

THE IN-HOUSE EXPERT: HOW TO BE PENNY-WISE WITHOUT BEING POUND-FOOLISH

Thomas M. Fulkerson
Fulkerson Lotz LLP
700 Louisiana Street, Suite 5200
Houston, Texas 77002-2773
(713) 654-5888
tfulkerson@fulkersonlotz.com

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I. Introduction

Corporate counsel must make difficult decisions in reconciling their budget against litigation needs. They are expected to work within the constraints of their litigation budget while winning their trial or obtaining a favorable settlement, requiring strategic choices from them about where to best spend the litigation dollar.

While outside counsel fees are usually the lead litigation cost, expert fees may rival that cost, particularly in expert-intensive litigation such as intellectual property disputes. Because outside experts are expensive, in-house counsel are increasingly relying on “in house” experts to economize or to bring to bear expertise within the company that will be effectively motivated to win the case.

This paper does not attempt to give a uniform answer to the question “should I use an employee expert?” because no single answer exists. Rather, it: (1) explains differences in the law applicable to in-house versus retained experts; and (2) identifies factors to be considered in making the decision, including some traps for the unwary you might not have considered until it is too late to make a mid-course correction.

II. How Important Are These Experts Anyway?

Counsel must first decide whether experts of any kind are needed. In one pre-*Daubert* review of 529 civil trials, 86% were found to use some kind of expert testimony. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991). One post-*Daubert/Kuhmo* survey indicated that 45% of experts testified in tort cases involving personal injury or medical malpractice, 23% in civil rights cases, 11% in contract cases, 10% in IP and patent cases, 2% in labor cases, 2% in prisoner cases, and the remaining 7% in a variety of other civil cases. MOLLY TREADWAY JOHNSON, CAROL KRAFKA & JOE S. CECIL, EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: A PRELIMINARY ANALYSIS 1 (2000).

A review of the literature makes it clear that at least in some cases, this money is misspent. Experts are required if your client is a plaintiff and testimony necessary to establish duty and breach can be attained only

through an expert. See, e.g., *Badhiwala v. Favors*, 340 S.W.3d 560, 568 (Tex. App.—Dallas 2011, no pet.) (granting summary judgment for the defendant because of the absence of reliable medical malpractice testimony). Frequently, damage calculations are so complicated or steeped in doctrinal rulemaking that they, too, must be established by expert testimony alone. See, e.g., *Oracle America, Inc. v. Google Inc.*, 798 F. Supp. 2d 1111, 1120-21 (N.D. Cal. 2011) (patent case holding that *Georgia Pacific* factors must be reliably followed for reasonable royalty calculation to become admissible). Similarly, a minimum level of expertise is necessary to rebut claims for which certain kinds of expert testimony have been offered by a plaintiff.

But when you have a choice, a cost/benefit calculation should be performed to assess the type of testimony to be given, the need for an expert, and the effect it may have on the outcome. The first assessment is whether the case is of a sufficient size that it warrants expert testimony expenditures at all. The following scenarios are calculated from a defendants' perspective:

**TABLE 1:
BASIC COST/BENEFIT CALCULATION**

Case Exposure	Probability of Negative Outcome without Expert	Probability of Negative Outcome with Expert	Improvement (Reduced Chance of Negative Verdict x Verdict Size)	Expert's Out-of-Pocket Cost	Decision
(\$100,000)	100%	50%	\$50,000	\$75,000	No hire
(\$1,000,000)	70%	60%	\$100,000	\$75,000	Hire
(\$10,000,000)	70%	65%	\$500,000	\$500,000	Draw
(\$10,000,000)	70%	50%	\$2,000,000	\$250,000	Hire enthusiastically

Predicting changes in the probability of outcomes due to the addition of an expert cannot be done easily or with mathematical precision. While mock trials might augment decision-making data, they too are inexact. As a result, consider a sensitivity analysis tailored to the case to determine whether or not to invest in an expert across broad ranges of probability changes and damage awards. By way of example, if in row 3 the probability of negative outcome is 10% rather than 5%, say (i.e. a 10% better probability of avoiding a \$10,000,000 negative outcome) the decision

moves from “draw” to “hire”. Of course, an appropriate expert may affect both liability and damage determinations and both effects should be considered when making the hire/no hire decision.

