Taking on the Hardcore Expert

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I. What this paper does and does not cover.

a. It does not cover *Daubert* challenges to the admissibility of expert testimony. It touches only tangentially on the process of "setting up" the expert for *Daubert* challenges. We highly recommend Judge Harvey Brown's work on this issue, or the work done for this seminar.

b. It does not cover the tasks of finding, hiring or preparing experts. We recommend the work separately written on this subject within this seminar.

c. It does cover the process of attempting to limit the effectiveness of, or reverse, an expert whose testimony is likely to be admissible in the case or arbitration you will be trying.

II. What is the "hardcore" expert?

a. General definition. A hardcore expert is either a specialist in a field of application involved in your litigation or a professional testifier who attempts to testify in one or more related fields of expertise.

b. Examples of "specialist" experts.

1. Guidance technology expert testifying on the development of oilfield tools involving the use of inertial navigation devices.

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2. Musicologist testifying as to whether a defendant's work is "substantially similar" to plaintiff's copyrighted piece.

3. Metallurgist testifying on the tendency of high-strength steels to suffer from hydrogen embrittlement in seawater environments.

4. Former oilfield service company owner testifying on the economics of new tool development and incorporation into the offshore oil and gas exploration market.

5. Rig operations manager testifying on the role and function of various tracking devices for "volume gain" occurring prior to well blowout and the responsibilities of rig personnel to respond to volume gain.

6. Electricity sales manager testifying on the value of lost revenue occurring by virtue of business interruption during the California rolling-blackout market of 2000.

c. Examples of omnibus professional testifiers.

1. Accountant testifying on the history of oilfield tool development, cost of development, minimal use of trade secrets by defendant and limited likelihood that new tool will penetrate the market.

2. Products liability expert testifying on proper product design, manufacture and warning of products ranging from cherry pickers to diapers.

3. Attorney with two years of indirect oilfield experience testifying on subjects ranging from on offshore rig safety to reservoir engineering of a "water drive" formation to the use of "measurement while drilling" systems to determine bottom hole location.

4. Real estate appraiser testifying on the profitability of a business built on environmentally contaminated land, but assessing profitability had there been no contamination.

5. Former United States Department of State official testifying on availability of Russian infrastructure to build and service an oil refinery.

III. The step-by-step approach to the hardcore expert.

a. Step one: Get your discovery done.

1. What you get through the disclosure process and why it is insufficient.

i. *Texas Rules*. TEX. R. CIV. P. 194.2(f) describes what a party must produce when requested to disclose. If you make a request for disclosure, you are to receive:

(a) All documents, tangible things, reports, models or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
(b) The expert's current résumé and bibliography.

Most Texas cases addressing Rule 194.2(f) relate to decisions by the trial court to admit or exclude experts, or their supplemental opinions, over an opposing party's objection. Generally, the cases discuss whether designation by a party was consistent with the rule, not whether a party may ask for and receive information above and beyond that required to be disclosed under 194.2(f). *See, e.g., In re W.D.W.*, No. 05-04-01254, 2005 WL 2303381 (Dallas Sept. 22, 2005), and *In re T.I.G. Ins. Co*., No. 09-05-253, 2005 WL 1903841 (Beaumont Aug. 11, 2005). The few cases that address the scope of discovery requested of experts continue to apply *Russell v. Young* for the proposition that it is improper to ask of an expert witness what percentage of the expert's income is derived from testifying as an expert. , 452 S.W.2d 434, 436 (Tex. 1970), s*ee, also, e.g., In re Weir*,

166 S.W. 3d 861, 864 (Tex. App.–Beaumont, 2005) (expert granted mandamus to avoid disclosure in response to this inquiry).

Generally, these cases are predicated upon privacy concerns for the expert and the concern that qualified experts will be deterred from serving if invasive questioning of them is permitted. *Id.* Then, in 1999, the Texas Supreme Court's revised discovery rules made inquiry into an expert's bias a permissible subject of discovery. TEX. R. CIV. P. 192.3 (e)(5) ("any bias of the witness"). Some commentators felt that this explicit addition to the rules meant that *Russell v. Young* had been overruled. *See* MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS, Ch. 6, § 4.5 (2003). At least two courts have rejected this position, however, holding that a party must make a preliminary showing of bias before an expert's income tax returns or information concerning the percentage of the expert's earnings from litigation could be discoverable. *In re Wharton*, No. 10-04-00315, 2005 WL 1405732 (Tex. App.–Waco June 6, 2005); *In re Doctors' Hosp. of Laredo, LP,* 2 S.W.3d 504, 507 (Tex. App.–San Antonio 1999, orig. proceeding).

