



## USE OF EXPERT WITNESSES IN THE TRIAL OF INJURY/DEATH CLAIMS

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### I. CONSULTING VS. TESTIFYING EXPERT

#### A. WHAT IS AN EXPERT?

As litigation has become increasingly complex, and the subjects dealt with in litigation have matched that increase in complexity, the use of expert witnesses has greatly expanded. The courts have recognized the growth in expert testimony by developing and revising the rules that govern the use of expert testimony at trial and the pre-trial discovery of expert opinions. The evidence rules have defined the concept of an "expert" as used in litigation:

ER 702. 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.

ER 703. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 704. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ER 705. 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.

Expert opinion must be based on scientific or otherwise specialized knowledge that goes beyond the common sense and general knowledge that a trier of fact may bring to the issue. State v. Smissaert, 41 Wn.App. 813, 815, 706 P.2d 647 (1985). The scientific basis must be those accepted in the scientific community. State v. Huynh, 49 Wn.App. 192, 196, 742 P.2d 160 (1987) and Burkett v. Northern, 43 Wn.App. 143, 147, 715 P.2d 1159 (1986) (thermography evidence not admissible because it was not generally accepted as a reliable test). See, also, the recent U.S. Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), in which the court held that the federal appeals court case of Frye v. United States, 293 F.2d 1013 (DC Cir 1924) is superseded by the Federal Rules of Evidence. The full implications of this decision are unclear, but it seems to place greater discretion in the trial court in deciding whether an expert's opinion meets the evidence rules tests.

#### B. SCOPE OF DISCOVERY

The scope of discovery for a testifying expert is governed by CR 26 (b)(5)(A) which provides:

(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, 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, and to state such other information about the expert as may be discoverable under these rules.

(ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

The scope of discovery with regard to consulting (non-testifying) experts is outlined in CR 26(b)(5)(B) which states:

A party may discover facts or opinions held by an expert 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 impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The importance of the distinction between a testifying expert and a consulting expert thus lies in the ability to discover the expert's opinions and bases for those opinions. In the federal version of Rule 26(b)(5)(B) the consulting expert is one 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..." The Washington version leaves out the "retained or specially employed" language. Although earlier cases seemed to read that requirement into the state rules, in Detwiler v. Gall, Landau & Young Construction Co., 42 Wn.App. 567, 712 P.2d 316 (1986), Division I declined to follow the earlier opinions. In state court, there thus may be a somewhat broader category of non-testifying experts whose identities and opinions are not discoverable except under exceptional circumstances, which may include an expert who was informally consulted but not employed, and an expert regularly employed in the conduct of the business of a party but not specially retained or employed for a particular case.

### C. TESTIFYING EXPERTS

Discovery regarding an expert who is expected to testify at trial is quite broad. Prior to 1985 the rule limited discovery to the subject matter on which the expert was expected to testify, the substance of the facts and opinions, and a summary of the grounds of each opinion. The federal rules continue to include those limitations. The 1985 Washington amendment added: "such other information about the expert as may be discoverable under these rules." Section II of this paper will discuss this broader grant of discovery authority.

### D. CONSULTING EXPERTS

A party may discover information about an expert not expected to be called at trial, including the identity of that expert, only upon a showing of

exceptional circumstances under which it is impracticable for the party to obtain the information by other means. Crenna v. Ford Motor Co., 12 Wn.App. 824, 532 P.2d 290 (1975), Detwiler v. Gall, Landau & Young Construction Co., 42 Wn.App. 567, 712 P.2d 316 (1986). There is an exception for IME examiners' reports in CR 35(b).

#### 1. Exceptional Circumstances Allowing Discovery.

Given the fact that a party may not even discover the identities of non-testifying consulting experts, let alone the broad categories of facts known and opinions held by such persons, it is difficult to make the "exceptional circumstances" showing called for by the rule. In most cases, too, the same information would be available to a party "by other means." Crenna v. Ford Motor Co., 12 Wn. App. 824, *supra*.

The largest category of cases in which a court has found such exceptional circumstances consists of situations where physical evidence has changed before a party could make its own investigation. Examples include: autopsy report by expert retained by plaintiff, Levine v. St. Luke's Hosp. (D.C.Pa.1969), 47 F.R.D. 362; escalator condition may have changed after defense expert examined it, Maginnis v. Westinghouse Elec. Corp., (D.C.La. 1962), 207 F.Supp. 739; vehicle had been disassembled after plaintiff's expert examined it, Colden v. R. J. Schofield Motors, (D.C.Ohio 1952), 14 F.R.D. 521.