A second factor that should be considered before hiring in the cost/benefit analysis is whether or not the testimony you seek to acquire is likely to be excluded. You may feel that admission is a given, but your court may disagree. Watch how reducing the probability of admission of the expert testimony to 50% impacts your hire/no-hire decision in the scenarios discussed above.

**TABLE 2:
BASIC COST/BENEFIT CALCULATION — DAUBERT CONSIDERED**

Case Exposure	Probability of Negative Outcome without Expert	Probability of Negative Outcome with Expert	Probability of Exclusion under <i>Daubert</i>	Improvement (Reduced Chance of Negative Verdict x Verdict Size)	Expert's Out-of-Pocket Cost	Decision
(\$100,000)	100%	50%	50%	\$25,000	\$75,000	No hire
(\$1,000,000)	70%	60%	50%	\$50,000	\$75,000	No hire
(\$10,000,000)	70%	65%	50%	\$250,000	\$500,000	No hire
(\$10,000,000)	70%	50%	50%	\$1,000,000	\$250,000	Hire enthusiastically

If we are assessing the “usefulness” of an expert, several factors identified by the literature help determine whether to make the hire. Jury research predicts that the effect of expert testimony varies widely with the kind of expert presented and kind of testimony she is to give:

- Juries are hesitant to grant verdicts on statistical evidence alone. Keith E. Niedermeier, Norbert L. Kerr & Lawrence A. Messé, *Jurors’ use of naked statistical evidence: Exploring bases and implications of the Wells Effect*, 76 J. PERSONALITY & SOC. PSYCHOL. 533-42 (1999). This factor militates against hiring an expert whose sole contribution is the creation of probability data.
- Specific expert testimony directed to the facts in controversy is by far and away more persuasive than “general” expert testimony summarizing trends or industry standards that are only indirectly relevant to the case at hand. Regina A. Schuller, *The impact of*

battered woman syndrome evidence on jury decision processes, 16 LAW & HUM. BEHAV. 49-82 (1992).

- Jurors tend to credit anecdotal evidence introduced by experts that they consider directly relevant to disputed factual issues over either purely statistical data or general background materials. Brian H. Bornstein, *The impact of different types of expert scientific testimony on mock jurors' liability verdicts*, 10 PSYCHOL., CRIME & L., 429-46 (2004).
- Jurors grasp the connection between group data and judgments about specific applications only when the link is made very explicitly in the expert's testimony. Margaret Bull Kovera, et al., *Does Expert Psychological Testimony Inform or Influence Juror Decision Making? A Social Cognitive Analysis*, 82 J. APPLIED PSYCHOL. 178-91 (1997). Like the purely statistical expert above, general statements of industry trends or tendencies are unlikely to be useful (and may not even be admitted).

The psychological literature is consistent with the author's experience. Expert witnesses who are capable of focusing upon the task at hand, developing directly pertinent decision-making tools for the jury and putting that testimony into graphic and understandable presentations, are worth far more than those who are not.

But in point of fact, the calculation is more complicated than either Table 1 or Table 2 describe. In-house and outside counsel are being asked not just whether *any* expert should be hired, but to determine whether an employee expert rather than a retained expert should be hired. We tackle this calculation in Section IV.

III. Differences in Treatment of Retained and In-House Experts in the Law

Significant differences exist in the way the law treats retained and in-house experts, and these differences may influence the decision you make concerning them. The differences fall into four categories: (a) reporting and supplementation obligations; (b) privilege questions; (c) questions concerning the scope of examination; and (d) admissibility.

A. Reports and supplementation

A key distinction is derived from Federal Rules of Evidence 701 and 702. Rules that were in the common law characterized as governing statements by “lay experts” have been formalized. A statement made by a witness may be admitted under Rule 701 if it is: “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FED. R. EVID. 701. Thus, if not based on scientific or technical data, such a statement is not truly “expert” testimony and may be admitted without such witness previously being designated or providing a report.