But, what level of proof is necessary to make a preliminary showing of "bias" sufficient to make an expert's income related information discoverable? Courts have yet to sufficiently define that level. For example, in two cases, the Texas Supreme Court appears to have distinguished, if not overruled, significant parts of *Russell v. Young*. *See Walker v. Packer*, 827 S.W.2d 832, 838-39 (Tex. 1992) (orig. proceeding) (proof of hospital policy refusing to permit its doctors to testify on behalf of malpractice plaintiffs without written permission sufficient evidence of bias to distinguish case from *Russell*); *In re Sheppard*, 513 S.W.2d 814, 816 (Tex. 1974) (prior appraisals of real estate appraiser in

condemnation matter directly relevant both as to credibility and substance of opinion). Frankly, these holdings appear result oriented, leading the author to conclude, at a minimum, that: (1) the litigant seeking to compel production of additional materials above and beyond those provided in 192.5(f) should choose his test case carefully; (2) something more than an admission by the expert that "1/4" or a "high" percentage of his income is from testifying is necessary to support production; and (3) the outcome is directly related to the scope of the request—the more invasive and time consuming the requests, the less likely that neither the trial court nor the court of appeals will grant the relief requested.

ii. *Federal Rules*. Compared to Texas rules, the Federal Rules of Civil Procedure are more expansive when it comes to expert related discovery. FED. R. CIV. P. 26 (a)(2)(B) requires that the sponsor of an expert witness provide:

(a) a written report "prepared and signed by the witness" and "containing a complete statement of all opinions to be expressed and the reasons therefor";
(b) the data or other information considered by the expert in forming the opinions;
(c) any exhibits to be used by the expert or summaries of his conclusions under FED. R. EVID. 1006;
(d) the qualifications of the witness, including all publications undertaken in the last ten years;
(e) the compensation to be paid to the expert for his/her testimony; and
(f) a listing of all cases in which the expert has testified in the previous four years.

Federal courts mirror Texas courts, however, in how they treat the discoverability of information other

than that compelled to be disclosed by an expert under Rule 26(a)(2)(B). Most cases addressing Rule 26(a)(2)(B) are directed to the issue of whether the party sponsoring the expert has made sufficient disclosure of the expert's conclusions, work papers or other disclosure items. *See, e.g., Capobianco v. City of New York,* 422 F.3d 47 (2nd Cir. 2005). The cases addressing whether in a specific case the deposing party is entitled to income tax returns, prior testimony, or to estimates of the percentage of income generated through litigation-based consulting are all over the map. *Compare Rogers v. United States Navy*, 223 F.R.D. 533 (S.D. Ca. 2004) (plaintiff not entitled to prior testimony or to underlying records where expert was ordered to disclose percentage of income from testimony for the prior three years and percentage of "plaintiff" versus "defendant" testimony), and *Cary Oil Co., Inc. v. MG Refining and Mktg. Inc.,* 257 F. Supp. 2d 751, 756 (S.D. N.Y. 2003) (plaintiff not entitled to learn amount of compensation between 1995 opinion by witnesses favoring the plaintiff and 2001 opinion contrary to their position), *and Boselli v. Southeastern Pa. Transp. Co.,* 108 F.R.D. 723, 725-27 (E.D. Pa. 1985) (court ordering expert to disclose total litigation-based compensation for the previous three years together with percentage of income derived from litigation).

While inquiries into the "percentage of income" an expert earns by testifying are helpful, in the author's experience such inquiries are not the most helpful means of impeaching an expert. Instead, inquiries into the expert's advertising, consistent employment by a single firm over the years, and prior inconsistent testimony are more important. Few cases deal with these issues directly, but there appears to be little reason for Rule 26(a)(2)(B)'s requirement of disclosure of prior testimony other than to permit the opponent to identify cases in

which inconsistent testimony has been given and to obtain that testimony.

(b) Useful information you will miss if you solely rely on disclosures.

i. *Disclosures alone are not enough*. If you rely on 194.2(f), you will miss useful information you can use to cross-examine the expert, such as:

(a) All preliminary drafts of the expert's reports;
(b) All billings from the expert to the law firm or party employing him/her;
(c) Public articles, treatises and/or speeches that the expert may have authored in the past;
(d) Treatises, articles and/or speeches that are cited by the expert in his/her field as reliable;
(e) Previous deposition or trial testimony that may conflict with the testimony being offered by the expert;
(f) Advertising information or solicitations by the expert of work from lawyers;
(g) Public records relating to the history of the expert when available, such as CRD records for brokers in customer-broker disputes;
(h) Documentation of the number of times the expert has worked for the party and/or firm employing him/her in your case.

ii. *Subpoena, subpoena, subpoena.* Attachment 1 is a standard form of expert discovery request used in our firm, covering the bases referenced in 3(a)-(g) above, as well as others. You may not receive all of the documents in the subpoena, but if you don't ask, you don't get.

(c) Timing is everything: Get the documents well in advance of the depositions.

The importance of this step cannot be understated. If you sit down to take the deposition of a true specialist or

professional expert and are presented with two or three boxes of documents that day, you are likely to fail to obtain useful testimony. Attachment 2 is a form of letter agreement we enter into with opposing counsel on most of our cases. It requires the designating party to produce all materials required by the subpoena or request for production (not those identified in 194.2(f)) 72 hours before the deposition is scheduled to commence. If you have scheduled the depositions properly, this will give you the time you need to evaluate the conclusions and formulate your approach. It is also a standard you (and your legal assistants) can live with when you are producing your own experts.

b. <u>Step two</u>: Make a preliminary outline identifying your objectives for the expert.

This step requires, in turn, that a number of preliminary analyses be made.

1. <u>What does the expert have to say that hurts your client?</u> This may seem too fundamental even to mention, but we have seen any number of cases where counsel spend an inordinate amount of time on issues having little meaning to the key jury issues in the case, leaving themselves 30 minutes to cover the "gist" of the experts' conclusions.

