EXPERT WITNESSES
SECTION OF LITIGATION

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# Paxil Case: *Daubert* Analysis Excludes Medical Causation Expert

*By James P. Ray – August 28, 2017*

In a case in which the plaintiff alleged that the antidepression drug Paxil caused birth defects, Judge Victor Bolden of the Connecticut District Court recently excluded the plaintiff's medical causation expert on *Daubert* grounds. In *K.E. v. Glaxosmithkline*, Judge Bolden found insufficient evidence of the plaintiff's exposure to Paxil, which was necessary to support the expert's opinion on specific causation. No. 3:14-cv-1294(VAB) (D. Conn. 2017). Upon granting the motion to exclude the expert, the court then granted summary judgment to the defendant, holding that the plaintiff could not proceed without expert causation testimony. (Though not discussed herein, the court also held that the plaintiff's claims were time-barred.)

**Factual Background**

The plaintiff was born in 2002, but it was not until 2010, after the plaintiff's father was diagnosed with heart disease, that the plaintiff was found to have a birth defect in his heart. The specific condition was identified as a bicuspid aortic valve with aortic valve insufficiency (BAV). While the condition did not at that time require surgery or other medical intervention, it did cause the plaintiff to undergo regular monitoring and suffer from periodic leakage and backflow of blood to the heart. The plaintiff's doctor stated that playing competitive sports could put the plaintiff's health at risk as he got older and that he might have to undergo surgery in the future.

The plaintiff alleged that the birth defect was caused by his mother's ingestion of Paxil during her pregnancy. Paxil is a prescription drug used to treat depression, anxiety, and similar disorders by altering levels of serotonin in the body. There is some evidence in the scientific community that the active ingredient in Paxil may cause birth defects in developing fetuses of women using the drug during pregnancy. This evidence consists of epidemiological data and animal studies.

There was little evidence regarding the mother's use of Paxil during her pregnancy—in particular during the first trimester when the plaintiff's heart was developing. The mother claimed that one of her doctors prescribed Paxil during the relevant time period and gave her samples of the drug. The doctor denied both of these assertions. The mother did not claim that she got the drug from any other source and could not testify as to how many samples she

received or how often she used the drug. Her medical records contained no references to Paxil use during her pregnancy, and the pharmacies where she had prescriptions filled had no record of Paxil prescriptions except after the child was born.

**Defendant's *Daubert* Motion**

The defendant drug manufacturer launched a full-scale *Daubert* attack on the plaintiff's causation expert, including challenging the expert's qualifications and his opinions on general and specific causation. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The court evaluated each of these bases for excluding the expert in considerable detail, rejecting some claims but ultimately concluding that the expert's opinions on specific causation were unreliable and thus not admissible.

> **The court affirmed the expert's qualifications.** The defendant first challenged the expert's qualifications. The expert was a medical doctor and an assistant professor and attending physician of pediatric cardiology at Johns Hopkins. The defendant claimed that the expert, in forming his opinions, reviewed literature in teratology and epidemiology, fields beyond the scope of the expert's experience.
>
> The court noted that district courts have wide discretion when considering whether an expert is qualified. The court reviewed relevant case law on both sides of the issue regarding whether medical doctors can testify about epidemiological studies and general causation. In this case, the court found that the doctor (1) had "extensive experience and understanding of the biological mechanisms by which chemicals might affect neonatal development," (2) had experience designing and publishing observational studies, (3) observed defective aortic valves in a number of patients, and (4) conducted clinical research in the area of pediatric cardiology. As a result, the court found the expert was "qualified to testify about hypothetical ways that Paxil might affect embryonic serotonin levels and cause heart defects." *K.E.*, No. 3:14-cv-1294(VAB).
>
> **The court affirmed one of two bases for general causation opinions.** The defendant claimed that the expert's opinions on general causation were unreliable, and thus inadmissible, on two grounds. First, it claimed that the expert's review of the epidemiological studies was flawed because he failed to consider a significant number of studies on the relationship between Paxil and birth defects. Second, it claimed that the expert improperly relied on animal studies and in vitro studies (those conducted outside a living organism).

Regarding the defendant's first assertion, the court stated that an expert cannot "cherry pick" or "selectively choose" the studies that support his opinion without acknowledging or accounting for contrary studies. *Id.* Specifically regarding the expert in this case, the court ascribed no ill motive, as some data he omitted actually supported his opinions. Nonetheless, the court found that by leaving out relevant data and studies, the expert's report presented an incomplete picture of the state of the literature; and thus his opinions, based on his review of epidemiological studies, were not reliable.

The court, however, rejected the defendant's second claim, finding the expert's other basis for an opinion on general causation admissible. Because toxicology studies frequently cannot be conducted on humans, scientists are often forced to conduct animal studies and extrapolate the data to reach conclusions about potential human impacts. Similarly, when studies are performed in vitro,as opposed to in vivo (within an organism), assumptions must be made when the data is interpreted. Whether opinions based on such extrapolations and assumptions are admissible often depends on the magnitude of the gap between these studies and more definitive studies and whether the inferences made by scientists are reasonable. Not surprisingly, courts finding the opinions admissible hold that the assumptions, extrapolations, and inferences are fertile ground for cross-examination. In *K.E.*, the court recognized that the expert's testimony suffered from some "significant limitations" because he could not testify about the ideal range of serotonin levels in pregnant women or how Paxil would impact those levels in the prenatal environment. *Id.* Still, the court found the expert's opinions admissible, stating that precautionary instructions, a vigorous cross-examination, and opposing expert testimony would provide sufficient protections.