The risk of relying solely upon Federal Rule of Evidence 701 to avoid designation or the filing of a report is exclusion. If counsel attempts to proffer an opinion using Rule 701 alone, when the opinion may actually be given only under Rules 702, 703 or 705, it will likely be excluded and the presentation of the case may be badly disrupted or lost for the want of key proof. Federal Rule of Evidence 701 should probably not be relied upon when the “expert/non-expert” opinion is the sole proof of a critical issue.

When designation is required, the Federal Rules of Civil Procedure have different report and supplementation obligations for retained and non-retained experts. Federal Rule of Civil Procedure 26(a)(2)(A) requires the disclosure of the *identity* of any witness that a party may use at trial to present evidence under Federal Rules of Evidence 702, 703 or 705. FED. R. CIV. P. 26(a)(2)(A). Whether a witness must prepare and file a written report, as well as the extent of the report required, is governed by Federal Rule of Civil Procedure 26(a)(2)(B). Until recently, that rule required that “[u]nless otherwise stipulated or ordered by the court ... if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony,” then a report containing all the materials outlined in the rule and signed by the expert must be filed. Formerly, as long as no stipulation or other order existed, a person who was not retained or specially employed to provide testimony in the case did not need to file an expert report. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1214 (9th Cir. 2008).

Effective December 1, 2010, however, Federal Rule of Civil Procedure 26(a)(2)(C) was amended to require that even non-retained experts (including probably mostly employees) who will testify under

Rules 702, 703 or 705 must: (a) designate the subject matter on which the witness is expected to present opinion testimony; and (b) summarize the facts and opinions that the witness will testify to. FED. R. CIV. P. 26(a)(2)(C)(i), (ii).

The reason for the continued comparatively lax treatment of in-house experts is made clear in the advisory committee notes. Automatic disclosure in Rule 26 is designed to avoid the “battle of forms” that previously took place in the form of interrogatories, depositions or admissions designed to flush out basic positional information. FED. R. CIV. P. 26, 1993 amendments, advisory committee’s note. (noting that disclosures under the former rule were often so sketchy as to be useless). Reports by employee experts were not formerly required because they were likely involved in both the history of the controversy and have left something of a document trail. As a result their opinions are likely to be known without the need of a full report. FED. R. CIV. P. 26, 1970 amendments, advisory committee’s note. Even prior to the amendment, however, some courts required more of certain in-house experts on an *ad hoc* basis. See, e.g., *Funai Electric Co. v. Daewoo Elecs. Corp.*, No. C 04-1830 CRB (JL), 2007 WL 1089702, at *2 (N.D. Cal. Apr. 11, 2007) (patent case); *Lee v. Valdez*, No. 3:07-CV-1298-D, 2008 WL 4287730, at *2 (N.D. Tex. Sept. 18, 2008). More expansive *ad hoc* disclosure orders were likely to occur when an employee is testifying to expert issues outside of the ordinary realm of her employment. See, e.g., *Ellis v. Pa. Higher Educ. Assistance Agency*, No. CV 07-04498 DDP (CTx), 2008 WL 5458997 (C.D. Cal. Oct. 3, 2008). The bottom line is that *some* reporting is now required of virtually all employee experts and that while it may be less arduous in scope, a general disclosure will be needed. In addition, Courts will have the inherent authority to require additional work and disclosures from your expert if they deem fit.

Supplementation obligations under the federal rules are identical to base disclosure rules. *If* a person is required to supply a report, whether by the rules or court order, that expert is obligated to supplement the report fully (meaning materials used in the report and conclusions) if the previous response is incomplete or incorrect. FED. R. CIV. P. 26(e)(1)(A). These supplementation obligations continue through the pretrial conference. FED. R. CIV. P. 26(e)(2). The *effect* of these supplementation obligations is anything but equal, as we discuss in Section IV.

