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When Your Own Experts Disagree

By Robert Ambrogi

It happens all the time between opposing experts in litigation. One side brings on an expert to look for holes in the work of the expert on the other side.

But what happens when one expert exposes another expert's work as flawed – and both experts are working for you?

What if your own expert comes to you and questions the methods or conclusions of another of your experts?

Perhaps you retained one expert as a consultant to conduct initial reviews and lay the groundwork for your case. Later, you retained a second expert in the same field to testify.

You present the consulting expert's work to the testifying expert as background to be used in formulating his own opinion. The testifying expert looks at the earlier work and proclaims, "I can't use this. The analysis is flawed because of X, Y and Z."

At this point, there is no option of sweeping the issue under the rug. Had the consulting expert's work remained just that, it would not have been discoverable under the federal rules. But once it was provided to the testifying expert, it became fair game.

That means that your opponent is likely both to learn about the consulting expert's work and also to learn of the testifying expert's condemnation of it.

When Life Gives You Lemons ...

For any litigator who ends up in this position, the best option may be to follow that old adage about what to do when life gives you lemons. Maybe there is lemonade to be made here.

"As the lawyer, I would use this as an opportunity to build the testifying expert's credibility," says Andrew C. Simpson, a corporate defense lawyer in the U.S. Virgin Islands. By that he means that he would argue something along the lines of, "Look, he's so independent he even criticized my consulting expert."

"I would expect the testifying expert to explain what errors the consulting expert made and explain why the testifying expert's opinion is more reliable because of this conclusion," explains Simpson, who consults with other lawyers on expert-witness issues.

Darrell Stewart, a trial attorney in San Antonio, Texas, agrees that the situation could be used to put the testifying expert in a good light. "Certainly it shows some independence by the testifying expert, and can be explained as such to a judge or jury," he said. "The expert would be doing the proper approach to bring this to the attorney's attention immediately upon discovery."

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Never the Twain Shall Meet

That said, the better route is to avoid getting into the situation in the first place, lawyers agree. The only way to do that is to keep from ever showing the consulting expert's work to the testifying expert. At a minimum, a lawyer should think long and hard before making such a disclosure.

"If the work done by the consulting expert is reviewed by the testifying expert, and particularly if it becomes part of the testifying expert's file, then it is discoverable, and he will be grilled about it," notes Thomas Little, a litigator with Smith, Spires & Peddy in Birmingham, Ala. "That's why you really have to give a lot of consideration as to what information to share with any expert with whom you consult."

Stewart agrees. "Disclosure to the testifying expert of the consulting expert's work would therefore make it available to the other side." The lawyer can avoid this from occurring through management of the case and of the experts, Stewart says. But if it does occur, "the testifying expert would be tested on it by sponsoring lawyer and again by opposition."

Seek and Ye Shall Find

None of the attorneys interviewed for this article had ever run into a conflict between their own testifying and consulting witnesses. The reason for that, they all agreed, is that they take their own advice and avoid allowing one expert to see the other's work.

An economics professor who regularly serves as a litigation expert suggests that attorneys are well advised to keep their experts apart. If testifying experts did routinely review the groundwork laid by consulting experts, he suspects, they would find no shortage of weaknesses.

Ashok Abbott, associate professor of finance at West Virginia University, says he is often retained as a consultant in litigation for the precise purpose of reviewing the work of experts on opposing sides. As many as half the reports he reviews are questionable, he finds.

He characterizes many expert reports as providing "an illusion of precision." By that he means that the expert may apply appropriate methods to a problem but employ too small a sample of data to be accurate.

In some cases, the expert's work is flawed simply due to negligence or mistake. But in others, he believes, the expert "whittled down the sample" in order to achieve a particular answer or "stretched their findings to fit the case."

Do As I Say, Not as I Do

Another expert witness once found himself in the situation of being asked to incorporate the faulty work of an earlier expert. Thomas Roney, principal of the Dallas, Texas, economic consulting firm Thomas Roney LLC, was contacted to testify in a franchise case.

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The attorney showed him the work of an earlier expert and suggested his testimony should mirror the earlier expert's findings. But when he looked at the report, he found that it was not only flawed, but dated, having been done more than five years earlier.

Unfortunately, this was not a case in which the testifying expert went on to redeem the earlier expert's faulty work. The attorney was not happy with Roney's conclusion and so Roney had no choice but to turn down the case.

Between a Rock and Hard Place

While lawyers indicate that the main reason not to reveal a consulting expert's work to a testifying expert is to protect the earlier work from discovery, there is another reason, defense lawyer Andrew Simpson believes.

If the second expert testifies based on the work of the first expert, then the testimony is based on hearsay. The federal rules of evidence allow this, Simpson notes, but it creates a quandary.

"The expert's reliance upon that hearsay does not establish the foundational fact established by the hearsay," he explains. "You still have to prove that foundational fact, which is probably going to cause you to put the consulting expert on the stand."

Lawyers often overlook the distinction between allowing an expert to rely on hearsay and the need to prove the hearsay in some other way, but it is a critical distinction, Simpson contends.

He sums it up this way: "I really don't want my testifying expert to be relying upon hearsay from a consulting expert."

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