12 Wash. App. at 832, 532 P.2d at 295. An attorney, moreover, is free to define or limit a potential trial expert's assignment in any way he sees fit. Ethical Consideration 7-1 instructs an attorney to represent his client zealously within the bounds of the law. WASH. ST. BAR ASS'N CODE OF PROFESSIONAL RESPONSIBILITY Canon 7. In protecting a primary trial expert in such a fashion, an attorney is doing exactly that.

Careful consideration should also be given to the matter of whether an expert should prepare a written report. In most cases such a report should *not* be written.²¹ A report unnecessarily commits an expert witness to a particular position and to the factual data upon which he has relied. As the discovery process unfolds, new facts may be discovered.²² An expert witness, moreover, may not fully understand all the legal implications of the statements contained in his report.

B. The Deposition of One's Own Expert

1. Procedure and Timing

In most cases, parties willingly allow the deposition of those expert witnesses who will testify at trial.²³ Civil Rule

21. A physician performing an independent medical examination pursuant to Civil Rule 35 must prepare such a report. CR 35(b)(1). There are other instances in which it may be desirable to have an expert prepare a report. Showing an opponent the full extent of one's case may promote settlement. It may also be necessary to have a report prepared in order to apprise an unyielding client of the full extent of the problems facing him. When such a report will be prepared, counsel should meet with the expert witness before the report is prepared.

22. It should also be noted that even where the factual data is available, expert witnesses, like attorneys, are never as fully prepared during the discovery process as they are immediately prior to trial.

23. Discovery of expert witnesses is generally controlled by Civil Rule 26, which provides:

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivisions (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably

26(b)(4)(A)(ii), however, does not require such willingness. Without leave of court or the acquiescence of opposing counsel, an expert may not be deposed. Under Civil Rule 26(b)(4)(A)(i), interrogatories are the only discovery device to which a party is clearly entitled.²⁴

The recent trend in the federal courts, however, is to allow wide-ranging depositions to be taken.²⁵ Rule of Evidence 705, based on the federal counterpart, would seem to require such an approach. Under that rule an expert can testify to an opinion without disclosing the factual basis for that opinion.²⁶ Within such a system, effective cross-examination at trial is not possible without full pretrial disclosure. The use of interrogatories, moreover, is seldom an adequate means of discovery with respect to expert witnesses.

incurred by the latter party in obtaining facts and opinions from the expert.
CR 26(b)(4).

24. Very few Washington cases deal with this particular matter. In one such case, *Meeks v. Marx*, 15 Wash. App. 571, 550 P.2d 1158 (1976), the court of appeals did recognize that a trial court could limit the scope of examination of an opposing expert.

25. The Washington Supreme Court has indicated that it will be guided by federal decisions construing identical Federal Rules of Civil Procedure. *Wood v. Morris*, 87 Wash. 2d 501, 511, 554 P.2d 1032, 1038 (1976); *Harding v. Will*, 81 Wash. 2d 132, 135 n.2, 500 P.2d 91, 95 n.2 (1972). The federal courts have routinely addressed this issue. In *Grinnell Corp. v. Hackett*, 70 F.R.D. 326 (D.R.I. 1976), the court held that the purpose of the federal discovery rules was to provide for the fullest possible discovery of all issues and facts involved in the litigation. The only basis for restricting discovery of information held by experts rests in the doctrine of "fairness." See *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976); *Herbst v. International Tel. & Tel. Corp.*, 65 F.R.D. 528 (D. Conn. 1975). Where depositions were not permitted, the courts often based their decisions on counsel's failure to have first elicited the expert's opinions through interrogatories. *United States v. IBM*, 72 F.R.D. 78 (S.D.N.Y. 1976); *United States v. John R. Piquette*, 52 F.R.D. 370, 372 (E.D. Mich. 1971). See also 65 F.R.D. 528; *Rupp v. Vock & Weiderhold, Inc.*, 52 F.R.D. 111 (N.D. Ohio 1971).