B. Privilege questions arising from the use of in-house experts

With few exceptions, information exchanged between either in-house counsel or trial counsel and the company's employees is privileged. See, e.g., *In re Sky Capital Group, Ltd.*, No. 05-12-00157-CV, 2012 WL 601154, at *3 (Tex. App.—Dallas Feb. 23, 2012). Assuming that no fraud or crime is involved and that no waiver has occurred, the communications between counsel and the client in preparation for trial, as well as in-house communications between employees undertaken for the purpose of preparing for trial, will also be privileged. *Id.*; FED. R. CIV. P. 26(b)(3); TEX. R. CIV. P. 192.5.

But the communications between counsel and retained experts have traditionally stood on precisely opposite grounds. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 445 (Tex. 2007). Such experts are required to disclose the bases for all opinions given, all data or other information considered by the witnesses in forming their opinions and any exhibits the witnesses might use in trial. FED. R. CIV. P. 26(a)(2)(B)(i)-(iii). These rules have been interpreted by the majority of federal courts to require that all documents shown to an outside expert be disclosed to the opposition, whether they were at one time privileged or not. CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2016.5, at 396-97 (3d ed. 2010). Even preliminary reports authored in part by the lawyer in conjunction with an expert's work have been held to carry no privilege. *Id.* at 396 n.7.

To avoid this outcome and permit free exchange of information between retained experts and counsel, parties often agree to maintain the privilege at least as to communications between expert and counsel and preliminary draft reports. *Id.* at 400. As of December 1, 2010, the federal rules have again changed to significantly limit the scope of waiver occurring by way of direct attorney-client communications with a retained expert. See FED. R. CIV. P. 24(b)(4)(B). That protection extends to draft reports, which are now regarded as core work product. *Id.* Texas has yet to adopt these amendments, though some have advocated that they do so. Ryan Harper, *Catching the Loophole in Texas Expert Discovery*, 63 BAYLOR L. REV. 440 (2011).

But the rules are less clear with respect to communications to employees who become experts and who are involved in other aspects of the claim or defense. The advisory committee in 2009 considered making

non-reporting expert communications with counsel absolutely privileged. Advisory Committee On Civil Rules, Minutes, Feb. 2-3, 2009, at 7. But the Committee ultimately rejected any notion of absolute privilege for non-reporting experts, fearing both the law of unintended consequences and creating a “safe haven” in which the retention of in-house experts might result in “obvious opportunities for mischief.” *Id.*; Advisory Committee On Civil Rules, Minutes, Apr. 20-21, 2009, at 14-20.

The decision by the rules committee does not, however, mean that the opposite is true—that designation of an employee as expert automatically waives privilege with respect to all communications between counsel and employees. Unfortunately, decisions thus far applying the rule have been very unclear and no bright line exists to identify for counsel or the client which communications will be privileged and which will not. See, e.g., *United States v. Sierra Pacific Indus.*, No. CIV S-09-2445 KJM EFB, 2011 WL 2119078, at *11-12 (E.D. Cal. May 26, 2011) (observing that, though committee did not impose “automatic” waiver standard, government waived its privilege on communications to two forest service investigators set to testify as to origins of a fire); *Dartmouth Hitchcock Med. Ctr. v. Cross Country Travcorps, Inc.*, No. 09-cv-160-JD, 2011 WL 940042, at *2 (D.N.H. Mar. 16, 2011) (privilege sustained against claim for attorney-employee expert communications under New Hampshire law on proof that physician was an employee of the plaintiff); *Graco, Inc. v. PMC Global, Inc.*, No. 08-1304 (FLW), 2011 WL 666056, at *14 (D.N.J. Feb. 14, 2011) (opponent was not entitled to written report for employee experts but was entitled to see all documents considered by employee experts, including communications with counsel). This is a longstanding problem in which one commentator accurately predicted nearly 30 years ago that “the floundering for an appropriate resolution is likely to continue.” James R. Pielemeier, *Discovery of Non-Testifying “In House” Experts Under Federal Rule of Civil Procedure 26*, 58 IND. L.J. 597, 598 (1983).