2. <u>Is the expert fundamentally honest?</u> The objectives you will have with a fundamentally honest expert are very different from those you will line up for the intellectually dishonest one. If the expert is honest and you have favorable facts that he or she gives in your client's favor, or new facts to be considered, then your objectives may include turning the witness into your own. If so, you may want to qualify him/her on the record so that he/she cannot be dismissed by your opponent. If not, then your objectives run largely to discrediting the witness and forcing him/her to make unsavory choices.

3. <u>Decide whether you have a reasonable shot at disqualifying the expert</u>. If you have the opportunity to do

so, then by all means go forward. By doing in-depth examination of an expert's background, knowledge and experience, however, recognize that you run the risk that if the remainder of the deposition goes poorly, your opponent will read the deposition or show film of the expert at trial without ever having to call him/her live.

4. Can the expert be dismissed? Is there something in the expert's background so vile or offensive that a jury will discount what he or she has to say regardless of the other qualifications the expert may carry or reasoning used? These are, in the author's experience, few and far between, but include:

   (a) Faked résumés;

   (b) Criminal involvement;

   (c) Disbarment or its equivalent from the professional organization of which the expert is a member.

5. What inroads can I make on the expert's credibility as a whole? This analysis is very heavily dependent on the identity of your expert and his or her relationship to the case. Here, we are speaking of issues that affect the expert's credibility no matter what his or her reasoning. Below are some common candidates for impugning the witness' credibility across the board:

   (a) Is the expert a professional testifier? Does he/she solicit work from the legal field? Does he/she advertise in the *Texas Bar Journal*, *Texas Lawyer* or other publications? Our experience has been that with rare exceptions, juries distrust experts who are for hire to discuss any aspect of a broad variety of cases and who make a substantial portion of their income through testifying. A favorite question is whether the frequent expert has ever turned down an assignment because he or she disagreed with the lawyers who wanted to make that assignment to

him or her. If "yes," then "where," "when," "who" and "how can I contact them?"

(b) Has the expert become your opponent's lap dog? Does the expert testify repeatedly for your opponent? Has he or she ever *disagreed* with the law firm or turned down an assignment?

(c) Is the expert beyond his or her field of expertise? This approach requires a painstaking analysis of the witness' background. Résumé puffing is an art form amongst experts, so it is essential that you not take representations on the résumé at face value.

(d) Is the expert stale? An expert who was a state-of-the-art avionics expert in 1978 is not likely an expert in the field today. More importantly for you, the jury is likely to see someone out of the field of expertise for many years as having lost his or her edge.

6. Has the expert been misled about the case? With astounding frequency, experts are asked to reach conclusions after viewing a hand-picked selection of the facts friendly to your opponent. In most such cases, the expert's report will reflect with reasonable accuracy the facts that have been omitted from consideration. The key to exploiting this situation is your method of questioning.

7. Can you learn enough about the expert's field of expertise to take him "*mano a mano*?" I feel comfortable examining a real estate appraiser, reserve engineer or banking expert because their fields of expertise, though focused, are not so far removed from the public domain that I have difficulty grasping the subject. I do not feel comfortable with organic chemists, interpreters of 3D seismic data, software engineers, physicists and their ilk. One fundamental issue you must address in creating your outline is whether you are attempting too much in the limited time and with the limited resources you have. Don't forget the tutorial capacities of your own experts, however, as they can radically shorten the learning

process. By the time your opposing experts have been presented, you should be well acquainted with the more technical aspects of your case.

8. Has the expert "imported" learned treatises into his or her testimony that materially aid your case?

9. Can you make progress with the witness "off topic?" Experts try to set their own limits, and frequently your job is to expand those limits so that they testify in off-topic areas that are helpful to you.

10. The final check in formulating your objectives: remember the jury and the expert's limited role in what they have to do. Because the expert's testimony is often very technically oriented and detailed, our temptation is to address the expert at a detailed technical level and to "score points" with respect to the testimony. This is frequently useless because the information so procured is so far from the apex facts or conclusions under discussion that the jury will find it uninteresting or useless. They may become frustrated that you are using their time to make "nitpicking" points with the expert. It is therefore critical to at all times keep the jury and your basic case objectives in mind when formulating your strategy.

c. Step three: Execute your game plan with the fundamentally honest expert.

If you have successfully done your homework and determined that you are dealing with a specialist who is honest, then follow a simple procedure: (a) get in, (b) get what you can and (c) get out.

1. Take the "easy pickings" first. Honest experts will present you with the opportunity to develop favorable testimony for your clients before any real discussion of fact-dependent conclusions that the expert has made. It is important to gather this fruit first before the deposition becomes contentious or before you have fully closed the trap established by the expert's own teachings, learned

treatises or other matters. This testimony usually occurs in connection with fundamental precepts involved in the case. These are the "supporting" conclusions that are used to support "ultimate" conclusions reached by an expert. Often the expert will lay low your opponent's ability to quibble about fundamental precepts so that you can avoid those issues entirely and proceed to the conclusions that are actually in dispute. By way of example, their real estate appraiser may concede that the use of "comparable sales" is the only valid method of establishing value in the case, obliterating your plaintiff's desire to use an "as built" model for the value of property. By conceding that the comparable sales method is the only valid means of determining value in the case, the expert may eradicate a significant portion of your opponents' case.