**The court rejected the expert's specific causation opinions.** The fatal flaw in the expert's opinions arose when the court considered specific causation. Even if the plaintiff could prove general causation—that is, that Paxil could cause the birth defect in question—he still had to prove that he was exposed to Paxil. The court could not get past the lack of evidence of the mother's use of Paxil.

While the court acknowledged that the issue of exposure is often left for the jury, it held that "in some cases . . . the duration and amount of exposure is so crucial to an expert's causal argument that the expert must rely on at least circumstantial evidence of exposure." This is especially critical when dose is so important, such as in cases involving exposure to chemicals believed to be carcinogenic only above certain levels. In *K.E.*, the expert doctor assumed that the plaintiff's mother took Paxil, but the court concluded that there was not sufficient evidence in the record to support this assumption, much

less to allow the expert to determine the duration or dose of the mother's exposure. Given this conclusion, the court held that the expert did not "apply the principles and methods reliably to the facts of the case." *Id.*

Finally, the court rejected the expert's opinions based on a differential diagnosis (a technique where the expert rules out all other potential causes). The use of a differential diagnosis can be a reliable means to prove specific causation, but it must still satisfy Rule 702 and *Daubert* requirements. Again, because of the lack of evidence as to the mother's exposure to Paxil, the opinion based on the differential diagnosis was unreliable. The court also noted that because only 40 percent of birth defects are from known causes, the doctor could not rule out other potential causes for the plaintiff's heart defect.

**Conclusion**

It is sometimes too easy for judges considering *Daubert* challenges to conclude that the attacks on expert opinions go to the weight, not the admissibility, of the opinions. In *K.E. v. Glaxosmithkline*, Judge Bolden carefully considered each basis for a challenge to the expert's opinion. He provided a thorough analysis of each before deciding whether to accept or reject the claims. Although he affirmed the expert's qualifications and one of the two bases for the expert's general causation opinions, Judge Bolden ultimately held that the opinion as to specific causation was not supported by sufficient evidence and was therefore unreliable.

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# Lawyer or Client: Does It Matter Who Hires the Expert?

*By Davis B. "Pepper" Allgood – August 28, 2017*

Should the lawyer hire the testifying or consulting expert for a litigation assignment, or should the client retain the expert directly? In other words, does it matter in terms of compromising the client's interests in the lawsuit? In general, the answer is that it makes no difference.

**Financing Arrangements: Six of One, Half a Dozen of the Other**

Given a choice, the attorney may prefer that the client pay the expert directly. However, client expectations, or client policies regarding billing and the advancement of costs, may dictate that the attorney hire and pay the expert, with the client reimbursing the attorney. Also, some experts prefer to rely on a law firm for payment.

Regardless, having the client retain and pay the expert directly usually will not compromise the client's interests in the lawsuit. In the same vein, having the lawyer obligate himself for the expert's fees will confer no advantage in the litigation.

It is important to note, however, that regardless of who pays for the expert, lawyers normally should take the lead in identifying and selecting experts. They ordinarily should draft or participate in drafting expert engagement letters, and, for convenience, a lawyer may act as the client's agent in executing such an agreement. The lawyer should document any arrangement clearly and explain it thoroughly, and the arrangement should comply with the ethics rules of the jurisdiction.

**Confidentiality Concerns**

Some clients, and some lawyers, mistakenly think that having the lawyer retain the expert significantly enhances the protection given to communications with the expert. Clients may use this rationale to ask that the lawyer assume initial responsibility for the expert's fee.

On the contrary, Federal Rule of Civil Procedure 26 and state rules patterned after it prescribe detailed rules on expert discovery that apply without regard to whether it is the lawyer or the client who formally retains the expert or assumes the obligation to pay the expert's fee.

A sampling of Rule 26 illustrates that confidentiality has nothing to do with whether the lawyer or the client pays the expert's fee. Under Rule 26(a)(2), a party who plans to use a testifying expert must disclose specific information about the expert and the expert's proposed testimony, regardless of who executes the engagement letter or pays the fee. Rule 26(b)(3)(A) protects documents that a consulting expert prepares in anticipation of litigation or for trial—

whether he serves as the party's consultant or the attorney's consultant. Furthermore, although "core work product" receives heightened protection under Rule 26(b)(3)(B), that elevated standard depends on the origin and content of the material—regardless, though, it protects such information even when disclosed to a client-retained consultant. *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 667 (3d Cir. 2003).

Similarly, Rule 26(b)(4) sets parameters for discovery from both testifying and consulting experts. For example, Rule 26(b)(4)(B) and (C) provide that the Rule 26(b)(3) protections for trial preparation materials apply, respectively, to draft expert reports and to communications between a party's attorney and a testifying expert who is required to provide a report. Rule 26(b)(4)(D) shields the facts known or opinions held by a consulting expert, absent a showing of exceptional circumstances. None of these rules turns upon the attorney's involvement in retaining or paying the expert.

**Privilege: Protecting Against Exceptional Circumstances and Substantial Need**

Rule 26(b)(4)(D)(ii) does allow discovery from consulting experts under "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Similarly, Rule 26(b)(3)(A)(ii) lets a party discover documents prepared in anticipation of litigation when it "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

Conceivably, having the lawyer retain a consultant could help protect communications with a consultant that otherwise could be discovered because of "exceptional circumstances" or "substantial need." That would be the case if doing so supported an argument that the attorney-client privilege applied. Rule 26(b)(1) limits the scope of discovery to "nonprivileged matter" and could thus exempt privileged attorney-client communications from Rule 26(b)(4)(D)(ii) "exceptional circumstances" or Rule 26(b)(3)(A)(ii) "substantial need" discovery.