Texas law on the issue has also not been completely developed, but current authority implies that use of an employee-expert may result in waiver. Texas has held that an employee may be forced to divulge expert opinions to an opponent. *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990) (stating that “[t]he factual knowledge and opinions acquired by an individual who is an expert and an active participant in the events material to the lawsuit are discoverable” and thus mere change to “consulting” expert does not preclude examination); *Barker v. Dunham*, 551

S.W.2d 41, 46 (Tex. 1977). It has also held that any materials provided to a testifying expert are discoverable. *In re Christus Spohn*, 222 S.W.3d at 443. The logical inference of the two lines of authority is that any materials shared with an employee expert might be fair game in discovery, even if the previously privileged material did not relate directly to the expert opinion.

Because the law is still under development, counsel would be well advised to anticipate the possibility of privilege waiver when employee experts are used. At a minimum, opposing counsel may be drawn to the possibility of waiver when using employee-experts and care should be used to avoid exposing the employee expert to more than she legitimately needs to see. On the other hand, where the opposition is also likely to use employee experts, each side has an incentive to clearly draw the line between privileged and unprivileged communications, so agreements may be achievable.

C. The scope of examination of employee and non-employee experts

The choice of whether to make an employee an expert is generally yours, not your opposition's. See, e.g., *United States ex rel. Tiesinga v. Dianon Sys., Inc.*, 240 F.R.D. 40 (D. Conn. 2006). However, a party, including an employee, may be required to give opinions concerning, for example, the cause of an incident when the formation of such opinions would ordinarily be a part of his employment. *Donlin v. Aramark Corp.*, 162 F.R.D.149 (D. Utah 1995).

The cross-examination of a retained expert is often heavily scripted. Opposing counsel wants to know *everything* that the witness is going to say and why he will say it, obtain any favorable testimony the witness might give and obtain any available concessions. The expert's prior inconsistent opinions, especially in a world dominated by easy access to previous publications, may also provide significant fodder for cross-examination.

The scope of retained expert examination and discovery is also reasonably well established. Under FEDERAL RULE OF CIVIL PROCEDURE 26(a)(2), the contents of the written report, prior testimony, compensation and other issues are discoverable. In Texas law, the outer limit of retained expert testimony has also been set. See, e.g., *Russell v. Young*, 452 S.W.2d 434, 437 (Tex. 1970) (defense entitled to all billings on case at bar,

not to all billings by expert to particular law firm or income tax returns or other data showing how much expert made through testimony as a whole).

But the scope of inquiry arising from the choice of in-house experts is less clear because they are naturally connected to more issues, events and transactions than just the issues at play in the litigation. For example:

- Can opposing counsel obtain internal performance reviews for the expert? They are arguably relevant; if the company characterized the in-house employee as incompetent or unworthy of promotion, the jury should be entitled to consider that assessment in deciding whether to accept his judgment.
- Can she obtain disciplinary actions or reports that have been made about the employee with the human resources department?
- Can she obtain the annual salary of the employee or information about whether or not the employee has stock options in the company for which the employee is testifying? Arguably, such information is relevant to claims of bias or prejudice if litigation outcome might affect those bonuses or equity positions.
- Can she obtain data on “unrelated” work projects?
 - i. In a trade secret dispute in which the plaintiff claims that the defendant cut two years off the development of a competing widget, is it not relevant that the plaintiff took only a few months to develop a like product without the benefit of any other party’s trade secret?
 - ii. In the same case, is it not relevant that the company hired an engineer from a direct competitor and assigned him to a project identical to the one upon which he worked for his prior employer?
 - iii. The employer’s difficulties encountered in developing its own products might be relevant to claimed deficiencies in product development efforts by a defendant.

D. Admissibility — *Daubert* issues

One final factor coming into play in the “employee versus retained” debate is whether the jury will actually ever see the testimony. All are by now familiar with the enhanced gate-keeping function being applied to expert testimony in both state and federal forums. FED. R. EVID. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). A full discussion of the *Daubert/Robinson* rules and their application is not the subject of this paper. Rather, we wanted to sample and test the decisions applying *Daubert/Robinson* to see if trial courts treated in-house experts more harshly than retained experts in their gate-keeping analyses.

