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Experts Are Rarely As Expert As You

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Who is the Real Expert Here?

I. Introduction

This goal of this presentation is to provide thoughts and guidance based on my experience concerning the effective retention and handling of experts in your next trial. My essential proposition with regard to both the retention and the examination of experts is that, for each expert in the case, you need to determine your approach through the lens of (1) bolstering your case theme and (2) discrediting your opponent's theme. And by case theme, I mean a distillation of the case that incorporates all the evidence that the jury is likely to accept as true and that fashions the most favorable outcome you can reasonably hope to obtain from that evidence. Your theme does not have to account for all of the evidence the jury will hear, but it should account for all evidence you think the jury will likely believe and it should maximize the chances that the jury will answer its questions in a favorable manner.

Consequently, your decisions at the front end of the case as to the type of experts to retain should be made with a keen eye towards the jury charge you envision will be submitted at trial. Because, of course, your case theme must be crafted with the goal of receiving winning answers to those jury questions. Too often, lawyers spend little time drafting their proposed jury charge until trial is looming. This can be a strategic mistake, with potentially grave consequences. Decisions with regard to all of your evidence, and particularly expert evidence, should be made with the jury charge squarely in mind. What causes of action are realistically likely to be presented at trial, and what are the elements of those claims? What defenses, affirmative or otherwise, are probably going to be asserted with regard to those claims?

As you consider the likely jury charge, review whether there are claims or defenses for which expert evidence will be required to sustain your, or your opponent's, burden? A corollary for this in every case is to determine whether you

can prove damages without an expert? If expert evidence is needed for damages, can it be persuasively supplied by a client or fact witness such as your client's accountant or a treating doctor? The answers to these questions will vary from case to case, but only by spending some time contemplating the jury charge and the evidence needed to sustain your burden in connection with that charge will you consistently answer these questions in a rigorous and reliable way. In my experience, the closer you can tie your expert's opinions to the language of the jury charge, the more effective the expert is likely to be.

I readily admit that all of this sounds simple and self-evident, and the approach I am advocating is neither revolutionary nor groundbreaking. My suspicion is that most lawyers agree with me, at least as they are contemplating how best to develop and try their next lawsuit. Nevertheless, many of us do not adhere to this strategy consistently. We put off contemplating the jury charge in a recently filed case to tend to more pressing matters. And in trial, many of us (this author certainly included) have succumbed to the temptation to examine experts on a wide variety of points, many of which have little to do with your case theme and, therefore, your path to victory. I propose that the more you can discipline yourself to refrain from such distractions, the more focused and effective your expert examinations will be.

II. Expert Selection – Surviving the Daubert Gauntlet

If you've decided you need an expert, you might as well hire a good one, right? And a good expert should, I think we can all agree, be permitted to testify at trial. Thus, it is of course critical that you choose an expert that you believe can survive any challenges raised to the admissibility of his or her testimony. You will therefore want to make sure that your expert's credentials are sound and that they are a good fit for the proposed areas of testimony. And you'll want to confirm that what your expert wants to say is confirmed by enough credible science in his or her field to satisfy your trial judge and the court of appeals. Last but not least, you

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