**Consultants and the *Kovel* Doctrine**

The attorney-client privilege generally protects confidential communications that involve a lawyer, the client, or a representative of either when the communications help the lawyer provide legal advice to the client. Attorneys sometimes need to retain consultants to act as their representatives in communicating with their clients by putting confidential client information into usable form. Thus, for example, the attorney-client privilege can attach to communications involving accountants retained by attorneys to help the attorneys understand client financial information: the accountants essentially act as translators for the lawyers so that the lawyers can advise the clients. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961);

*United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989). Some courts refer to this reasoning as the *Kovel* Doctrine.

The existence of the attorney-client privilege, even in these cases, does not depend upon the attorney having retained the consultant. *In re Hardwood P-G, Inc*., 403 B.R. 445, 458–59 (Bankr. W.D. Tex. 2009) ("It has, literally, nothing to do with who hired them."). A consultant whom the client retains and pays can fill the "expert as translator" role. *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 210 (S.D.N.Y. 2000) (investment banker retained by client served "an interpretive function . . . akin to the accountant in *United States v. Kovel*").

However, having the lawyer retain the consultant could make citation to this line of cases more persuasive, according to *Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.)*:

> The Court in this decision does not directly address the question of whether retention of an accountant by a lawyer, in contrast with retention by the client directly, should make any difference with respect to the protection to be afforded an accountant's work product. Nonetheless, the Court notes that Deloitte & Touche was retained by counsel . . . and such a retention may augment an argument based on *Kovel* that the accountant, having been retained by counsel has a role here that may be analogous to that of an interpreter.

No. 04–01078, 2007 WL 1964852, at *4 n.5 (Bankr. S.D.N.Y. July 2, 2007).

Notably, though, the *Kovel* Doctrine will seldom apply to communications with consulting experts hired to help with pending litigation. Parties and their lawyers usually hire a litigation consultant to provide the consultant's own advice or knowledge, not to translate confidential client information. In such a case, the privilege does not apply. *Kovel*, 296 F.2d at 922 (". . . if the advice sought is the accountant's rather than the lawyer's, no privilege exists"); *see also United States v. Ackert*, 169 F.3d 136, 139–40 (2d Cir. 1999) (where the consultant did not interpret client information for the lawyer but rather provided information to the lawyer that the client lacked, the communication was not privileged).

**Conclusion**

In most cases, no legal or strategic consideration dictates that the lawyer take any responsibility for the expert's fee. Who hires and pays the expert usually should turn on relationships and practical considerations, not protecting communications from discovery.

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# Hot-Tubbing of Experts in Arbitration

*By Gilbert Samberg – August 28, 2017*

"Hot-tubbing" of experts—a procedure for the contemporaneous presentation of competing expert oral testimony—is now regularly considered, although infrequently adopted, in arbitrations. Also referred to as "concurrent evidence" or "witness conferencing," hot-tubbing "is a technique in which two or more fact or expert witnesses, presented by one or more of the parties, are *questioned together* on particular topics by the arbitral tribunal and possibly by counsel." ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration 14 (2012) (emphasis added).

**Usage**

Hot-tubbing reportedly originated in nonjury cases in the courts of Australia, but it has crossed oceans and legal regimes and has now found a place in the current repertoire of many arbitrators. In addition to being common in Australian courts, hot-tubbing is permitted in Canadian and Hong Kong courts and at least known in U.K. and U.S. courts (Tax Court and a few nonjury cases). *See* Fed. R. Evid. 611. Although an unusual procedure, it is no longer extraordinary, particularly in international arbitrations.

Hot-tubbing is not mandated by the leading arbitration-administering organizations, e.g. the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) or its International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA), and the Singapore International Arbitration Center (SIAC). Indeed, the procedure appears to be described in only one set of broadly used guidelines—the *IBA Rules on the Taking of Evidence in an International Arbitration* (2010). *See* IBA Rules arts. 8(3)(f) ("[T]he Arbitral Tribunal . . . may vary [the] order of [witness testimony], including . . . in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing).), 5(4). However, as with any other procedure in arbitration, hot-tubbing may be agreed by the parties, or suggested or mandated by the arbitral tribunal.

**Purpose**

In brief, the goals when employing hot-tubbing are (i) to promote objective impartiality, and to reduce or eliminate bias or advocacy, in expert evidence; (ii) to enable the experts to answer the same questions, based on the same assumptions, at about the same time; and (iii) to improve the responsiveness, precision, and clarity of expert evidence.

The "price" of hot-tubbing, from the advocate's perspective, is a degree of loss of control of the presentation of the case, the extent of which will vary depending upon the particular procedures employed.

**Procedures**

The core process is typically as follows: (i) experts are sworn in simultaneously at a hearing; (ii) the tribunal manages the discussion; (iii) tribunal members may put questions to the experts; (iv) the experts may put questions to each other; (v) counsel may or may not be permitted questions as well; and (vi) the hearing agenda may be set by the tribunal, or it may be based on required prehearing submissions by the experts.

Most often, hot-tubbing follows submittals of written testimony in the form of (i) a joint expert report, or (ii) direct and rebuttal expert reports or testimony from each expert, or (iii) both. In a collaborative submission, the experts identify points on which they agree, points on which they disagree, and perhaps the reasons for disagreement. (Such joint expert reports are common in English judicial proceedings.)