In some cases the federal courts have imposed restrictions on the scope of examination. See, e.g., *Pearl Brewing*, 415 F. Supp. at 1138-41; *Maginnis v. Westinghouse Elec. Corp.*, 207 F. Supp. 739 (E.D. La. 1962) (court allowed examination as to facts known by the expert but refused to allow discovery as to his opinions and conclusions); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954). The current trend, however, is to reject the *Maginnis* distinction. *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968). The language of Washington Evidence Rule 102, with its emphasis on truth and justice, seemingly directs Washington courts to promote this trend: "These rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined." WASH. R. EVID. 102.

26. Rule 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

WASH. R. EVID. 705.

The timing of depositions is important. Ordinarily, a defendant should demand the right to depose plaintiff's expert before he allows his own expert to be deposed.²⁷ Defense counsel should argue that his expert will be responding to the plaintiff's contentions and that he has no need for expert testimony unless and until the plaintiff has presented a *prima facie* case.²⁸ For his part the plaintiff might try to force the defendant's expert witness to commit himself before the plaintiff's expert is deposed.²⁹

Unless there are exceptional circumstances, a party cannot discover facts or opinions held by opposing experts who will not be called as witnesses at trial by the party retaining them.³⁰ This general rule and the provisions of Civil Rule 26(b)(4)(B) are relevant to the following four important situations.

Treating Physicians. Civil Rule 35(b)(2) provides that once a plaintiff either requests a copy of an independent examiner's report or takes that doctor's deposition, he waives the physician-patient privilege as to any past or future treating physicians.³¹ Even if the plaintiff does not so act, he necessarily waives his

27. The federal courts have emphasized that they will not allow one party to unfairly use another party's experts to prepare his own case. *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976); *Grinnell Corp. v. Hackett*, 70 F.R.D. 326 (D.R.I. 1976). See note 24 *supra*. Since the plaintiff has the burden of going forward at the time of the trial, plaintiff should offer his expert first.

28. There are, however, disadvantages associated with initiating the deposition process. For example, although plaintiff's expert has already been deposed, he may nevertheless substantially modify or expand upon his views after reading the subsequent testimony of the defense expert. While his prior testimony may successfully serve to impeach such an expert, defense counsel may be unaware of material changes in his testimony until the expert has already testified at trial. If a party has the opportunity to conduct a second deposition for each expert, this problem can be minimized. If such an opportunity does not exist, counsel should seek to protect himself by serving interrogatories directed to testimonial changes.

29. In *Rupp v. Vock & Weiderhold, Inc.*, 52 F.R.D. 111 (N.D. Ohio 1971), the court recognized that it might not allow a defendant to depose a plaintiff's expert until the defendant had prepared detailed answers to federal civil rule 26(b)(4)(A)(i) interrogatories directed to the defense expert.

30. CR 26(b)(4)(B). See note 23 *supra*.

31. Civil Rule 35(a) states:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

physician-patient privilege during any personal injury action.³² A question still remains as to exactly *when* he waives that privilege.³³

Physicians Retained by Defendant. Civil Rule 26(b)(4)(B) specifically provides that its protection does not apply to physicians conducting independent medical examinations at the request of a defendant.³⁴ The plaintiff, moreover, has an absolute right to call as a witness any physician retained by the defendant to examine the injured plaintiff.³⁵ Care must be exercised in deciding whether or not to have an independent medical examination performed. The independent physician may simply give credence to the contentions set out by the plaintiff's treating doctors. Indeed, it is not uncommon for the independent examiner to take a more serious view of the injuries than does the plaintiff's own treating doctors.

Employees of a Party. An attorney has the right to take the deposition of employees of a party opponent, even though those employees may have expert opinions and even though they are not expected to be called as witnesses by the employer.³⁶ Only

32. *Phipps v. Sasser*, 74 Wash. 2d 439, 445 P.2d 624 (1968).