2. Establish what the expert relies upon before proceeding to use it as a blunt instrument. You have already read through the expert's own teachings as well as the materials he or she has gathered for this specific project. It is essential to set aside the authorities produced by the expert and presumably relied upon by him or her before closing this trap. You should:

   (a) Intersperse the "killer" treatises with neutral or harmless treatises that the witness has also reviewed and relied upon so as not to tip your hand.

   (b) Ask your questions in an open ended manner: "Why did you research what the United States Department of State had to say about refinery capacity in the former Soviet Union?" "Did you view their work as important?" Did you rely on the U. S. Department of State report to reach your conclusions?" Once you have this concession, you then show the expert all the entries in the report demonstrating that the very refinery project your client proposed was in the USDOS's view practical, economic, well established technologically, in-demand and that several were under construction at

the time of the case to undermine his/her conclusion that the venture was new, uncertain and used untested technology.

(c) Know the author's own work better than he or she does.

3. Consider using the "push/pull" technique to obtain concessions from the automatically contrary witness.

If the witness is automatically contrary—that is, he or she takes a position that is automatically the opposite of the direction your questions want to take him or her—then consider using what I call the "push/pull" technique. Using our prior example, instead of asking open-ended questions, ask questions that point the contrary witness in the opposite direction of the one you want her to take: "These State Department publications are notoriously unreliable, aren't they?" or "You can't honestly tell me that you have ever relied upon one of these State Department publications before, have you?" The contrary witness thinks you are challenging his or her decision to use and rely on these materials (probably thinking that you've found damning materials in them), so he/she authenticates the very materials you need to use with "of course they're reliable" or "of course I've used them before; that's why I researched them for this project." This technique requires that you develop a sense of the witness' mode of operation fairly early in the deposition.

4. Use context over and over and over.

Often a specialist expert has accumulated history that tends to defeat the very conclusion he or she is reaching. To get to this information, you must stop taking the expert's testimony at face value and ask about the reality of the expert's life outside of this one assignment. Take, for instance, the physicist/inertial guidance engineer who says that all of the technology involved in your client's guidance instrument was "old hat" by the time it was stolen and thus of no worth. Be prepared to show that the

witness was tied to a confidentiality agreement from the first day that he stepped into Litton Industries in the 1970s and that each and every project he worked on was considered confidential. Make him answer that the company considered its new tool/instrument development projects to be highly confidential. Have him admit that his employer believed that if its confidential information got out, it would endanger or ruin the project. Have him expand on the fact that the company he worked for considers guidance systems it developed in the late 1970s to be proprietary, or to have proprietary aspects, even today. Finally, ask him whether he would go on the street even today and try to sell to others any of the technologies that he worked with under a confidentiality agreement in the 1970s or 1980s. Force him to admit that it would be wrong, that it would be like stealing for him to do so. Juries understand that an expert who is testifying to something that is radically different from the practice he or she has employed his or her entire life cannot be relied upon. Better yet, they will take the reality of the expert's background as the truth and his or her particular conclusions for your opponent as false.

5. Turn the honest specialist to your advantage.

The honest specialist who has been shown only that fraction of the documents or testimony in a case that are helpful to your opponent is a target of opportunity. The key to using this expert against his or her proponent is to establish the foundations of the expert's decisions. If, for instance, an expert in the securities field bases his testimony that the investments sold by a brokerage were all suitable upon the assumption that the investors were 20-something computer geeks with long earning histories ahead of them, he will likely have a very different opinion about a 65-year-old retiree with limited investment experience. The key to turning such a witness to your favor is to have the witness identify the *factors* that he or she is relying upon to reach conclusions favorable to the

opposition before introducing evidence to the expert undermining those assumptions.

The easiest way to force either the honest specialist or general-purpose expert/warrior to either conclude with you or waste his or her credibility is the *honest* hypothetical question. This is perhaps the hardest single question to ask of an experienced expert or witness because it is so easy for that witness to pick apart the hypothetical rather than to reach the logical conclusion that the hypothetical calls upon the expert to concede. The key to using the honest hypothetical is to use the witness' own words where possible, exactly, without paraphrasing them. Only then can you work off the "established" or "agreed" facts, vary the key inputs and force the expert to either agree with you or lose his or her credibility.

6. Take the honest specialist off topic.

With astounding frequency, specialist experts have enough expertise in a number of fields to be dangerous to their proponents and yet are not well prepared to address even obvious questions in these areas. For instance, an opposing brokerage's expert witness who testifies that a series of high-tech stock picks were appropriate for inexperienced investors may be forced to concede basic principles that are at the core of your case. "Should investors be entitled to rely upon the fact that the broker will act on their behalf in making recommendations?" (The broker was receiving payment from the stock offeror to make the recommendation.) "Should brokers take kickbacks from stock issuers to recommend their stocks?" "If a broker first calls a customer, discusses the market, discusses how the market is operating, discusses what options the broker thinks are underpriced and the customer then elects to buy a call, the transaction is solicited isn't it? This is basic isn't it? Any broker should know that this was a solicited transaction? Brokers are required to keep honest records of their transactions, aren't they? If they don't, it is a violation of NASD rules of

fair practice, isn't it?" You get the idea. The penultimate conclusion that the expert reaches (that the investments were appropriate for these investors) may be more than outweighed by the experts' testimony favoring your client's position.