Although some courts have distinguished between the facts known by a non-testifying consulting expert and the opinions held by that expert for purposes of establishing exceptional

circumstances allowing discovery, other courts have held that the line between expert facts and opinions is not significant.

Some courts have included a required showing of "substantial need" as well as "exceptional circumstances," thus engrafting a CR 26(b)(3) requirement onto CR 26(b)(5)(B). Crockett v. Virginia Folding Box Co., (D.C.Va. 1974), 61 F.R.D. 312.

#### 2. When the Expert's Status Changes

The discovery rules applicable to an expert whose status has changed is less than clear. In Pimental v. Roundup Co., 32 W. App. 647, *aff'd* 100 Wn.2d 39 (1983), it was held that a deposition of an opponent's retained expert may be used at trial where it had been stipulated that the deposition could be used for "any purpose under the civil rules." In Mothershead v. Adams, 32 Wn.App. 325, 647 P.2d 525 (1982), the court refused to allow the plaintiff to depose a physician who conducted an examination of the plaintiff at the request of the defense under CR 35, when the defense did not list the physician as a testifying expert. In a footnote, however, the court said that its opinion did not apply to circumstances not present in the case, such as where a party waives its right to shield an expert by (1) allowing a deposition to be taken and stipulating to its use (as in Pimental, presumably) or (2) listing an expert as a witness to be called at trial and not calling him. Mothershead, note 4 at p. 329.

Where does that leave the party who initially lists an expert as a trial witness but then decides to strike the expert and not use him/her? Under Mothershead, the implication of the footnote is that merely listing the expert



may allow the other party to call him/her as an expert. See Williamson v. Superior Court, 21 Cal. 3rd 829, 582 P.2d 126 (1978), in which the court held an expert, once named as a testifying witness, is subject to discovery after later withdrawal of the designation. Pimental stands for a more restrictive rule: the other side can use the deposition of an expert if the parties entered into a “use for any purpose” stipulation at the time of the deposition. It is not clear whether the court would extend its ruling to a deposition where no such explicit stipulation was made, or whether the expert who was deposed could be called as an actual trial witness by the party who deposed him/her.

Federal cases are also not entirely clear on the impact of a change in designation of an expert from a testifying expert to a consulting expert. In Durflinger v. Artiles, 727 F.2d 888 (10th Cir. 1984), and Ross v. Burlington Northern Railroad Co., 136 F.R.D. 638 (ND Ill. 1991), a party had disclosed the identity and subject matter of an expert’s testimony, but no other information. The courts allowed the re-designation, with the resultant limitations on discovery, but it is not clear whether a broader disclosure would change the result.

The concept of “designation” of an expert may also be impacted by local rules, such as King County’s requirement for early listing of “possible” trial witnesses, including experts who may be used at trial, even though decisions may not yet have been made as to who will testify at trial. A comment to King County Local Rule 26 indicates that the designation applies only to persons who **might** be called as witnesses at trial, and it would

seem that the rule should thus not apply to CR 26(b)(5)(A)’s “person whom the other party **expects** to call as an expert witness at trial.”

### 3. Waiver of Discover Restrictions

Even if a consulting expert is shielded from discovery by CR 26(b)(5)(B),

his/her opinions and bases for opinions may not be if they are disclosed to an expert expected to testify at trial. There are risks in sharing information between a consulting expert and a trial expert, even when that information may be verbal rather than written. If the consulting expert’s opinions or facts known are considered by the testifying expert in forming opinions, they may be discoverable as part of the grounds supporting the expert testimony. See Heitmann v. Concrete Pipe Machinery, 98 F.R.D. 740 (D.Mo. 1983). The topic of discovering the “foundation” for an expert’s opinion, including information shared by a consulting expert, is covered further in section II of this article.

### 4. CR 35 IME Expert

CR 26(b)(5)(B) makes special reference to CR 35(b) when it limits discovery of information from and about a consulting expert. The reason is 35(b)’s specific requirement that an IME report be provided to the party subject to the IME examination upon request, and under certain conditions. Even if a party does not intend to call the IME examiner as an expert witness or makes a later decision not to do so, the report of the examiner must be provided even if the other restrictions of CR 26(b)(5)(B) continue to apply. Further discovery, including a deposition, of a non-testifying CR 35 examiner would be

subject to the exceptional circumstances requirement. Mothershead v. Adams, 32 Wn.App. 325, 647 P.2d 525 (1982).