33. In *Phipps*, the court refused to establish a specific point in a personal injury action at which the plaintiff is considered to have made a blanket waiver of the physician-patient privilege. The court did recognize that the privilege is waived whenever it becomes "apparent" that the plaintiff must decide to call one of his physicians as a witness at trial. *Id.* at 448, 445 P.2d at 628-29. While the court respected the need to preserve plaintiff's right to dismiss rather than face disclosure, it also recognized that the waiver could not be delayed until the trial. The court also stated that the defendant is entitled to know that the privilege will be waived in time to take the depositions of the testifying physician and any other physicians who have information relevant to the plaintiff's condition. In *State v. Tradewell*, 9 Wash. App. 821, 823-24, 515 P.2d 172, 173-74, *pet. rev. denied*, 83 Wash. 2d 1005 (1973), *cert. denied*, 416 U.S. 985 (1974), the court recognized that the plaintiff will not be allowed to pick and choose between physician witnesses with respect to the claimed injury. The court has not specifically addressed the situation in which the defendant wishes to gain discovery about a *different* physical condition which he contends is the cause of the plaintiff's disability. The general language in *State v. Rochelle*, 11 Wash. App. 887, 527 P.2d 87 (1974), however, indicates that in bringing a personal injury action, the plaintiff waives his physician-patient privilege as to any medical testimony which tends to contradict or impeach his medical evidence.

34. See note 23 *supra*. In cross-referencing to Civil Rule 35(b), Civil Rule 26(b)(4)(B) provides both that the plaintiff can secure a copy of the report that must be prepared by the examining physician and that he can take the deposition of that physician. CR 26(b)(4)(B).

35. The civil rules do not speak to this issue. In *State ex rel. Berge v. Superior Court*, 154 Wash. 144, 281 P. 335 (1929), a case decided well before the passage of the civil rules, the supreme court recognized such a right. The passage of the rules has not abrogated that right.

36. *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975); *Rodrigues v. Hrinda*, 56 F.R.D. 11 (W.D. Pa. 1972).

those in-house experts that are "retained or specially employed in anticipation of litigation or preparation for trial" are protected under Civil Rule 26(b)(4)(B).³⁷

Other Experts. Nonexamining medical consultants and nonmedical experts who are not employees of a party may not be subjected to discovery or called as witnesses at trial unless the party retaining that expert will himself use the expert as a trial witness.³⁸ An attorney should be certain that he wishes to call an expert as a trial witness before serving that witness up for a deposition. From that time onward the expert's function may be construed to be more than that of a "consulting" witness.³⁹

2. *Preparing an Expert for His Deposition*

An expert should not be produced for a deposition until he is fully prepared and has all necessary factual material in his file. Prior to the deposition, the expert and the attorney should review the expert's entire file and proposed testimony. Privileged or work product materials should be segregated into a separate folder. The expert, however, should clearly disclose to the opposing party that he has made such a segregation.⁴⁰

The attorney should advise the expert as to the basic tenor that should be taken during the deposition. An expert should know whether to impress opposing counsel with the full extent of his knowledge or whether to answer the questions honestly, but as narrowly as possible. Further, an attorney and his expert should review similar cases in which the expert has been involved and be ready to explain any inconsistencies in those cases.

37. *Seiffer v. Topsy's Int'l, Inc.*, 69 F.R.D. 69 (D. Kan. 1975); *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975).

The corporate employer should seek to limit this inquiry. The courts have not allowed one party to unfairly use another party's experts to prepare his own case. See notes 24-25 *supra*. Only those opinions held prior to a substantive event upon which the litigation turns should be discoverable. Opinions evidencing prior knowledge or notice may not be withheld. Opposing counsel, however, should not be allowed to use hypothetical questions either to elicit an employee's current opinions or to have the employee formulate an as yet unformed opinion for use at trial. The opposing party should be forced to use his own experts to build his case.

38. CR 26(b)(4)(B), *construed in Crenna v. Ford Motor Co.*, 12 Wash. App. 824, 532 P.2d 290, *pet. rev. denied*, 85 Wash. 2d 1011 (1975). Discovery or use at trial of such a witness can be accomplished only upon a showing of exceptional circumstances.

39. A court may hold that it would be suppressing its truth-seeking function if such an expert's testimony might not then be presented to the jury. See WASH. R. EVID. 102.

40. If an attorney carefully protects his expert there will not be a need for segregating such materials. If sensitive attorney-expert materials do exist, the attorney should not allow review of such materials without a court order. See CR 30(d).