Procedural variations in hot-tubbing concern (i) the order of questioning of the experts; (ii) the degree of participation by the experts in responding to the testimony of other experts; and (iii) whether cross-examination by counsel will be permitted, limited, or precluded.

Some arbitration institutional rules may affect how hot-tubbing is conducted. *See, e.g.*, LCIA art. 20.8 ("Any witness who gives oral testimony at a hearing . . . may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of such testimony."); SIAC art. 25.3 ("Any witness who gives oral evidence may be questioned by each of the parties, their representatives and the Tribunal in such manner as the Tribunal may determine.").

**Pros**

A number of benefits have been suggested for employing hot-tubbing of experts. (Most are debatable.)

- It deters misleading or bad faith statements and pure advocacy by an expert through instant peer review by one or more adverse experts.
- It reduces counsel's influence over the expert's testimony.
- It makes it easier to identify points of expert disagreement.

- It enables the arbitrators to make extended explorations of issues. For example, inconsistencies in expert evidence can be hashed out in a nondisjointed, relatively brief period.
- It enables the arbitrators to better satisfy themselves concerning their own questions, and it may result in an improved quality of decision-making by the tribunal.
- It may put an expert at ease due to its relatively informal and nonadversarial format.
- It encourages open and frank discussion among the experts (provided that they are acting independently and in good faith).
- It may lead to cooperation and concessions by the experts, reducing the number of issues in dispute.
- It can result in time and cost savings (provided that the customary procedures for expert testimony are scaled back).

**Cons**

A number of criticisms of hot-tubbing have also been raised.

- Like dueling as a means of settling disputes, it values a particular skill—debating—over the substance of an expert's opinions. The weight of testimony from a less rhetorically gifted witness might well be discounted.
- If debating skill is at a premium, the pool of experts who will be well qualified to be a witness will be limited.
- It may have little or no value if the experts do not act independently and in good faith, or if the experts do not respect or trust each other.
- If cross-examination by counsel is prohibited, it can deprive a party of the opportunity to present its case fully and freely, as required in most administered arbitration rules and in accordance with the culture of arbitration.
- It may waste time if counsel or the tribunal loses control over the line and scope of the expert discussion.
- It can increase arbitration costs due to the added witness preparation required or if hot-tubbing is simply added on to the customary procedures of written direct testimony, counsel cross-examination, etc.

**Tips for Optimizing the Use of Hot-Tubbing**

**Nail down procedural details early on.** Strive to reach early agreement on the process. In addition to settling on the basics, participants might seek to (i) define the issues to be explored; (ii) set an agenda identifying the order in which the issues will be examined; (iii) set time limits for the exploration of each of the issues; (iv) determine whether the

tribunal or counsel will lead, as well as if, how, and when others may follow in participating; and (v) determine whether prehearing conferencing of experts will be required (in order to prepare a joint submission).

**Preserve counsel cross-examination.** Resist the elimination of counsel cross-examination.

It is a cardinal principle and a part of the culture of arbitration that, unless otherwise agreed, each party is to be permitted a full opportunity to present its case. Toward that end, the parties hire advocates. Arguably, prohibiting the cross-examination of experts by those advocates deprives the party of the right to present its case fully and to make relevant points.

Moreover, the utility of hot-tubbing will be enhanced by some cross-examination by counsel, absent which the experts' opinions are unlikely to be thoroughly tested. Preserving cross-examination by counsel is particularly valuable (i) if the credibility of an opposing expert is at issue, (ii) if the flaws in an opposing expert's opinions have been pinpointed, or (iii) if an adverse expert's opinions are actually useful to one's client.

If cross-examination by counsel is limited or prohibited, there may be a temptation to deploy an expert to pose certain questions to an adverse expert. That would place an undue burden on a "deployed" expert, and any overt advocacy might well compromise the expert's credibility.

As an alternative, counsel might request that the arbitrators pose the critical questions to an adverse expert. Indeed, if the arbitrators are not fully prepared to question the experts, the hot-tubbing procedure will be wasted. Therefore, their participation should be preceded by written submissions by the experts. For example, the experts could submit a joint report in advance to elucidate their respective opinions, points of agreement and disagreement, and the reasons for disagreement.

**Evaluate the Witness During Preparation**

Prepare the expert for hot-tubbing. The procedure raises the bar for an expert witness. Among other things, it requires an expert to be a more independent actor in the process. Fundamentally, the "translation" by legal counsel of an expert's opinions and descriptions ceases, and the expert will be called upon to express his or her views in his or her own words and manner. There will be pressure for the expert to be more articulate and quicker witted. Hot-tubbing likely ought to be avoided if counsel believes

that the expert witness is not sufficiently articulate, lacks sufficient tenacity, might be subdued in the face of a more experienced peer, or is unwilling to challenge another view by a peer.

**Conclusion**

Recognize that if the adverse experts' opinions are irreconcilable, little if anything is to be gained by hot-tubbing, and the use of conventional methods of presentation of expert testimony is recommended. On the other hand, if a client's case would benefit from the experts reaching a middle ground, then hot-tubbing can be useful.

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# Making the Most of Your Expert

*By Jonathan Couchman – August 28, 2017*

An expert's value in litigation extends beyond the report and testimony phases. From discovery requests to deposition questions, technical analyses, and settlement discussions, pretrial use of experts can strengthen a side's case. At trial, preparation and proper utilization of experts are critical. This article will address how to realize the maximum benefit from the expert through all phases of litigation.