Of course, experts may be excluded for many reasons under the *Daubert* gate-keeping function — including a lack of true expertise, unjustified extrapolations, the failure to account for obvious alternative explanations, whether the field of expertise is itself recognized, the failure to use recognized methods or the failure to connect recognize methods to available data. FED. R. EVID. 702, 2000 amendments, advisory committee’s note. (2000).

We researched a sample of over 200 recent post-*Daubert* opinions to determine whether a substantial difference existed in exclusion of employee experts and hired experts, but could find no significant differential.¹ Rather, the opinions compared the nature of the expert’s background or work against the type of challenge made by the party seeking exclusion. It did not appear that any overt prejudice existed against employee experts that gave them a significantly higher likelihood of exclusion. Rather, the decision was made on standard *Daubert* grounds—qualifications, method, data utilized and connectivity between the method, data and qualifications on the one hand, and conclusion on the other.

IV.

The Final Decision: A Hypothetical Using the “All In” Cost of Employee Experts

The budgetary pressure to use employee experts is substantial. To give effective advice to the client, both in-house and trial counsel must

¹ This search was difficult at inception, but made more difficult by the fact that district courts passing on *Daubert* challenges frequently did not mention whether or not a proffered expert was an in-house or outside employee.

consider a variety of factors including many that do not automatically jump off the page. In Section III, we gave a simple calculation for the decision of whether to hire an outside expert at all. Unfortunately, life isn't so simple; you will be called upon by the client to consider a host of factors before deciding to use an employee as an expert, including:

- The amount of time required by the employee and his or her salary — the direct cost;
- Any overhead or carrying charges imputed to the employee;
- Indirect out-of-pocket costs;
- The opportunity costs of using the employee;
- Admissibility questions;
- The positive or negative difference in trial outcome due to the use of an employee rather than a retained expert; and
- Potential negative outcomes or limitations involving discovery and discovery supplementation.

Throughout this section, we will focus upon the following hypothetical case:

- Your client has hired an employee to work on an offshore oilfield tool.
- The client announces a breakthrough in the field and begins to market the tool. Customer response is enthusiastic, and it appears your client will be able to make large margins on sales.
- Your client is sued by the new employee's former employer, who believes he has copied and misused computer-assisted designs, metallurgical specifications and manufacturing processes.
- Initial discovery indicates that the plaintiff's damage claim is in the realm of \$2,500,000, but you believe the number may go higher — perhaps as much as \$20,000,000.

- Your primary tool developer for the project is an engineer of 30 years of service in the industry with 15 years for your company (let's call him Hal). He is a registered engineer and has a master's degree in mechanical engineering from Rice University. His annual salary is \$150,000 before bonuses, and he is now your Vice President of Design, Manufacturing and Procurement.
- If you don't use Hal, a retained expert has given you a firm bid of \$150,000 on the project (\$1,250 per day x 120 days).

Let's consider all the potential costs of using Hal.²

A. Direct out-of-pocket costs

This is the simplest calculation. If you believe the entire project will require 500 hours of Hal's time, you have committed to \$37,500 of direct out-of-pocket costs by using Hal ($\$150,000 \times (500/2000)$). By this measure, you save your client \$112,500 by using Hal rather than the retained engineer expert.

B. Overhead and carrying charges

But we're not done. Hal doesn't work in a tent. For accounting and all other purposes, your engineering department calculates that its "burdened" cost of all engineering employees is 1.85 times salary. Thus, for Hal, the "burdened" cost of using him for the project will be \$69,375 ($\$37,500 \times 1.85$). Still, by this measure, you would be ahead by using Hal — \$150,000 versus \$69,375 produces savings of \$80,625. While one may argue that these are "sunk" costs which the company will incur whether Hal is assigned to expert or other duty, opportunity cost of applying these "sunk" costs to internal expert testimony should be considered.