An attorney should carefully digest the transcript of his own expert's deposition or, if the case does not merit transcription, take careful notes during the deposition. There are several reasons for preparing such a digest. First, in asking questions the other attorney will undoubtedly indicate the direction that he and his expert will take at the time of trial. Second, objectionable questions asked during the deposition can be addressed in a motion in limine.⁴¹ Third, difficult areas may be defused by bringing them out in a more favorable manner during direct trial examination.

IV. DEALING WITH OPPOSITION EXPERTS DURING THE DISCOVERY PROCESS

A. Ascertainment

An attorney should determine the identity of the experts retained by opposing counsel to the full extent allowable under Civil Rule 26(b)(4)(A)(i).⁴² Interrogatories permitted under that subsection should be served upon opposing counsel at the very outset of the discovery process.⁴³ Unfortunately, even after interrogatories have been served, opposing counsel will ordinarily not furnish the names of his experts until he is pressed.⁴⁴ When that occurs, a motion to compel the identification of expert witnesses should be filed at an early stage in the litigation.⁴⁵

B. Preparation for the Deposition

In preparing for the deposition of the opposition's expert, an

41. Objections should be made outside the presence of the jury whenever possible.

42. See note 23 *supra*.

43. Opposing counsel has a duty to supplement his answers to those interrogatories pursuant to CR 26(e)(1)(B).

44. The most common response to such interrogatories is "unknown at this time." Often, identification of expert witnesses is not made until a few weeks prior to trial.

45. Such a motion may be delineated as a "Motion for an Order Limiting Experts." The right to such a cut-off date is recognized impliedly in Civil Rule 26(e)(1)(B), which states:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . (b) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

The party making the motion should be prepared to list his own experts either at the requested date or shortly thereafter. CR 26(e)(1)(B).

attorney should review all prior testimony given by the expert.⁴⁶ The expert, moreover, should be served with a subpoena duces tecum prior to the deposition. Unless such a subpoena is served, the trial itself may be the first opportunity for review of the materials upon which the expert relies.⁴⁷ If inquiry about treatises or other materials will be made, a schedule detailing such material should be attached to the subpoena duces tecum. The opposing expert's own file often will not contain all the materials of concern to the interrogating attorney. By incorporating such a schedule, an attorney can better prevent an expert from avoiding difficult questions.

Prior to the actual taking of the deposition, a conference with one's own expert should be conducted. That conference serves several invaluable purposes. One's own expert can render advice about technical terminology, prior testimony given by the opposition expert, and that expert's weaknesses. The terminology that counsel will use during the deposition should be carefully reviewed. It is important that deposition terminology be understood both by the expert and by in-house personnel. The terminology should have a clear and unmistakable meaning both to the opposing expert and to one's own witnesses and consultants. In preparing expert witnesses and in pinning down the opposing expert, this type of predeposition preparation is essential. During such a conference it is also productive to determine which treatises and articles favorable to the questioner's client will be recognized as authoritative by the opposition.⁴⁸

46. Transcripts of experts' testimony should be kept in a central file. The client, especially a national or international concern, may have collected an expert's testimony in other parts of the country or world.

47. The subpoena duces tecum must be tailored to the particular case. In preparing a subpoena the following items should be listed in most cases: (1) all materials generated or received by the expert working on the litigation; (2) any documents logging the hours he has spent on the case; (3) a log of any similar cases on which he has been retained; (4) copies of articles or publications he has written in the substantive area involved in the litigation; and (5) any treatises, books or other materials of any type that the expert reviewed in connection with the litigation. All materials, whether or not they support his opinions, should be produced. If such a production is cumbersome, counsel should request that a listing of these materials be made available prior to the deposition.

48. In exploring this latter subject, it is necessary to determine the exact title and edition of the volume about which inquiry will be made. The opposing expert may refuse to admit that a volume is authoritative simply because it is not the most up-to-date edition.

C. Taking the Deposition

One's goals in taking an opposing expert's deposition should be clearly formulated before the deposition. Unless an attorney shows some restraint, he may teach the opposition more about his own case than he learns from the opposing expert. The questions asked during a deposition often expose the concerns, factual contentions, and strategy of both the questioner and his experts. Where settlement is the primary goal, an attorney may desire to divulge certain lines of attack that might ordinarily be reserved for trial. Generally, however, an attorney should save his most penetrating questions for trial.

