

CONSIDERATIONS REGARDING WRITTEN EXPERTS' REPORTS

In many legal proceedings, one important consideration of counsel is when and how to use an expert and whether the expert should prepare a written report. It is extremely important that the expert not prepare any written reports without the full knowledge of, or specifically instructed to do so, by retaining counsel. There are many reasons counsel may want an expert to prepare a written report. Some of the reasons include the following:

1. A written report may be required by the Court where the litigation is pending such as those required in federal court under federal rule of procedure 26(A)(2)(B).
2. Written expert reports, which are introduced into evidence and marked as exhibits, may be taken into the Jury Room for review and deliberation by jurors.
3. A written report may be needed or required to assist in settlement negotiations, or in some arbitration proceedings or bench trials.
4. An expert report may be needed to support or oppose a motion for summary judgement.

Before the preparation of any written report an attorney-expert conference should be arranged, either by telephone or, preferably, face to face.

During this early conference it should be determined if a written report is being requested, as well as the type of report, the format, the issues, factual assumptions, proposed language and opinions the expert will offer. Any questions the expert or counsel may have should also be addressed at this conference.

It is critical that experts not opine in areas that are beyond their true expertise. Experts who do this will open themselves to an easy challenge on cross-examination. Experts should avoid the use of legal terms or the expressing of legal opinions in their reports and should only use terms for which they completely know the definition.

Any factual assumptions relied upon by the expert should be expressed specifically and in a detailed non-vague manor. Factual assumptions should be based on reliable, verifiable information and should cite the source of the information used. The expert should avoid the use of terms which may imply guessing regarding assumptions. Terms such as "presumably", "supposedly" or "as I understand the facts of this case" should not be used.

It is obvious that the reason an expert is used in a case is to express an opinion and that a written report may be used to communicate that opinion. The expert's opinion, therefore, needs to be effective and defensible and needs to be stated in a clear, confident, explicit manor. The use of hedge words such as "I feel", "I believe", or "it would seem" should not be used. A much more effective way to express an opinion would be to use words such as "based upon a reasonable degree of certainty (or "probability"). The expert should be able to document a detailed and reliable methodology in order to avoid a challenge under Daubert.¹ The expert's opinion should also avoid the use or absolute words such as "always" and "never."

¹ Daubert v. Merrel Dow Pharm, 43 F. 3rd (9th Cir 1995)

Assistance by Retaining Counsel

It is common for retaining counsel to assist in some manner with the expert's report. However, the more assistance counsel provides, the more vulnerable the expert will be on the cross-examination of his report. The correction of a typographical or grammatical error may carry very little risk or exposure. A great deal of risk or exposure is present if counsel completely changes the expert's report and asks the expert to sign off on the changes. To reduce the vulnerability of the expert on cross-examination, trial attorneys should not dictate or significantly alter the expert's opinion or draft report. A significant risk to a trial attorney and the expert is that opposing counsel will ask for draft reports and focus on differences. Any changes made by the retaining counsel will affect the credibility of the expert and his or her independent opinion. Experts should be mindful of how they will be cross-examined during the preparation of their report.

Advice given to counsel for deposing an expert witness should include the following:

1. Determine whether the expert was asked to prepare a report or written documents.
2. If a report was prepared inquire if drafts were prepared or instructions were given as to how to prepare the report.
3. Determine if opposing counsel participated in the preparation or editing of the report.
4. Consider questioning the expert about any differences in the contents of reports, the answers to any expert interrogatories, and testimony at deposition. However, part or all of this inquiry may be postponed until cross-examination at trial.

Proofreading for Mistakes

Since each mistake in a report lessens the expert's credibility, reports need to be carefully proofread for mistakes. Opposing counsel, upon finding a mistake, will argue that if there is one mistake there may be others and that the entire report is suspect. Corrections need to be made for substantive mistakes, as well as bad grammar, typographical errors, and misspelled words.

Spelling mistakes should never occur in an expert's report. Since it can be difficult for an expert to proof his own work, the expert and at least one other person should proof the report. Any spelling error not caught will make the expert look sloppy and needlessly damage his credibility. Imagine the expert being questioned on cross-examination as to whether he was careful and diligent in his investigation, formation of an opinion and preparation of his report. The obvious answer by the expert is yes. The next questions could be "were you rushed in the preparation of your report?" and "did you carefully review your report for errors before it was submitted?" After the spelling or grammatical error is pointed out and the expert is forced to admit the mistake in the report that he carefully reviewed, the next question will probably be "are there any other mistakes in your report?"

In any case involving the use of an expert, it is critical for the expert and counsel to have clear understanding and communication from the initial "expert conference" until the end of the case. Once it is determined that a written report will be prepared, communication must continue between the expert and counsel concerning format, assumptions, content, language and opinions offered by the expert. From there, it is incumbent on the expert to write a clear and well-written report.