New Rules for Expert Testimony and How to Make It Admissible

By Stewart I. Edelstein, J.D.

You need to know about recent changes in the Federal Rules of Civil Procedure – and how they contrast with state court rules – if you testify in courts in Connecticut. It makes a big difference whether you are retained to testify in federal court or in state court. This article summarizes the present state of the law in both courts affecting testifying expert witnesses.

New Federal Rules as of December 1, 2010

Before these recent amendments, you had to be wary in all your communications with the lawyer who hired you to testify, because those communications were not covered by any protections against disclosure. What lawyers and judges refer to as the "work product protections" did not apply. Those protections shield from disclosure the work of a lawyer in representing a client. But ever since the 1993 amendments to the federal rules, judges have refused to apply work product protections to testifying expert witnesses.

The result has been increased pre-trial costs, retention of both consulting and testifying witnesses (communications with consulting witnesses have always been within the work product protections, barring exceptional circumstances), guarded communications between retaining counsel and testifying experts, and lawyers' strategies that protect against discovery but also interfere with the work of experts – all undesirable effects.

To remedy this situation, work product protections now apply in federal court as to a testifying expert's communications with retaining counsel. Now, if you are retained to testify in federal court, all your communications with the lawyer who hired you – whether oral or written – are protected. So if you are deposed, or called to testify in court, you cannot be required to disclose those communications.

Likewise, your draft expert reports are protected from disclosure. What must be included in your report? You must include: a) a complete statement of all opinions you will express, and the basis and reasons for them; b) the data or other information you considered in forming them; c) any exhibits that you intend to use to summarize or support

them; d) your qualifications, including a list of all publications you authored in the previous 10 years; e) a list of all other cases in which, during the past four years, you testified as an expert at trial or by deposition; and f) a statement of your compensation for your study and testimony in the case. If your report does not include everything that is required, or is not disclosed to opposing counsel within the time ordered by the court, your testimony may not be allowed.

The only change from the old rules in what must be in your report is from "data or other information" to "the facts and data" you considered. Thus, you need disclose only information of a factual nature, excluding theories and mental impressions of retaining counsel.

Certain communications, however, are not protected – even under the new rules. Three subjects are still subject to disclosure: a) communications related to your compensation for study and testimony in the case; b) the identity of facts or data retaining counsel provided to you and you considered (even if you did not rely on them) in forming the opinions you intend to testify about; and c) the assumptions retaining counsel provided to you and you relied on in forming those opinions.

If you were retained before December 1, 2010, and have not yet been deposed or have not yet testified in court, the law is unclear about how the recent amendments to the federal rules apply to you. The rules are silent about this.

The Order of United States Supreme Court Justice Roberts, which implemented these new rules, provides that the changes apply, "insofar as just and practicable," to all proceedings pending as of December 1, 2010. You should discuss the applicability of these rule changes with retaining counsel before you are deposed or testify in court.

If you are deposed, the lawyer deposing you must pay you for the reasonable time you spend preparing for your deposition and for the time you are actually deposed. The hourly rate you can charge depends on a number of factors, all pertaining to the reasonableness of that rate. Keep track of the number of hours it takes to prepare for your deposition and inform retaining counsel.

State Court Rules Governing Testifying Experts

In Connecticut state court, none of these changes have been made. Accordingly, you must assume that every communication you have with retaining counsel, no matter in what form, will be the subject of questions at deposition and at trial. You must be as wary as before in talking to retaining counsel and sending emails, faxes, and letters to retaining counsel.

No formal report is required in Connecticut state court, but a formal disclosure of all expert witnesses is required. That disclosure must include your name, address, employer, field of expertise, subject matter about which you expect to testify, the expert opinions to which you expect to testify, and the substance of the grounds for each such opinion. If you do not comply with all requirements for your disclosure, or do not disclose it within the time the judge orders, your testimony may not be allowed.

Unless the judge orders or the parties agree otherwise, the lawyer hiring you as a testifying expert witness must,

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upon request by the opposing party, produce to all parties all materials you obtained, created, and/or relied upon in connection with your opinions in the case, within 14 days before your deposition or such other time as ordered by the court or agreed upon by the parties.

Unless otherwise ordered by the judge for good cause, or agreed on by the parties, your fees and expenses for your deposition, *excluding preparation time*, must be paid by the party taking your deposition. The amount can include only a reasonable fee for your time to attend the deposition, your travel time to and from the deposition, and reasonable expenses you incur for travel to and from the place of deposition and necessary lodging.

If you and retaining counsel do not comply with all these requirements regarding disclosure to opposing counsel, the judge can preclude your testimony, but only after a hearing, and only if the judge finds that preclusion is proportional to the noncompliance at issue, taking into consideration the consequence to the party offering your testimony if it is not allowed, and whether the noncompliance at issue can be adequately addressed by a less severe sanction or combination of sanctions.

One example of such a "sanction" would be to allow opposing counsel to take your deposition during a break in the trial, at the expense of the party whose lawyer retained you.

State and Federal Rules Governing Whether Your Expert Testimony is Admissible

Even though the rules in state and federal court in Connecticut differ as to which of your communications with retaining counsel are protected and as to disclosure requirements related to your opinions, the standard for the *admissibility* of your opinions at trial is, for all practical purposes, the same.

The trial judge in both state and federal court acts as the gatekeeper to determine whether your expert opinions are admissible. It is for the judge to decide whether you have the necessary qualifications to testify as an expert, whether your testimony will assist the judge (and the jury, if a jury

trial) to understand the evidence or decide a fact in dispute, and whether your testimony is trustworthy.

In deciding whether your testimony is trustworthy, the judge considers whether your testimony is based on sufficient facts and data, whether it is the product of reliable principles and methods, and whether your principles and methods have been applied in a reliable manner to the facts and data in the case.

Judges exclude expert testimony if there is too great an analytical gap between the data and the opinion an expert offers, if it is speculative or conjectural, or if it is based on assumptions that are too unrealistic. For a discussion of cases in which judges have rejected expert opinions as to lost profits, see "*Daubert* and Lost Profits Testimony" (*Trial Magazine*, September 2005). You will find a link to that article at www.cohenandwolf.com/?t=40&an=4620&format=xml&p=3199.

Accordingly, in doing your work as a testifying expert witness, be sure to gather all facts and data reasonably required for your analysis, and make sure the sources of those facts and data are reliable. You can rely on facts and data you learn from others, if of a type reasonably relied by CPAs in rendering such opinions.

Do not speculate and, to the extent you need to make assumptions, make sure they are well-grounded. The methodology you use in your analysis should be generally accepted among CPAs. Unless you follow these guidelines, your opinion can be attacked for lack of trustworthiness, and the judge may not allow you to testify.

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