C. Indirect out-of-pocket costs

When you hire a seasoned testifying expert, you should expect that he or she will come to the fray knowledgeable of the need to prepare a proper report. Employees, on the other hand, are unlikely to have such knowledge and will need the outside assistance of counsel to prepare their expert reports and to prepare to give deposition testimony. In addition,

² An accompanying PowerPoint presentation has been created tracking this same discussion and may be more easily followed.

additional testing conducted by your employee expert may to permit her to become qualified and this may lead to additional costs. While some of this expense will be incurred if the employee testifies as a fact witness anyway, some increment is applicable to giving expert testimony.

For our purposes, we estimate an additional \$15,000 of testing cost for a revised total of \$84,375. Under this scenario, we still obtain an economic advantage (of about \$65,000) from using our employee even when indirect costs are considered.

D. Opportunity costs

Opportunity cost is the cost of any activity measured in terms of the value of the next-best alternative not chosen. It is the sacrifice related to not taking the second-best choice and the reason Nobel-winning economist Milton Friedman claimed: “There ain’t no such thing as a free lunch.” Even when lunch is free, you spend time eating it that you could spend elsewhere — that is opportunity cost. For your client, the cost of using an employee includes not just the out-of-pocket and overhead burden--the 500 hours anticipated for his case-related work is no longer available for company projects.

Look at it another way — your client does not pay Hal his salary of \$150,000 per year and all overhead attributable to him (1.85 x salary), or a total of \$277,500 per year, just to make \$277,500 back from his work. If the client expects a 30% return on all of its invested capital, then it is implicitly valuing a full year of Hal’s time at \$360,750 ($277,500 \times 1.3$). If it expects a 40% return on invested capital, it values Hal’s time at \$388,500 ($277,500 \times 1.4$).

So, if we still anticipate that Hal will spend 500 hours on the project, then if your client expects a 30% return on its expenditure for Hal, the cost rises to \$119,437.50 ($91,875 \times 1.3$). Our savings from using Hal vis-à-vis our expert then drop to less than \$30,000.

But this opportunity cost frequently consists of more than just lost time. Many of the employee experts we have worked with in the past have been highly competitive individuals who were strongly committed to the defense of their company or to personal vindication. As a result, they tend to *obsess* about the issues in the case in a manner that draws down their

work effort well beyond the mere hours expended. These are difficult costs to quantify but have a very real business impact.

E. Admissibility issues

An additional cost consideration arises from admissibility issues. If employee experts are more likely to be excluded because of the thinness of their resumes or missteps in the deposition process, we may increase the risk of wasted time in choosing to use them. For example, in our test case, if the exclusion of the witness leads to a 10% worse outcome, the net effect might be very substantial — in a \$20-million principal damage claim, a negative expectancy of \$2 million. Such a figure might well dwarf other cost considerations if the size of the case is significant enough.

F. Differential outcome costs — or benefits

Any seasoned trial lawyer will tell you what the research confirms — that an expert is worthwhile only if he or she is credible. Substantially more credible expert witnesses significantly influence trial outcomes where the testimony provided by them is also deemed highly relevant to the specific inquiry made of the jury. Stanley L. Brodsky, *The Witness Credibility Scale: An outcome measure for expert witness research*, 28 BEHAV. SCI. & L. 892-907 (2010).

So which expert is the more credible—retained or non-retained? The most credible experts are, predictably, the most scarce — those who are not compensated at all and who are neutral. Regina A. Schuller, *The impact of battered woman syndrome evidence on jury decision processes*, 16 LAW & HUM. BEHAV. 49-82 (1992).

In the more normal case, both the retained and non-retained experts can be attacked for bias — the retained expert for accepting funds to do the work and the non-retained because his job at the company is arguably at stake if he does not provide helpful testimony to the employer. Indeed, at least one authority has indicated that highly compensated and frequently testifying experts are less credible than their peers. Joe N. Cooper & Isaac M. Neuhaus, *The “hired gun” effect: assessing the effect of pay, frequency of testifying, and credentials on the perception of expert testimony*, 24 LAW & HUM. BEHAV. 149-71 (2000). The non-retained expert can also be challenged if he or she has outcome-related bonuses, stock or stock options that might be impacted by the outcome of the litigation.