If you are taking the honest expert off topic, do it early. The longer you cross, the more the expert will understand the relationship between your questions and ultimate outcome. Typically, honest experts confronted with this problem and who come to an understanding of the damage they are doing to the party who hired them will simply clam up.

d. <u>Step four</u>: Execute your game plan with the hired-gun generalist.

To a degree, the dichotomy we've set up between the "honest specialist" and the "hired-gun generalist" is a false one. You will, of course, encounter specialists who, despite their training, expertise and obvious qualifications, are completely dishonest, or generalists who nonetheless approach their assignments with honesty and a strong sense of internal governance over the positions they are asked to take. Thus, some of the commentary supplied above will apply to the generalist, as does some of the commentary supplied here.

1. <u>Executing the decision to qualify, ignore qualifications or attempt to disqualify</u>. The generalist is at particular risk of disqualification under *Daubert*. The risk increases as the distance between the subject matter of the expertise required and the expertise possessed grows. Here are some rules of thumb to determine which of three available lines of attack you should take.

   (a) *When to qualify the expert*. Qualify the expert if you are certain that he or she has given you testimony that is at least as helpful as hurtful. Qualify if the expert gives testimony that supports a key and otherwise unsupported position. Consider using qualification to signal your opposition that you like

what the expert is saying and want to use him or her; we've encountered numerous experts who simply never appear because of the post-deposition baggage they carry. If you qualify the expert, always punctuate the most helpful testimony with "and you have reached X conclusion after being retained by [the opponent], correct?" The fact that your opponent sponsors a witness who undercuts it is much more powerful than your doing so.

(b) *When to ignore or say nothing about qualifications*. Ignore the subject of qualifications if you want to force the expert to be called to trial. If your opposition does not then qualify the expert in the deposition on redirect, the testimony cannot be admitted except through the witness' physical presence at trial.

(c) *When to attempt to disqualify the expert*. Attempt to disqualify the expert (1) if you have a strong probability of excluding his or her testimony under *Daubert* or (2) if, in the process of doing so, you make serious inroads into the expert's credibility that are independently worth proving to the jury. The author's personal experience is that trial courts are far more apt to exclude experts in the field of hard science or engineering rather than in the "social" science fields such as economics, accounting, real estate appraisal and so on.

2. Focus on direct attacks on credibility. Experts are retained solely for their qualifications, credibility and conclusions. The attorney who retains the generalist solely because he or she provides the third item in the preceding sentence runs a risk of making a worthless investment, or worse of having his or her client smeared with the dishonesty or unprincipled testimony of his or her expert. This being said, there are definitely right and wrong ways to go about discrediting a witness who deserves it. Doing it the wrong way wastes your goodwill with the jury and risks making you look like the bad guy;

worse yet, it risks enhancing the credibility of the opponent's expert. Here are several rules of thumb along with examples of their implementation. One common theme throughout is creating the ability at trial to lay the witness bare through a series of small, step-by-step questions to which you already know the answer.

It uses the example of an "all purpose" expert who has just testified that your plaintiff's damage model is all wrong because even though the defendant consistently botched repairs and refused to perform them, there really isn't much demand for your plaintiffs' survey tool in the oil and gas exploration service industry. The expert is 52 years old, has four years of experience as a petroleum landman, an additional three years as a "company man" on offshore rigs and then went to law school before becoming a testifying consultant. He has been a consultant for the last 10 years, serving primarily attorneys.

(a) *The "bought and paid for" approach*. Many attorneys use only the "you're being paid $300 per hour for your testimony?" question to undermine the opposing expert's objectivity. This, I believe, is a mistake. Most juries don't expect the expert to offer his or her services for free. While they may not be familiar with accountants who charge $350 an hour, they are familiar with automobile mechanics who charge $70 an hour. You therefore need to advance the ball well beyond "so you're getting paid." Here are additional questions and the sort of answers you may receive from the expert. The answers listed here are ultimate answers; you will have to expect to push and parry with the expert to get them.

(1) Where do you advertise? [The *Texas Bar Journal*, *Texas Lawyer* and *American Lawyer.*]

(2) How much do you spend on advertising each year? [$5,000.]

(3) Do you advertise in any trade publications that actually serve the oil and gas industry? [No.]

(4) Are you looking for either employment or consulting from oil and gas companies? [No.]

(5) So you only advertise to attorneys? [Yes.]

(6) Do you also have entertainment expenses for attorneys, such as meals, gifts or travel? [Yes.]

(7) How much are they annually? (We had one witness admit spending $25,000 per year and another over $50,000 per year.)

(8) Your résumé indicates you have testified in 78 cases over the previous five years. Have you ever turned down a case because you disagreed with what the attorneys were asking you to say? [Yes, I am sure I have.]

(9) When? Who? What did they ask you to say that you disagreed with? [I don't remember.]

(10) Would it be fair to say, then, that although you believe you have, you cannot identify a single instance in which you have disagreed with the attorney attempting to hire you? [I am sure I have.] Objection, non-responsive. [No.]