At the outset of the deposition, the questioner should make certain to use terminology that he and his own expert have agreed upon during their predeposition conference. The lines of inquiry pursued during the deposition of an opposing expert will vary from case to case. There are a few basic questions, however, that should be directed to every expert during his deposition. It is essential to elicit the following information during the deposition:

- (1) the nature of the input, both oral and written, provided to the expert both by opposing counsel and by other experts;
- (2) a chronological, step-by-step account of all the work the expert has performed on the particular case;
- (3) a discussion of the materials he has reviewed and how those materials have influenced his opinion; and
- (4) a listing of any further work, review, experiments or tests in which he might engage prior to the time of trial.

In a deposition, unlike trial, an attorney should give an opposing expert a chance to expand on his answers. One's technique should not be limited to the leading questions that will be propounded at the time of trial.⁴⁹ This is not to minimize the importance of circumscribing the opposing expert or having him unconsciously adopt the characterizations and terminology set out in the questions. In strictly limiting oneself to such a technique, however, very little is learned as to exactly how the opposing expert will

49. The third inquiry has a heightened importance under the new Rules of Evidence. Rules 703 and 705 offer a choice of contrasting styles for presenting expert testimony. Rule 703 allows reference to innumerable authoritative sources that support the witness's opinion. Rule 705 allows the expert, if he so chooses, to state his opinion without any reference to the data upon which he relies. In either case, effective cross-examination rests upon full discovery. Where vast supporting data will be produced, it is necessary to probe for weaknesses in those materials prior to trial. Where direct trial testimony itself does not disclose underlying sources, cross-examination will be treacherous unless those materials were disclosed during the discovery process.

present his testimony on *direct* examination. A careful blending of open-ended and leading questions is advisable in the deposition examination of the opposing expert.

V. THE DIRECT EXAMINATION OF ONE'S OWN EXPERT

A. *Qualification*

The direct examination of an expert witness involves two separate processes. The first process, the qualification of an expert witness, is no less important than that of eliciting his substantive opinions. In fact, an expert's opinion has little meaning if the jury is not favorably impressed with his credentials and trustworthiness. The qualification process should be neither mechanical nor limited to establishing that the expert is legally competent to testify. One hopes an attorney has not gone to the substantial expense of preparing an expert who might not meet the minimal competency standards. Any attempt by opposing counsel to admit that an expert is qualified should be resisted. As much time as possible should be spent in drawing out the education, experience, and professional status of the expert.

B. *Eliciting the Expert's Opinions*

Having established an expert's qualifications, an attorney must then elicit the expert's opinions. The questions and answers making up the direct examination should be reviewed in advance. While the examination should not sound scripted, neither the attorney nor the expert should be surprised by the other's approach.⁵⁰ An attorney should be fully conversant with all foundation questions necessary to elicit expert testimony or secure admission of evidence. He should also make ample use of demonstrative evidence and encourage his expert to prepare charts, diagrams, and other types of demonstrative evidence to emphasize his testimony. Attorney and expert alike should search for treatises, periodicals, and studies by other experts that support the expert's opinions. All of these materials can be mentioned to the jury, whether or not they are admissible as evidence.⁵¹

50. Before the expert witness even appears in court, counsel should once again review the contents of his file. Any problems associated with his file should be handled outside the presence of the jury before the expert testifies. Opposing counsel can substantially lessen the credibility of a proponent and his expert by forcing an objection to a requested examination of the expert's file.

51. WASH. R. EVID. 703.

The obvious weak points in the testimony of one's own expert should be brought out on direct examination rather than waiting for cross-examination. Using one's own terminology, emphasis and tone can substantially minimize those problems inherent in the expert's testimony.

Some expert witnesses are so persuasive that the attorney need ask only one or two broad questions and then let the witness lecture the jury on the work he performed on the case.⁵² Where an expert witness is not quite so capable, the attorney can still make use of the hypothetical question or a summarizing statement to set forth the various facts upon which the expert relies.⁵³ In this manner, an attorney can virtually sum up, at least in a factual sense, in the middle of his case.