### E. EXPERTS WHO ARE NOT “EXPERTS “

A witness who expresses professional opinions at the time of trial may not fall within the “expert” category found in CR 26(b)(5). In Peters v. Ballard, 58 Wn. App. 921 (1990), rev. den’d 115 Wn.2d 1032 (1990), the court held that a treating physician in a medical negligence case could be asked for opinions by the defense even when the plaintiff stated the physician would only testify as to factual issues. The plaintiff had appealed the trial court’s decision allowing such expert testimony on the grounds that CR 29(b)(4)(B) shielded the physician’s expert opinions since he was, in effect, only a consulting expert to the plaintiff. See Detwiler v. Gall, Landau & Young Construction Co., 42 Wn. App. 567, 712 P.2d 316 (1986). As a non-testifying expert, the expert’s opinions would be shielded from being elicited at trial as well as during discovery, Crenna v. Ford Motor Co., 12 Wn. App. 824, rev. den’d 85 Wn.2d 1011 (1975).

In Peters the court avoided the CR 29(b)(5) issue by holding that the physician’s opinions were derived from his role as an actor and not in anticipation of litigation or for trial. Thus, any opinions expressed were not those of an “expert” as the CR 29(b)(4) term implies, but rather a fact witness who also held opinions. The same rationale was applied in Baird v. Larson, 59 Wn. App. 715, 801 P.2d 247 (1990), where the court held that an accountant with fact knowledge may be called to testify as to opinions,



without the party who called him having to pay the accountant as an expert. Under CR 29(b)(4)(C), the court ruled, “only opinions acquired and developed in anticipation of litigation are expert opinions.”

A separate category of discoverable expert information may exist for facts and opinions acquired by a consulting expert before that person was hired or retained. That information may be discoverable under CR 26(b)(1). See *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984 (DC Cir. 1979) and *Eliassen v. Hamilton*, 111 F.R.D. 396 (ND Ill., 1986).

## II. DISCOVERING THE EXPERT’S “FOUNDATION”

### A. DISCOVERY RULES IN GENERAL

CR 26(b)(5)(A) provides for a liberal scope of discovery regarding trial experts and their opinions. In addition to the items specified in the federal version of the rule (identity of witness, subject matter, substance of facts and opinions, and a summary of grounds), the state rule allows discovery through interrogatories of “such other information about the expert as may be discoverable under these rules.” Thus, the “other information” provision should coincide with the scope of discovery spelled out in CR 26(a)(1): “any matter, not privileged, which is relevant to the subject matter involved in the pending action” and information “reasonably calculated to lead to the discovery of admissible evidence.” Given the broad scope of allowable expert discovery, it is surprising that many attorneys continue to limit their interrogatories to the standard four basic items of “identity, subject matter, substance, and summary.” If

a much broader line of questioning is permissible in deposing the expert, the same breadth of discovery should be allowable in interrogatories.

### B. INTERROGATORY ANSWERS

In responding to interrogatories about experts under CR 26(b)(5)(i), it

is not uncommon for answers to be vague. A rationale sometimes given is that the expert will be deposed in any event, and full information will be developed at that time. An underlying purpose of the rule, however, is to allow a party to gain sufficient information about a trial expert without the need for a deposition and, further, to gain enough information to adequately prepare for a deposition. In *Uresil Corp. v. Cook Group, Inc.*, 135 F.R.D. 168, 173 (ND Ill. 1991), the court tried to define what constituted a complete response to interrogatories asking for information about a party’s trial experts. The court held that the answers must include: (1) a precise statement of the **subject matter** of the expected testimony, (2) the **theories** the expert will use when testifying, (3) the opinions the expert will express, (4) the reasons behind the expert’s opinion, and (5) an explanation of any technical terms to be used. The court added: “All of this information must be furnished keeping in mind the underlying purpose of interrogatories: to allow the opposing party to prepare a rebuttal or cross-examination of the testimony presented.”

### C. POSSIBLE AREAS OF INQUIRY

An elaboration of the items covered by the Uresil opinion can include a lot of ground. Following are some suggestions as to areas of inquiry that may come within the “other information

about the expert” allowable under CR 26(b)(5)(A)(i), whether the inquiries are in the form of interrogatories or deposition questions.