(11) You have testified for attorneys on how to install a Kelly bushing on a well, haven't you?

(12) You have testified for attorneys as an expert on how truckers are supposed to deliver drill pipe to the site, haven't you? *Followed by:* You've never been a trucker, have you?

(13) You have testified for attorneys on OSHA requirements for tool pushers, haven't you? *Followed by:* You've never been a tool pusher, have you?

(14) You have testified about the value of seismic data from an oil and gas data room, haven't you? *Followed by:* You have never been entrusted by an oil and gas company to interpret geophysical data in your life, have you?

(15) So if I understand your answers, you advertise solely to lawyers, spending about $5,000 per year plus dinners and entertainment?

(16) You cannot identify for the jury a case you've turned down since beginning your advertising and working for attorneys, can you?

(17) But you have testified as a trucker, a toolpusher and a geophysicist without ever having been a trucker, geophysicist or toolpusher, haven't you?

The key components of these questions, as distinguished from the more typical "you are being paid to testify in these cases," are (1) forcing a strong and continuing association between the witness and attorneys as a "gun for hire" regardless of the testimony needed; (2) establishing that in the real world, no one trusts this guy to do anything that matters; and (3) this is a witness who is willing to claim expertise on any subject. With respect to this third main theme, you must use caution to pick your spots; investigate only the most extreme extensions of the claimed expertise where the expert has the least background. Use the ones where the testimony is most logically disconnected (trucking, Kelly bushings, economic demand for wellbore survey systems). Finally, summarize, summarize summarize. Most of your jurors are thinking about what television programs they're going to watch that evening—they need a good map and a sense of impact of your questions to dismiss the expert's conclusion.

(b) *Establishing a lack of education or background*. The key in undermining educational or practical experience is to be graphic, specific and to internally summarize. You can expect the expert to "back up" when questioned in this and any other area in which his or her background is under attack, so expect to take detours and return to your path.

Experts frequently have “stock” replies to the common questions that they receive concerning their qualifications, so it is your job to stay off their comfortable ground and get onto yours. Here is an example applied to our sad-sack hypothetical expert:

(1) The last time you were an employee for an oil and gas company was twelve years ago, correct? [Well, I have done quite a bit of consulting in the field since that time, so I would say no.]

(2) Objection, non-responsive. My question was relating to a regular job. The last time you held a regular job for an oil and gas exploration and production company was 1993, is that correct? [Yes.]

(3) You were what was referred to as a “company man,” correct? [Yes.]

(4) As a company man, you would go onto a rig and make sure operations were conducted as the owner of the oil and gas property being drilled wanted them to be, correct? [Yes.]

(5) Purchasing decisions, such as what drill pipe or what kind of directional survey instruments to use, would have been handled before you ever got on the rig, right? [Yes.]

(6) And decisions about what survey instrument to use would have been handled by someone else, wouldn’t they? [Yes.]

(7) Have you ever run a wellbore survey using a gyroscopic surveyor? [No.]

(8) Have you ever seen the insides of a survey instrument? [No.]

(9) Have you ever attempted to repair a survey instrument? [No.]

(10) You wouldn’t know how to, would you? [No.]

(11) Has any oil and gas company ever hired you to decide what kind of surveys should be run on its wells? [No.] *(Once you establish he is*

not in any aspect of bidding or procurement, then…)

(12) *(Repeat the previous question until you have worn out your welcome.)* Has any oil and gas company ever relied on your advice to decide what kind of (1) drilling mud, (2) drill pipe, (3) mud motor, (4) drill bits, (5) drilling rigs, (6) etc. to use on a well?

(13) Has any oil and gas company ever entrusted you with the task of actually figuring out the market for survey instruments and how they ought to be purchasing in it? [But I have overseen the use of gyroscopic and magnetic survey instruments on over 50 rigs.] Objection, non-responsive. *Then…*

(14) Lets talk about that. You aren't contradicting your own testimony that you've never run a survey, correct?

(15) You took survey results as the company man and helped decide things such as how much further and in what direction to drill, right?

(16) You weren't literally looking over the surveyor's shoulder and telling him what to do, were you?

(17) Instead, you were using results he produced?

(18) You oversaw the surveyor the same way that you "oversaw" toolpushers, mud men and others on the rig, nothing more?

Again, the key is to figure out first precisely what the expert <u>has</u> done and to limit the expert's amplification of that role so that you can show just how distant his testimony is from his actual area of expertise.

3. <u>Crippling the dishonest generalist by using his own testimony</u>.

Generalists who testify frequently and without principled approaches to the assignments they are given will

inevitably contradict themselves. We have, for example, caught one law professor testifying both that the operator of an oil or gas well has a fiduciary duty to his peers and that he does not. Needless to say, achieving these results requires substantial effort on your part in researching the previous testimony and its orientation. This research is complicated by the increasing use of protective orders in complex commercial litigation that require parties to destroy either the expert's former testimony or documents supporting them immediately after the litigation closes. There are several resources available to you.

You can, of course, subpoena former counsel. I subpoena *opposing* counsel because they most likely have no love lost for this expert.

The Texas Association of Defense Counsel has an extensive inventory of depositions given by experts of all descriptions.