VI. EXAMINING THE OPPOSING EXPERT AT TRIAL

A. *Preliminary Matters*

It is important to bring a motion in limine with respect to any inadmissible areas that will be covered during the direct examination by opposing counsel. By the time of trial, one should have considerable knowledge about problem areas. A common problem involves the expert who has been retained in prior litigations by the cross-examining attorney or a member of his office. The cross-examining attorney should seek to preclude reference to that fact. Whether a court will grant such a motion, however, is unclear.⁵⁴

Counsel may interrupt the direct examination and request permission to ask questions where the direct examination has not established the competency of the witness to express an opinion

52. A witness should not be permitted, however, to simply read from reports or notes that he has prepared. That type of delivery is certain to lose the jury's attention.

53. Rule 705 does not prohibit use of the hypothetical question. It merely removes the requirement that previously encouraged its use.

54. A longstanding relationship between the expert and the cross-examining attorney conceivably could influence the expert's testimony. It seems unfair, however, that an attorney's professional relationship should prejudice his client. Where the proponent himself hires the expert, the inquiry should be prohibited unless actual bias can be clearly demonstrated. In most cases, the proponent's goal is wholly unrelated to potential bias. One would expect that the proponent has called the expert as a witness because his opinions are *favorable* to the direct examiner's client. In fact, the direct examiner's goal in proving an expert-opposing counsel relationship is to *establish* the expert's trustworthiness. If it is divulged that the cross-examiner himself previously retained the expert, he will have substantial difficulty in attacking the expert's qualifications. To a lesser extent, his ability to attack the expert's substantive opinions will also be impaired. The cross-examiner's client should not be saddled with these limitations as a result of his attorney's relationship with the opposing expert.

or conclusion.⁵⁵ The court will ordinarily grant such a request.

B. Cross-Examination

The strategies involved in taking depositions and conducting cross-examination at trial are markedly different. The deposition is the attorney's opportunity to probe with impunity. Probing during trial examination can be, and often is, catastrophic. Even worse than the substantive damage suffered is the resulting loss of professional regard felt by the trier of fact.

The cross-examination should be brief and conceptually simple. Questions that allow an expert to restate either his qualifications or opinions should be avoided. Unlike the deposition examination, only leading questions should be asked during cross-examination. Questions should repeatedly use characterizations and concepts that are favorable to one's own theory of the case. If possible, the opposing expert should be limited to giving "yes" and "no" answers. Only questions to which an attorney is virtually certain of the answer should be asked. A direct attack on the personal integrity of an expert witness should not be launched unless serious damage can be inflicted. Jurors do not respond well to such personal attacks.⁵⁶

"Learned treatises" contradictory to the opposing expert's opinion should be read, at length, to the witness.⁵⁷ Once it is established that the treatise is a reliable authority, Rule 803(18) provides that it shall be admitted as substantive evidence and not merely as a basis for impeachment. Although it will not be received as an exhibit,⁵⁸ direct reference can be made to the treatise during summation.

If the opposing expert relies entirely upon hypothetical facts, a whole series of questions might be asked in which the witness must admit that he has never met with or talked to any of the actual lay witnesses in the litigation. Many lawyers also routinely

55. Until the adoption of Rule 705, this request could also be made when a proper foundation for an opinion had not been laid. WASH. R. EVID. 705.

56. An attorney is far better advised to have the expert witness admit that he has testified in many different areas and that there are specific subspecialties of a discipline that better relate to the problem at issue.

57. Rule 803(18) liberally allows the use of such "published treatises, periodicals or pamphlets on a subject of history, medicine, or other science or art" as long as such a document is a "reliable authority by the testimony of the opposing expert or any other expert." WASH. R. EVID. 803(18). Again, it is necessary to make certain that the volume is the most current edition of that treatise.

58. WASH. R. EVID. 803(18).

ask opposing experts if they have ever been wrong with respect to other opinions they have rendered. In asking this question, an attorney does not care which answer the opposing expert gives. If possible, the most telling line of the attack should be saved for the end of the examination. That high point is what jurors and judges will remember.

VII. CONCLUSION

Modern civil litigation has emphasized the importance of expert witnesses. In fact, there are few civil cases whose outcomes are not significantly shaped by expert testimony. An attorney who has not developed a systematic approach to the management of such experts enters the litigation process at a decided disadvantage.