1. Education, Training, and Experience of the Expert. These topics are important not only to establish—or attack—the qualifications of the expert, but because they may uncover information relevant to the basis for the expert’s opinions. A physician expert, for example, may have trained at a hospital where a particular school of thought about a medical procedure was predominant, or a chemical expert may have worked in a state where a particular chemical was not commonly used. The opinions may thus be based on data known to the expert that is biased or incomplete. An expert, after all, is often relying on general experience and knowledge as much as on specific data or information developed in the case.

2. Prior Writings and Testimony. An expert’s publications may be a source of valuable information about that person’s opinions or sources of information on a particular subject. If the expert is often found in the legal arena, prior depositions or trial testimony may be even more valuable. Not only can you learn about the expert’s opinions on what may be a similar subject, but you can find out what questions or line of questions was most productive. Although experts often have a flawed memory about prior cases in which they have participated, it is relevant to ask about those cases, including names of parties and counsel.

3. Information Provided to the Expert by the Party or Counsel. Although there is a split in the federal cases on discoverability of an attorney’s communication with a client (and

no Washington cases specifically on point), if an expert is relying on any information or documents provided to by counsel, they should be discoverable. Examples would be medical records, photographs, witness statements, drawings, or other documents. As to communications from the attorney, some courts allow discovery not only of factual statements but even views on the case and comments about strategy. Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (ND Ca. 1991); Boring v. Keller, 97 F.R.D. 404 (D.Co. 1983). See, also, William Penn Life Assurance Co. v. Brown Transfer and Storage Co., 141 F.R.D. 142 (WD Mo. 1990), in which oral information provided to an expert by counsel was discoverable. Other courts have held that the attorney's opinions and strategies are protected as work product and are not waived simply because communicated to an expert. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3rd Cir. 1984), United States v. 215.7 Acres of Land, 719 F.Supp. 273 (D.DE 1989). With uncertainty about discoverability, however, it would be wise to review carefully what is put in communications to experts. A safe rule is to assume that it is discoverable and may even be admissible at trial.

4. Observations, Inspections, and Experiments. An expert may travel to an accident site or inspect equipment. Information about those acts and what information or opinions were derived from them are appropriate areas of inquiry. Included, of course, would be drawings, maps, photographs, etc., that may have been generated from the observation or inspection. In some cases, an expert may perform actual experiments to gain data about an area

of testimony. If so, detailed information about the experiment should be discoverable, including drawings, photographs and films, or computer data about the experiment and its results.

5. Books and Other Sources of Information. If an expert has done any research in forming his/her opinions, information about the books or publications should be discoverable. Query: would it be appropriate to inquire about books, publications, and other sources of information that were not specifically reviewed by the expert or relied upon in the case, but which may be part of the accumulated knowledge base which underlies the expert's opinions?

6. Other Persons. If an expert has discussed the case with colleagues or other experts, the information gained may be part of the basis for his/her opinions. Since an expert may rely on hearsay in forming an opinion, so long as the information is of the kind normally relied upon by experts in that field, it is appropriate to ask about that information. It may be a statement made to the expert by a colleague in a telephone conversation, or information in an unpublished paper presented at a conference. If the expert spoke with a party or with witnesses, then that information should be discoverable if it was relied upon in forming any opinions.

7. Communications with Consulting Experts. If a party uses both consulting and trial experts, there is real risk in having any communication between them, even if via the attorney. The protections against discovery of consulting expert's opinions (and even

of their identity) can easily be waived if it can be argued that the testifying expert relied upon any information generated by the consulting expert. The possibility of such information being communicated by the attorney also strengthens the argument that the attorney communication with the testifying expert is subject to discovery. One commentator has expressed the view that the testifying expert shouldn't even know of the existence of the consulting expert in order to keep the barrier as strong as possible.

8. Draft Reports and the Expert's Notes. There are no Washington cases on point and a split in the federal cases on whether draft reports and documents generated by the expert are discoverable. Favoring discoverability: In re IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39 (ND Cal. 1977), Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp., 74 F.R.D. 594 (D.Conn. 1977). Holding that an expert's written report constitutes work product and is not discoverable: Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (ND Miss. 1972). The stronger argument would seem to favor discoverability in Washington: if the standards of CR 26(b)(1) are applied, it seems apparent that a draft report or notes prepared by the expert may lead to the discovery of admissible evidence in the form of a changed opinion or simply facts that were relied upon in forming the expert's opinion.