**Communication: Key to Focusing Your Story**

Despite the inherent differences that come with advocacy (attorneys) versus independence (experts), the importance of attorneys and experts "being on the same page" cannot be overstated. A shared understanding of the landscape of issues involved in a case and the applicable legal framework forms a solid foundation that will allow all participants to effectively and efficiently work together.

Part of "being on the same page" includes developing a common understanding of the key themes of the case. In complex litigation, which often involves massive document productions, numerous witnesses, and seemingly countless detailed facts, distilling your case into a compelling story is crucial. Attorneys and experts should work together to focus the case on the most salient facts in order to most persuasively craft a story for the judge or jury.

It is important to make the most of every opportunity to use the expertise of your expert. However, properly using your expert extends well beyond the value of the opinions written in a report and expressed through testimony. An expert can also provide counsel with invaluable assistance at every stage of the case, ranging from taking efficient and tactically important discovery to critical examination of opposing experts to formulating a case-management strategy—all in order to persuasively tell your story at trial.

**Initial Case Evaluation**

Early involvement of experts at the case-evaluation stage can help counsel fairly and objectively weigh the strengths and weaknesses of their client's case and set realistic expectations for scope, schedule, and possible outcomes.

Overpromising and underdelivering is not a recipe for repeat business in the legal field. Most clients want an early, objective assessment of their case and their realistic prospects of achieving a satisfactory result. An independent expert's involvement in case evaluation can help counsel define expectations for the case.

Just as much as clients appreciate a realistic assessment of their potential case from their attorneys, attorneys also appreciate a realistic and straightforward case assessment from their experts. A valuable expert is neither an echo chamber for initially promising case theories nor merely a "devil's advocate" charged only with pointing out the case's flaws. Instead, an expert should be an impartial sounding board that counsel can use to help determine what is realistically possible to achieve based on both the positive and negative circumstances present in the case.

**Efficient and Strategic Discovery**

Obtaining the right information through the discovery process is critical to building your case and enabling your expert to provide powerful and persuasive opinions.

Whether obtaining data and documents from your own client or seeking production from the opposing party, experts can help identify not only what is needed but also the correct language to use to ask for it. Furthermore, experts can assist by recommending the formats and ranges in which data should be produced. This can prevent having to go back to opposing counsel to clarify a prior production request and then waiting weeks until it is produced in the useful format. Your expert may also provide guidance on the futility of using interrogatories to obtain certain information. For example, an expert may advise that it may be more efficient and effective to take the deposition of the chief financial officer, or to notice a 30(b)(6) deposition on the specific topic. Working with your expert to plan for efficient and targeted discovery requires minimal investment but provides the potential to yield extraordinary benefits.

Early involvement of experts can also prevent the pursuit of extraneous discovery. In truth, knowing what is not important can be as valuable as knowing what is. Moreover, this knowledge may also be strategically valuable in managing the finite amount of goodwill of opposing counsel.

In terms of assistance with written discovery, an expert can provide valuable insight when drafting document production requests, requests for admission, interrogatories, and correspondence with opposing counsel. Logically, the expert is often the best person to help counsel identify the information that is relevant to formulating the expert's own opinion. Certainly, experts can ensure that the information produced contains the necessary level of detail and is provided in a useful and efficient format. In addition, though, the expert may be aware of industry-specific information or certain types or sources of documentation that counsel may not be aware of and that can be extremely valuable as evidence or useful as exhibits in the deposition of a fact or opposing expert witness.

**Depositions of Fact Witnesses and Opposing Experts**
Depositions can result in some of the best evidence gained through the discovery process. Working with an expert both in advance of and during a deposition can allow counsel to more completely and effectively examine witnesses.

Using the skills and expertise of your expert begins with identifying the right individuals to depose. For example, an accounting expert may know that the plaintiff's controller is most likely to have the answers, while an engineering expert may know that the quality control supervisor would have been responsible for the analysis at issue.

If the areas of inquiry are industry specific or highly technical in nature, meeting with the expert in advance of depositions can be helpful. Often, counsel will be required to examine someone with industry or technical knowledge greatly exceeding their own. Experts can be used to provide counsel with a base level of understanding and familiarity with industry-specific terms and concepts that are likely to come up during their examination. Additionally, preparing with your expert for depositions can help attorneys distinguish the important lines of inquiry from those that have no bearing on the issues in the case, saving valuable time during the deposition.

Your expert can also provide tactical assistance with depositions. Specifically, the expert can draft questions for use at depositions and help identify or prepare exhibits for use at deposition.

During a deposition, the examining attorney can use an off-the-record sidebar with an expert sitting at the deposition to get an on-the-spot explanation of the witness's testimony. Did the witness even answer the question posed? The expert may be in the best position to identify instances of nonresponsive answers or misunderstandings between counsel and the witness. Additionally, the expert can suggest follow-up questions that allow the examining attorney to fully unearth relevant details or to obtain a transcript that is useful for cross-examination at trial.

It is particularly valuable to have assistance from the expert when taking the deposition of the opposing expert witnesses, who often require multiple follow-up questions to elicit responsive testimony. It can sometimes be as little as a single word in a question that requires tweaking in order to focus the response from the witness. Often having prior experience answering deposition questions themselves, combined with industry or subject matter experience, your expert can help you recognize slight but crucial changes to perfect your questions in the heat of the moment. Your expert can also help you anticipate how the opposing expert will likely

attempt to defend analyses or opinions that are particularly vulnerable, allowing you to prepare thoughtful and strategic follow-up questions designed to test and potentially break down those defenses.