The *Southeast Texas Blue Sheets* (now computerized) contain references to the trial testimony of experts in many cases that have gone to trial. While this is no guarantee that a transcript of their testimony exists, it is another lead that ought to be pursued.

Always Google™ your expert to determine if any of his or her testimony has made its way into the public domain.

Use your e-mail. Particularly if you are associated with a large firm, it is likely that your peers have had experience with the jaded generalist. If they have retained him, you certainly need to know about it, because the generalist will almost certainly use the "well, your partner Jimbob certainly thought I was qualified or he wouldn't have hired me" argument.

4. <u>Crippling the generalist by forcing him decide to break or to lose his credibility</u>.

The approach in cross-examination to the dishonest generalist expert is, in substance, no different than the approach you would take to a hardened party-opponent. The party-opponent is willing to fudge on the truth, or simply lie, because it is potentially economically rewarding for him or her to do so. The expert fudges or lies for the same reason, though his or her ultimate goal is satisfaction of the hiring counsel so that he or she will be engaged again at some later time.

The direct attempt to undermine credibility, explained above, may be all that you need. If you are not comfortable that you've sunk the wooden spike by this means, then I suggest you use cross-examination to force the expert to induce self-inflicted wounds. The generalist is hired for his or her *conclusions*, however illogical or poorly reasoned. Pick one substantive conclusion of the generalist to attack, and obliterate it. Do not "touch lightly" upon a number of the expert's conclusions or you risk resuscitating him or her. Here are the criteria for choosing the line of substantive cross-examination you will use to show the expert's true colors:

(a) The subject area needs to be important to the expert's ultimate conclusions. If you "nitpick" on minor points, the jury holds it against you for wasting their time, not against the expert.

(b) The subject area needs to be one in which you have in your arsenal "incontrovertible" facts which become the hitching posts you'll use to tie the expert down (see the example below).

(c) The subject area needs to be one in which the chain of questioning is not so long or complicated that you'll lose the jury during your attack.

(d) The expert's conclusion must be one that defies logic, given the true facts, and which is easily understandable by your jury. This last point is the most critical. The "punch line" for this attack is the

expert stating a conclusion that the jury can tangibly and categorically reject. Your objective is not to get the expert to concede he is wrong—he is unlikely ever to do this. Rather, the objective is to make him pay for his dishonesty through a loss of stature before the jury.

Here is an example of the process being implemented. Again we use the generalist who testifies that our client's wellbore survey system won't replace preexisting survey methods:

(a) You agree that the old survey system was accurate only within 300 feet at 10,000 feet of depth, don't you?

(b) And that Goodco's new system is accurate within 6 feet at 10,000 feet of depth, correct?

(c) So Goodco's system is five times more accurate than the old system, isn't it?

(d) You agree that the old system used an average of eight hours worth of rig time to run, correct?

(e) You agree that the average run time for Goodco's system is four hours, right?

(f) You told us in your deposition that the daily cost of a semi-submersible rig drilling in the Gulf of Mexico is currently $240,000 per day, right?

(g) So the cost is roughly $10,000 per hour, right?

(h) Thus, Goodco's system will, on average, save the operator $40,000 per use on semi-submersible rigs, right?

(i) But your conclusion is that Goodco's tool will replace only 3% of the existing survey market, correct?

(j) So oil and gas companies who are trying to maximize their profits will, in your opinion, in 97% of all cases, use a system five times less accurate and twice as expensive as the one Goodco offers, right?

Don't forget to explain the "impact" of the expert's conclusion and to commemorate it in some material way. Use the easel and oversized notepad provided by the court: "Mr. Smith: 'Oil and gas operators will continue to use old survey systems 97% of the time that are five times less accurate and twice as expensive as Goodco's.'" This recap gives you and easy method to dismiss the expert during closing arguments.

VI. Conclusion.

Handling experts can be one of the most difficult things we as trial lawyers can do, yet it can be one of the most rewarding. By managing the preparation process, the development of the game plan for the expert and its execution, you can make this test of wits both more enjoyable and, more importantly, more productive for your clients.

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ATTACHMENT 1

DOCUMENTS AND THINGS REQUESTED

1. Your complete expert file, which has been assembled and maintained by or for you, relating to your consultation, preparation, and testimony as a testifying expert in this matter.

2. To the extent not contained in your expert file identified as item no. 1, your complete records and documentation of billings, fees, and expenses incurred or for which you are to be paid or reimbursed for your work as a testifying expert witness in this matter.

3. To the extent not included among those documents identified in item nos. 1 and 2, all records, notes, or other documentation identifying the dates, and amount of time, you or persons working at your direction, have performed services or otherwise worked as a testifying expert in this cause.

4. Originals or copies of all documents and things which you have reviewed and upon which you rely in whole or in part to base any opinion or conclusion which you have formed, expressed, or intend to express as a testifying expert in this cause.

5. Originals or copies of all documents and things you have reviewed but which, for any reason, you have determined you do not or will not rely upon as a basis for any opinion or conclusion which you have formed or intend to express as a testifying expert in this cause, including any documentation produced on behalf of Defendants, Plaintiffs, or any third party, including attorneys representing Defendants.

6. Originals or copies of all literature, including journal articles, magazine articles, monographs, research papers, book chapters, texts or treatises, published or unpublished, upon which you rely as a basis for any opinion or conclusion which you have formed, or intend to express, as a testifying expert witness in this cause.