The employee expert may also be subject to credibility attacks if she is part of the “problem” that the lawsuit describes: don’t make the accused thief in a trade secrets case your primary or sole expert, particularly if she is less than clean. If she is one of the parties accused of misusing proprietary data and that part of the case goes badly at trial, both she and the whole case will be tarred with the process.

But, on the whole, the same factors used to evaluate any expert witness must be applied to your own people. Do they have demonstrated competence in the field? Do they look you in the eye or evade? Are they comfortable in their own skin? Do you like them? The jury will largely apply these very same factors.

Credibility, and a thorough evaluation of it, is likely to be the single most influential factor favoring the decision to retain or not retain an outside expert over an employee. In our example, if the switch to an employee expert causes the probability of losing a verdict of \$20,000,000 to increase by just 2%, the negative cost expectancy ($P(e) \text{ loss} \times \text{outcome}$) is \$400,000 and dwarfs the cost of the retained expert whether you consider the cost of diverting your in-house engineer or not.

G. The cost of discovery misadventures

Finally, counsel should consider and discuss with the client potential negative outcomes that can arise from the discovery process. Generally, they consist of: (1) the possibility that your employee expert may not be able to fully testify; (2) uncomfortable intrusion into the background of your expert and subject matter intrusion into other projects or issues; and (3) heightened supplementation requirements.

Your protective order may limit the ability of your employee to testify. In virtually all current commercial litigation, the parties negotiate and ask the court to execute a confidentiality order concerning the production and use of confidential information in the case. This protects the parties from having sensitive material become part of the public record and thus losing its proprietary status. Frequently, these confidentiality orders have two levels of protection: (1) “confidential” and (2) “confidential, attorneys’ eyes only.” Category 1 documents can be shown to your in-house expert, but Category 2 documents cannot be shown to him without leave of court. As a result, one consequence of relying solely on an in-house expert is that this expert may not be able to become fully informed of

all needed facts. You should consider this fact, along with the enhanced chance that he may be excluded under *Daubert* for a failure to consider all relevant evidence, before proceeding.

Intrusive background checks are possible. Because rules concerning employee experts and the scope of proper examination for bias, prejudice and credibility issues are less well defined than they are for retained experts, expect opposing counsel to push several discovery buttons that may not be present with a retained expert. The employee's personnel file, his work on the project involved in the case or on related projects or even unrelated projects are likely to all be requested. Even if you are successful in defending the expert and the company from these intrusive requests, the fight over the issue may cost thousands to tens of thousands of dollars, thus increasing the cost of the employee experts.

Heightened supplementation problems may arise. Finally, unusual supplementation issues may arise from the use of in-house experts. Outside counsel generally controls the flow of information to a retained expert. They may be criticized for not showing him enough information, but they are at least in control of it. Not so with the employee expert. Because of his role with the company, Hal continues to be involved in the design, manufacture and procurement of materials for the widget that is the subject of your litigation and on many other projects. He will likely continue to receive data and information from fellow employees that either impacts his opinion or which the opposition can fairly say *should* impact his opinion. You may therefore become obligated to produce the information on an ongoing basis, *even if the opposition has not otherwise directed a request to your client for it* or its requests for production are time limited.

This developing new data may present problems. It may force a Hobson's choice to drop Hal as an expert after he is designated and deposed because of the fear of unwanted additional disclosure, or it may cause an inadvertent continuance when his or the Company's "regular" work creates documents pertinent to an area of inquiry at the last minute. The irony is that the more qualified your expert employee is, the more likely he or she is to be exposed to a broad array of company information that might be relevant and require post-designation disclosure.

V. Conclusion

Employee experts can be both penny-wise and pound-smart because they are often more knowledgeable in the relevant field, more focused and more credible than the hired gun. Nonetheless, for a host of reasons both economic and substantive, caution is warranted. Though we may think of the costs of using the employee expert as solely the salary for hours expended on the project, they are a fraction of the real costs.

We hope this paper provides to you the means to make a good choice when you face the issue.

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