**Evaluation of Opposing Expert Opinions**

Experts can assist counsel by performing critical reviews of opposing experts' opinions to identify vulnerabilities and weaknesses. Particularly when complex damages calculations or scientific modeling is involved, the expert can be a great resource to help verify the validity of assertions or calculations made by the other side. Does their math add up? Are there any problems with the source data they are relying on? Are there other factors that the opposing experts have failed to consider? When winning the case comes down to a battle of "dueling" expert opinions, identifying and highlighting fatal flaws can leave the jury feeling that the opposing experts' opinions are not a viable option.

**Pretrial Tasks**

When it comes to pretrial tasks such as preparing motions, briefs, stipulations, proposed findings of fact, exhibit lists, and more, involving your expert is crucial to ensure that all participants are on the same page and have a common focus on the themes of the case. When included in your pretrial brief, the opinions of the expert can set expectations in the judge's mind for the anticipated trial testimony of the expert. Consequently, it is imperative to work with the expert to ensure that opinions are framed and introduced through the pretrial brief in the same manner as the expert intends to describe them at trial.

Exhibit review is a great opportunity to involve the expert in identifying and evaluating potential exhibits for trial. If there are several documents that could be used to prove a point, which one is the best to use, and who is the best witness to use it with? While counsel may value a particular document for what can be proven by a certain section of it, the expert may recognize that another section has information that the opposing side would love to use with dramatic effect to advance one of its points. Perhaps the expert also knows of another document that can be used to prove the same point but that doesn't contain the problematic section. Brainstorming with the expert on trial exhibits not only can lead to a tighter and more focused case but also may serve as excellent trial preparation for the expert. Additionally, pretrial review of the opposition's exhibit list with your expert can help identify the anticipated use of those exhibits and proactively identify strategies to defuse or otherwise counter their intended effect.

**Cross-Examination Prep**

Preparing for cross-examination of witnesses presents an opportunity to use your expert to

sharpen your examinations and magnify their persuasive impact at trial. Strategizing with your expert can help identify the key points to establish through cross-examination. These key points can include not only facts underlying your case or your expert's opinion but also testimony that erodes the opposition's case. The expert can assist by writing specific cross-examination questions or by simply identifying important passages from deposition transcripts.

An often-overlooked aspect of preparing for cross-examination is live role play through mock examination. Based on expertise and subject matter knowledge, your expert is often a great choice to play the role of opposing fact or expert witness. When in character, your expert should push you and help you prepare for unanticipated responses. Mock testimony is also a great time to test and run through your impeachment material to ensure that you have the supporting deposition testimony that you need. Your expert's in-character mock testimony can illuminate specific instances where a question needs to be refined; added; or, in some cases, removed.

**Observation of Trial Testimony**

At trial, your expert can provide value assistance outside of time spent on the stand. By observing trial with an independent perspective and mind-set, your expert can provide invaluable feedback on the direction of your case and can often pick up on what is working and what is not. For example, your expert may have sensed confusion from the judge or jury on a particular subject where the trial team had expected understanding. Consequently, counsel can implement changes to explain the issue in a different way during the expert's direct testimony. Subtle but important cues are sometimes hard for counsel to see when in the middle of the action but are often easier to appreciate from the gallery.

Another benefit of trial observation is that it enables your expert to later respond to opposing fact and expert witness testimony as well as comments and questions posed by the judge. On the expert's direct, counsel can easily ask, "Did you hear Mr. X say ___, and do you have any opinions on that assertion?" Also, if your expert heard the judge's questions earlier in the trial, it can be naturally addressed in the expert's direct testimony and have the added benefit of establishing a connection between your expert and the judge. "I recall Your Honor asking about ___ yesterday, and on that subject, my opinion is ___."

**Assistance with Cross-Examination**

Despite all your preparation, it's sometimes just not possible to think of everything that might come up at trial. Your trial schedule usually includes periodic breaks that allow time for communication with your expert. During those breaks, experts can help with advice on strategic

changes, such as modifying certain cross-examination questions or the use of different exhibits that might be more effective in light of the direction of the opposition's testimony.

**Admission of Exhibits and the Benefits of Compelling Demonstratives**

One of the best ways to tell your story and emphasize the key themes of your case is through the presentation of key exhibits and demonstratives that can be used to break down complex issues. We've all heard the phrase "A picture is worth a thousand words." In complex litigation, that may be an understatement.

Depending on the venue, experts can be used to move key exhibits into evidence. Even when that is not possible, experts can almost always be used to put key exhibits and helpful demonstratives in front of the judge or jury. Although the best exhibits and demonstratives almost speak for themselves, the advantage of introducing exhibits during your expert's testimony is that they are accompanied by a skilled communicator who can magnify their impact and help to leave lasting impressions that reinforce your case themes.

Some experts have the skills and resources available in-house to prepare their own persuasive and visually compelling demonstratives. If a professional graphics design or visual presentation firm is used to create demonstratives, the expert should be directly involved with their development and design so that the final product fits seamlessly with the expert's testimony. An additional option to consider is the use of 3-D printing to create models that can be viewed and even touched by the judge and jury.