7. Originals or copies of any and all images, whether graphic, animated, photographic, digital, videotape, or otherwise, which you have prepared for purposes of assisting you in rendering testimony concerning your opinions or conclusions, or which you have reviewed or relied upon in connection with your work in forming any opinions and conclusions as a testifying expert in this cause.

8. Any and all electronic data, whether digital, analog, or other, together with the necessary software to extract, run, or otherwise render such data assessable, including computer models or other computer generated materials, and printouts of such data which you have generated, reviewed or relied upon in the course of forming any opinion or conclusion as a testifying expert in this case.

9. Originals or copies of all correspondence which you have received, or which you have generated, from or to any party, whether by hard copy mail or courier service, telefax, voice-mail, or electronic media such as e-mail and desktop telefaxing, including correspondence to and from attorneys, in connection with your work as a testifying expert witness in this case.

10. Originals or copies of all notes, whether handwritten, typed, or otherwise recorded, collected or generated by or for you in connection with your work as a testifying expert witness in this case.

11. Originals or copies of all drafts of your initial expert report, and your final expert report, including those stored as backups on electronic systems such as personal computers, disk, tape, or hard copy drafts, including pen changes, which remain in existence.

12. Originals or copies of all laboratory, analytic, or other work documented by any person other than yourself, including third party laboratories, consultants, persons within your business organization working at your direction or otherwise reporting to you, which you have reviewed in connection with work performed as a consulting or testifying expert in this cause.

13. To the extent not included in any of the preceding categories, originals or copies of all charts, graphs, cross-tabulation tables, data summaries and compilations, charts, technical data bulletins and manuals, equipment inventory and parts lists, engineering drawings,

process flow diagrams, piping and instrumentation diagrams, plats, blue-line drawings, or other drawings, manuals, and informational compilations of any kind whatsoever which you have reviewed in the course of your work, to form any opinion or conclusion relative to your work as a testifying expert witness in this cause.

14. Originals or copies of your initial and final expert reports in this cause, together with copies of each and every document, or other resource, identified as a reference, or cited for any fact purpose, in those reports.

15. A list of all cases, whether lawsuits, administrative proceedings, or legislative hearings, in which you have offered testimony by deposition, or by live testimony, in the four (4) years preceding your retention as an expert in this case.

16. A copy of your most current curriculum vitae.

17. Originals or copies of any and all marketing materials, advertising, or correspondence soliciting business, or other materials designed for the purpose of providing information to clients or potential clients or otherwise marketing services of you personally, and/or your consulting firm, for purposes of providing expert consultation and testimony whether connected with litigation or otherwise.

18. Original or copies of any and all industry, governmental, trade organization, professional, or other standards which you reference or rely upon for any opinion and conclusion in connection with your work as a testifying expert in this matter.

19. Original or copy, to the extent not included in your most current curriculum vitae, of a list or bibliography of all published and unpublished articles, monographs, research papers, book chapters, treatises, letters to the editor, papers, whether peer reviewed or referred or not, and whether published or unpublished, which you have authored, co-authored, or contributed to in any manner.

20. To the extent, for any reason, not included in any of the preceding categories of documents and things to be produced at your oral deposition, please produce copies or the originals of all additional documents, materials, physical models, data compilations,

photographs, imagery, tangible things of whatever kind, which you have been provided, to have assembled or have had assembled for your benefit, which has otherwise been collected or maintained, for purposes of your work as a testifying expert witness relative to your production of an initial expert report, your final expert report, and any other work performed in this matter.

21. To the extent not included in the previous categories, please produce a copy or the originals of any materials which you have been provided by any person, including counsel representing the Plaintiff in this action, for purposes of preparing for your provision of expert reports, oral deposition testimony, preparation of any affidavit which is currently in draft of which has been generated by or for you, and for your testimony at trial. This would include, but not be limited to, videotapes, audio tapes, written outlines and articles, or notes, which relate to the manner in which a deposition is conducted, techniques for expert witnesses or general witness behavior in the course of a deposition, or which suggests or otherwise outline anticipated questions and/or responses for the provision of reports, deposition testimony, affidavits, or trial testimony.

22. Originals or copies of any written materials, including seminar outlines, lecture outlines or transcriptions, videotape or audio tape recordings, articles, texts or book chapters, which you have authored, contributed to author, or reviewed for your personal use, which relate to the process of experts performing as witnesses in the context of litigation, regulatory proceedings, or legislative proceedings.

ATTACHMENT 2

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October 13, 2005

Ms. Opposing Counsel
123 Large Building
Houston, Texas 77002

Re: Goodco, Inc. v. Bigco, Inc.; In the 215th Judicial District Court of Harris County, Texas.

Dear Ms. Opposing Counsel:

When countersigned below, this will constitute our Rule 11 Agreement concerning the production of information in advance of expert depositions.

The parties agree that true and complete copies of all documents identified by Tex. R. Civ. P. 194.2(f), or that are responsive to requests for production relating to expert witnesses, shall be delivered to the offices of the party noticing the expert's deposition 72 hours before the deposition is scheduled to commence.

Very truly yours,

Thomas M. Fulkerson

Agreed to this ___day of _____2005;

Ms. Opposing Counsel