**Conclusion**

When used to their maximum potential, experts can provide far more value to litigators and their clients than what is captured in expert reports and testimony. Attorneys and experts can enhance the efficiency and effectiveness of their respective roles and contributions toward the litigation process. Early involvement and continuous communication, paired with a shared understanding of the factual and legal issues at play, permit all participants to unlock their greatest potential and enhance the prospects of a successful outcome.

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# Advice from an Art Expert: Avoiding Pitfalls of Buying Fine Art

*By Rachael Cozad – August 28, 2017*

Buying high-end fine art requires knowledge, sound judgment, and a certain amount of finesse. If you don't know what you're doing, you can lose your investment—or worse.

Like all markets, the art market goes up and down; and buyers looking to make an investment need to be aware of the trends. Currently, the market for contemporary artwork (roughly defined as art created after 1970) is red-hot and full of both opportunities and pitfalls. The market for modern art, American art, and European art is also robust, especially for certain artists and movements within those categories.

But purchasing art involves much more than concerns about price. Today's art-related lawsuits revolve around a broad range of issues, including authenticity, ownership, theft, damage, valuation, taxes, and matters of provenance and repatriation. Repatriation is the demand that owners return works of art or cultural heritage, usually looted, and sometimes ancient art to their country of origin or former rightful owners. For example, Hobby Lobby has just agreed to return a $3 million–plus collection of 3,000-year-old Mesopotamian antiquities, which the company purchased, unknowingly, from ISIS! *United States v. Approximately Four Hundred Fifty Cuneiform Tablets*, No. 17-03980 (E.D.N.Y. 2017) (Dkt. 3-3). In recent years, the insurance industry has even developed art title insurance in response to these risks.

To ensure peace of mind, I always recommend that people buy what they love—but do a little homework first. This article contains tips to help those interested in delving into the world of purchasing art.

**Where to Buy**

Most artists (especially those that are deceased) have both a primary market and a secondary market. A primary market is one in which the work of art is sold for the first time. A secondary market is one in which the work of art is sold or changes hands for the second or any subsequent time. It is prudent to review both markets for a given artist to understand the artist's pricing structure and thereby validate a price before you buy.

Seasoned collectors may be able to do this for themselves to some degree. Research tools include art databases, usually available for a fee, such as Artnet.com, ArtPrice.com, Askart.com, Terapeak.com (for eBay), and LiveAuctioneers.com, among many others.

Comparing markets is not always easy for the beginning collector, and nuances abound, so call a professional appraiser when you want a neutral third-party expert opinion on a price—an expert can research an asking price for you before you buy.

The good news is that today's collectors have many options as good artwork is available at a wide range of price points from various sources, including both brick-and-mortar galleries, auctions (including the online variety), private art dealers, art fairs, and the occasional entrepreneurial individual looking to make his or her own sale by cutting out the intermediary.

**Art fairs offer an opportunity for those who can handle the pressure.** Art fairs have been booming over the past 10 to 15 years, and many gallerists and dealers currently do the majority of their business on the sales floor at their booths in a convention center.

These art fairs can be a fruitful opportunity for you to increase your collection *if* (i) you are a seasoned collector who knows what you want, (ii) you have the ability to make quick decisions, and, hopefully, (iii) you do not routinely suffer from so-called buyer's remorse. For many collectors, however, there is a sense of pressure and competition in this format. If you prefer to take your time and do your research before buying, these fairs may be a good place to browse and learn, but not to buy.

Notable and reputable high-end art fairs include *Art Basel*, *Art Basel-Miami Beach*, *The Armory Show*, *Documenta*, *Frieze*, and many others.

**Private dealers can act as advisers.** If you want to buy and/or sell privately, this is often a good route to take. Dealers should provide detailed biographies on themselves and their education and expertise, including membership in professional and scholarly organizations, in order to demonstrate their knowledge in a particular field. It is of paramount importance that the dealer and client share mutual respect and a high level of interpersonal trust.

Working with a private dealer has distinct advantages as many also act as a personal adviser, available to assist in locating specific types of items. Most (but not all—as each person works somewhat differently) will help collectors navigate the general art world and have a wide network of contacts in a variety of associated fields such as art insurance agents, attorneys, appraisers, and estate planners.

**High-end auctions warrant diligence.** *Caveat emptor* has long been a principle associated with buying anything at auction, but when it comes to high-value artwork,

the novice needs to be particularly diligent. The pitfalls of buying at auction are numerous, and buyers should do a number of things to protect themselves and ensure quality in their purchases. An art adviser or appraiser can assist in navigating the auction system.

Items should always be inspected in person to fully understand the physical condition of the object, to review signatures, and to ensure that the property is indeed as the auction catalog presents it. Obviously, works of art can be different in person than they appear in a photograph.

The auction houses generally take a fee, or premium, from both seller and buyer, and the buyer's premiums can often be quite pricey at the higher end. It is important to remember that your winning bid is only the "hammer price"—your buyer's premium will add anywhere from 10 percent to 25 percent to your winning bid. There may also be other fees associated, so be sure to read the fine print (literally in the back of the auction catalog) or ask a representative to address your specific questions.

Be sure to ask in advance for a condition report on the item you are planning to bid on because this can reveal previous repairs or weaknesses affiliated with the physical condition of the work.

At higher-end auctions, provenance is usually listed in the auction catalogs, but not always. Be sure to ask about provenance if this is even a little unclear.

**Local auctions and estate sales usually feature reasonable prices.** These types of sales are often good places to buy both originals and multiples at the lower end of the price spectrum. Original paintings by lesser-known artists and students and out-of-trend items can often be found for reasonable prices. Here, buyers are looking to acquire out of pleasure rather than for investment.

A buyer's premium will usually be added at any auction; but at an estate or tag sale, the price is usually marked—and often negotiable. However, be aware that sales are generally final.

As with the higher-end venues, ask if you have a question about condition or provenance—good vendors should be willing to tell you what they know, but many times information is scarce.

**What to Expect**
Property should be presented with a clear understanding of what the item is and where it came from. For example, a wall label or informational sheet accompanying a large-scale handmade silkscreen by the contemporary artist Chuck Close might read as follows:

| | |
|---|---|
| Chuck Close (American, b. 1940) | *(name of the artist, nationality, date(s) birth–death)* |
| *Self-Portrait*, 2000 | *(title of the work and date of its creation)* |
| Color silkscreen, 63/80 | *(media, specific number in any edition)* |
| 65 ½ x 54 inches | *(physical dimensions)* |
| signed and dated, lower right | *(notation of artist's signature)* |
| Provenance: Private collection | *(a detailed history from the date of creation forward)* |

In addition to provenance information, a work of art with age and history should come with bibliographical information in the form of an *Exhibition History*. This will note where the piece has been publicly exhibited and when, including the exhibition title and reference to any accompanying publications or catalogues or scholars involved. Bibliographical information should also list where the work has been discussed or pictured in a book or periodical.

If the artist is very established and notable, there is often a definitive reference book called a *Catalogue Raisonné*, which is a complete listing of every work of art created by, and attributed to, the artist. At the highest ends of the markets, a work of art must be included in the artist's *Catalogue Raisonné* to be accepted as authentic. If such a publication does not yet exist but is in progress, a letter from the scholar of record will serve as a stand-in.

Dealers should also have available for prospective buyers a complete CV or biography of the artist. Any CV should include the following:

- The artist's full name, nationality, and year of birth (and death, if applicable). The only exception to this might be in the case of a living artist when the year of birth may not be critical for identification purposes.
- The artist's credentials, including where the artist was formally trained or studied; degrees obtained, such as a B.A. and M.A. or M.B.A.; and a list of exhibitions, awards, notable lifetime events, important stylistic associations, and public collections to which the artist's work belongs.

**What to Avoid**

Buying fine art is an art in itself. However, purchasers can maximize that talent by being aware of a number of warning signs.

**Avoid the lure of a "deal."** Sales of art should be based on quality rather than value. As in most situations, if the purchase seems too good to be true, it probably is. There are few reasons why art should be "on sale" or marked down in some way. Exceptions to the general rule are situations when an artist's work is selling rapidly, must be commissioned, or is otherwise graced with a factor of rarity.

Discounts, on the other hand, are entirely possible, and most dealers will offer something when asked.

**Avoid ready-made appraisals.** Avoid any dealers or arrangements promising instant return on investment or sales offers that are already accompanied by "appraisals." The Uniform Standards of Professional Appraisal Practice (USPAP) no longer recognizes appraisals offered by the seller of a work of art.

**Avoid mistaking marketing materials for informational materials.** Avoid artwork accompanied by marketing materials, as opposed to informational materials. Informational materials include factual biographical material on the artist and the object and its process of creation. Marketing materials include nonfactual, subjective descriptions of the artist, object, and process. When glamour head shots of the artist and his or her large flourishing signature take center stage, this is evidence of more "sizzle than steak." Featuring the artist over the art is particularly troubling when looking at the work of living artists. Heavy marketing efforts featuring the artist are a sign of an overly aggressive primary market, likely not supported by a secondary market for resale of the item.

**Avoid common mistakes in the limited-edition market.** The term *limited edition* should be applied to editions that are truly created in small numbers and that are truly handmade. While the term can be subjective, *limited edition* should be assigned only to items made in an edition of 100 or less. The final product should also be handmade rather than machine made. Some artists work with master printmakers to make prints because the craft is highly complex, and that is acceptable. But avoid objects made in mass quantities and then finished (embellished) by another artist.

When buying limited editions or multiples (i.e., prints, photographs, bronze casts, etc.), avoid overly stratified pricing structures. When a small, handmade limited edition is selling quickly, buyers should expect prices to rise in response. However, buyers must be aware of gimmicks. For example, different price points should not be assigned for artist's signatures "infused with 23-karat gold" or to canvases painted upside down in front of a large audience. These stunts are frequently used to lure buyers just starting to collect. They do not help the long-term value of their purchase.

**Avoid *authorized* editions if you're in the market for fine art.** Recognize artists who have a market history of muddled attributions and mixed quality. (Note: This may be not be the fault of the artists themselves.) These artists include Marc Chagall, Salvador Dalí, Henri Matisse, Joan Miro, Pablo Picasso, Rembrandt van Rijn, and others. While these artists are major European masters, what is frequently for sale by these artists at galleries located in tourist towns, on cruise ships, and at auctions are not handmade or original artworks; instead, they are later editions, sometimes posthumously produced with the consent of a family member now in control of an artist's estate. These are often referred to as *authorized editions* and have little relationship to what was produced by the artists' own hands during their lifetime.

**Conclusion**

Collecting fine art can be extremely rewarding in many ways. It plays a role in personal growth, and it can be a good investment down the road for your family.

A little education and a trusted adviser can help you avoid overpaying or buying something with unwelcome baggage attached to it. A good resource to find art appraisers (and appraisers who are also advisers) is the Appraisers Association of America, established in 1949, which has a membership of over 700 independent appraisers in 100 different areas of specialization.

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